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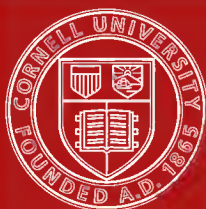
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POMEROY'S
EQUITY JURISPRUDENCE
AND
EQUITABLE REMEDIES
SIX VOLUMES.

POMEROY'S
EQUITY JURISPRUDENCE,
IN FOUR VOLUMES.

By JOHN NORTON POMEROY, LL.D.

THIRD EDITION, ANNOTATED AND MUCH ENLARGED,

AND SUPPLEMENTED BY

A TREATISE ON EQUITABLE REMEDIES,
IN TWO VOLUMES.

By JOHN NORTON POMEROY, JR.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1905.

A TREATISE
ON
EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES
UNDER THE REFORMED PROCEDURE.

BY JOHN NORTON POMEROY, LL.D.

THIRD EDITION,

BY

JOHN NORTON POMEROY, JR., A.M., LL.B.

IN FOUR VOLUMES.

VOL. III.

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A TREATISE
ON
EQUITY JURISPRUDENCE.

PART THIRD.

TREATISE

ON

EQUITY JURISPRUDENCE.

PART THIRD.

THE EQUITABLE ESTATES, INTERESTS, AND PRIMARY RIGHTS RECOGNIZED AND PRO- TECTED BY THE EQUITY JURISPRUDENCE.

PRELIMINARY PARAGRAPH.

§ 975. The general nature of equitable estates and interests, as distinguished on the one side from legal estates, and on the other from mere equitable remedial rights or “equities,” has been sufficiently described in the preceding volume.¹ In contemplation of courts of equity, equitable estates, according to their various degrees, are as truly property or ownership as legal estates are property in contemplation of courts of law. In fact, the entire dealing of equity with the subject of equitable estates, and the fundamental distinctions between equitable and legal conceptions and modes, are based upon the notion that equitable estates are in the truest sense property, and not mere rights of action,—not mere rights to obtain certain equitable remedies. Even when the equitable estate is the result of some positive wrongdoing, when the legal estate has been vested in a third person by fraud, undue influence, breach of fiduciary duty, and the like, so that the original

¹ See vol. 1, §§ 146-149.

owner can only regain the title by means of a cancellation, he is nevertheless, in contemplation of equity, the equitable and true owner; his equitable estate in the subject-matter is a true property, capable of being devised and otherwise dealt with.² In short, the equitable estate is often regarded by a court of equity as the real, beneficial, substantial ownership, while the corresponding legal estate is a mere form and shadow. Many important incidents connected with equitable estates have been considered in the preceding chapters, such as the relations of equitable with legal estates in the sections on "merger," "priorities," "*bona fide* purchase," some of the modes in which equitable estates may arise in the sections on "fraud," "mistake," and "accident," and the like. I purpose now to describe more directly the nature and characteristics of equitable estates, interests, and primary rights, and to state the rights and obligations with respect to them which devolve upon their owners. The entire discussion will comprise the following subjects: Trusts; equitable interests of married women; equitable interests arising from succession to a decedent; equitable conversion; mortgage of real and per-

² *Stump v. Gaby*, 2 De Gex, M. & G. 623, 630; *Gresley v. Mousley*, 4 De Gex & J. 78, 90, 92, 93, per Turner, L. J.; *Uppington v. Bullen*, 2 Dru. & War. 184; *Dickinson v. Burrell*, L. R. 1 Eq. 337. In *Stump v. Gaby*, A, an owner of land, conveyed to his attorney, and subsequently by will confirmed the conveyance. After A's death, his heir at law brought a suit to set aside the conveyance as voidable. Lord St. Leonards said: "I will assume that the conveyance might have been set aside in equity for fraud. What, then, is the interest of a party in an estate which he has conveyed to his attorney under circumstances which would give a right in this court to have the conveyance set aside? In the view of this court he remains the owner; and the consequence is, that he may devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all question as to any rights of entry or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this court." In *Gresley v. Mousley*, *supra*, A conveyed lands to his attorney under such circumstance that the deed could be set aside in equity. He afterwards died, having devised all his real estate to the plaintiff. Held, that the equitable estate passed by the devise to the plaintiff, and the full relief was granted.

sonal property; equitable liens; interests arising from equitable assignments; and contracts in equity.³ To these will be added an account of the equitable jurisdiction over persons *non sui juris*.

3 "Trusts" and "mortgages" are subjects of such vast extent, embracing such a multitude of details, and each requiring volumes for their adequate treatment, that I shall endeavor to present only their general and fundamental principles and doctrines; the attempt to do anything more within the limits of this treatise would be both unnecessary and unavailing.

CHAPTER I.

TRUSTS.

SECTION I.

ORIGIN OF USES AND TRUSTS.

ANALYSIS.

- § 976. The testament in the Roman law.
- § 977. *Fidei-commissa* in the Roman law.
- § 978. Origin of uses.
- § 979. The use at law.
- § 980. The use in equity.
- § 981. Resulting uses; equitable theory of consideration.
- § 982. Double nature of property in land, the use and the *seisin*.
- § 983. The "statute of uses."
- § 984. Kinds of uses not embraced within the statute.
- § 985. A use upon a use not executed by the statute.
- § 986. Trusts after the statute; effect of the statute in the *American states*.

§ 976. The Roman Law Testament.—To explain the nature and extent of the equitable jurisdiction and jurisprudence with respect to trusts, some historical account of trusts themselves, of their introduction into the law of England under the name of "uses," and of the enormous changes which they made in the primitive conceptions of property in land, is necessary. The *elementary* notion of trusts, like so many other doctrines of equity, was borrowed from the Roman law. The Roman testament was quite unlike the last will of our own law. Its essential feature consisted in the naming or appointing some person or persons as heir, upon whom the entire inheritance of the testator devolved. This inheritance included not only the property of the deceased, but also his liabilities. The heir thus became the "universal successor" to the testator, acquiring title to all his assets, and becoming liable for all his debts.

The fundamental conception was, that the legal condition of the deceased, consisting both of rights and liabilities, was prolonged and imposed upon the heir; that death made no real break in the continuity of the testator's legal personality. Partly from rules of the ancient law, and partly from prohibitory statutes, the Roman citizen was much restricted with respect to the persons whom he might appoint as his testamentary heir. He could not give his inheritance to an alien or *peregrinus* (i. e., one not strictly a citizen), nor to a person prescribed, nor to a posthumous child not belonging to his own family, nor, with certain exceptions, to a woman.¹ To evade these restrictions, the method was contrived, during the latter period of the republic, of appointing a qualified person as heir, upon whom the inheritance would devolve according to legal rules, and of accompanying the appointment by a direction or request that this heir would, as soon as he obtained the inheritance, transfer it to another specified person who was the real object of the testator's bounty, and who, although prohibited from being made heir, was not prohibited from receiving a transfer of property from a living person by way of gift. At first, the fulfillment of the testator's direction was left wholly to the heir's sense of honor, but in process of time the claim of the beneficiary was recognized and enforced by a magistrate.²

¹ Concerning the Roman testament, see Just. Inst., b. 2, tit. 10, secs. 1-14; tit. 13, secs. 1-7; tit. 14, secs. 1-6; Sandars's Trans., pp. 245-280.

² Just. Inst., b. 2, tit. 23, sec. 1; Sandars's Trans., pp. 337, 338; Gains's Inst., b. 2, secs. 246-259. Justinian's Institutes thus describe the progress of the beneficiary's right: "At first, *fidei-commissa* were of little force; for no one could be compelled against his will to perform what he was only requested to do. When testators were desirous of giving an inheritance or legacy to persons to whom they could not directly give either, they then intrusted them to the good faith of some person capable of taking by testaments; and *fidei-commissa* were so called because their performance could not be enforced by law, but depended solely upon the good faith of the person to whom they were intrusted. Afterwards the Emperor Augustus, having been frequently moved by consideration for certain persons, or on account of some striking instance of perfidy, commanded the consuls to interpose their authority. Their intervention being favored as just by public opin-

§ 977. *Fidei-commissa*.—The inheritance thus given to the appointed heir, in trust for another person, was termed a *fidei-commissum*, the heir or trustee the *fiduciarius*, and the beneficiary the *fidei-commissarius*.¹ As the heir trustee, although he might surrender the whole estate to the beneficiary, would still remain legally liable for all the debts of the deceased, since a transfer of the inheritance *inter vivos* would not transfer the liabilities, he was accustomed to take from the beneficiary a contract of indemnity. To obviate the necessity of such a contract, “during the reign of Nero (A. D. 62) a statute known as the *senatus consultum Trebellianum* provided that all actions which might by law be brought by or against the heir [trustee] should be permitted for or against the beneficiary. After this the prætor began to give equitable actions for or against the beneficiary as if he were the heir.”² By this legislation, the equitable estate of the beneficiary was fully established and protected.³ Although it is plain that the conception of a “use” was borrowed from this *fidei-commissum* of the Roman law, and that the English chancellor followed in the footsteps of the Roman magistrate, yet beyond this mere elementary

ion, it gradually assumed the character of a regular jurisdiction, and *fidei-commissa* grew into such favor that soon a special prætor was appointed to adjudicate in these cases.” The proceedings before this prætor to enforce the trust did not belong to his “ordinary” jurisdiction, and were not conducted by means of *formulae*, but fell under his “extraordinary” (i. e., equity) jurisdiction, and were decided by the magistrate himself, without the aid of any *judeæ* or *arbiter*: See *ante*, vol. 1, Introductory Chapter, §§ 4, 6.

¹The English word “*fiduciary*” should therefore always designate the trustee; to apply it to the beneficiary, as has been done by some writers, is clearly improper. The Latin *fidei-commissarius* cannot be easily anglicized.

²Just. Inst., b. 2, tit. 23, sec. 4.

³Subsequent statutes were passed limiting the power of testators, with respect to the persons to whom as beneficiaries *fidei-commissa* might be given, and providing that a fourth part of the inheritance might be retained by the heir: Just. Inst., b. 2, tit. 24. The law also permitted a testator to give any particular thing, as a slave, a piece of land, etc., as a *fidei-commissum*. Justinian added stringent provisions for enforcing secret trusts by means of an oath administered to the heir: Just. Inst., b. 2, tit. 23, sec. 12. This, it will be seen, resembles the “discovery” of the English chancery procedure.

notion or suggestion there is little resemblance between the two species of ownership. Their essential differences are as marked as their superficial similarity; and it is a grave error to represent the entire equity jurisprudence concerning uses and trusts as derived from the Roman law.⁴

§ 978. *Origin of Uses.*—Uses, in the ordinary meaning of the term, as designating those which are passive, seem to have been invented during the latter part of the reign of Edward III.¹ Like the Roman *fidei-commissa*, they were designed to evade the law; but, unlike them, they were resorted to at first for mere purposes of fraud,—by the clergy to defraud the statutes of mortmain, and by the laity to defraud creditors or feudal superiors. Being free from many heavy feudal burdens, uses grew rapidly into favor, and it is said that during the reign of Henry V. the greater part of the land in England was held in this manner.² At

⁴ In the ancient use and modern trust there are of necessity two distinct estates, the legal and the equitable, vested in different persons, and these *must* continue as long as the trust relation exists. In the Roman law there was no such division of ownership, no double simultaneous estates. Until he had transferred the inheritance, the heir possessed the only estate, and the beneficiary had only a right of action. After the inheritance was transferred, the beneficiary obtained, in turn, the whole and only estate in the portion thus transferred, while the heir, under the Trebillianian act at least, was left without either interest or liability.

¹ 1 Spence's Eq. Jur. 439–442.

² 1 Spence's Eq. Jur. 439–442, 442–444. There were two forms of conveyance to use, which should be carefully distinguished. By the one form land was conveyed upon a trust that the feoffee was to exercise acts of dominion over it for the benefit of the feoffor or of a third person, as, for example, receiving the rents and profits and paying the feoffor's debts therewith. Such conveyances, made upon an *active* trust, had probably been known from a very early day. They were not regarded as objectionable, they were not referred to when the phrase "conveyance to use" was ordinarily employed, and they were not included in the provisions of the statute of uses. By the second form, a conveyance was made to a feoffee to the use of some religious corporation or of some private person, with no expectation that the feoffee was to exercise any dominion over the land, but with the assumption that the *cestui que use* was to have and enjoy all the rights and privileges of an owner, except that of holding the naked legal title, and that, to complete this arrangement, the feoffee was to

the very outset these conveyances to use were made for the benefit of third persons. This mode having been established, conveyances were made for the benefit of the original owner, the feoffor. Thus A, being seised in fee, would convey the land by a legal feoffment to B to the use of himself, A. In this manner the owner in fee would convert his legal estate, which was subject to all the feudal burdens and common-law liabilities, into an equitable estate unknown to the common law, which was freed from these burdens and restrictions, which could be devised by will and aliened without livery of seisin, and which, under the doctrines subsequently established by the court of chancery, gave him all the dominion, possession, rights, and powers belonging to the legal estate.³

§ 979. The Use at Law.— For a while the *cestui que use* had no means of redress in any court. The law courts, as a necessary consequence of common-law doctrines, recognized no other estate than the legal one vested in the feoffee. If the *cestui que use* had any legal right at all, it was neither a *jus ad rem* nor a *jus in re*, and so there was no common-law form of real action by which he could recover possession of or enforce any claim upon the land itself. His only possible remedy would be an action for damages, upon contract express or implied, against the feoffee for the latter's violation of the trust.¹ Even this action was not generally

convey the legal title whenever and to whomsoever the *cestui que use* should direct. It is this latter form of *passive* use which grew to be so important, and which is generally referred to under the designation of a "use" or "conveyance to use," and against which the statute of uses was directed.

³ 1 Spence's Eq. Jur. 439-444, 447-449.

¹ All the common-law actions for the recovery of land, or for the maintenance of any interest therein, were based upon the assumption that the plaintiff either had some *property* absolute or qualified in the land (*jus ad rem*), or that he had a right to some particular use of land belonging to another,—an easement or servitude (*jus in re*). As the interest of the *cestui que use* was neither of these, he could enforce it by none of the common-law *real* actions, and was therefore shut up to actions *ex contractu* for damages; but, as I show, even such a personal action could only be maintained by him under one special state of facts.

maintainable upon common-law principles, since there was no *privity* between the feoffee and the *cestui que use* when the latter was a third person; whatever promise the feoffee had made, whatever legal obligation he had incurred, was to the feoffor, and not to the *cestui que use*.² It was formally decided in the fourth year of Edward IV. that the common-law courts had no jurisdiction over the use.³

§ 980. *The Use in Equity*.—There being no common-law actions to which resort could be had, the rights of the *cestui que use* were for a considerable time purely moral, and were protected only through the authority of the clergy, acting as confessors, upon the consciences of those who held the legal title of land for the use of others.¹ No traces of applications to the court of chancery have been found in the early records prior to Henry V., but during his reign the court began to entertain such suits and to decree relief. In the reigns of Henry VI. and of Edward IV. the chancery jurisdiction was fully established, and was also recognized by the courts of law. In other words, the law courts, while refusing themselves to protect the estates of *cestui que usent*, admitted the fact that such estates existed and were protected by the court of chancery.² The passive or permanent use as established in equity is thus described by Bacon when it is created in favor of the

§ 979, ² There are in the early records some traces of such actions brought in the common-law courts; but I presume it will be found that they are all confined to cases where the use was declared for the benefit of the *feoffor* himself, where A conveyed to B to the use of A. In such a case alone would there be any *legal* liability of the feoffee to the *cestui que use*. Whenever A, upon a consideration moving from B, promises B to do something for the benefit of C, the English courts have uniformly maintained the rule that C can have no action on the contract against A, because there is no *privity* between them. The modern rule has been settled otherwise in most of the American states.

§ 979, ³ 1 Spence's Eq. Jur. 445, 446.

§ 980, ¹ This authority would be especially exerted where lands were conveyed to the use of religious corporations or persons.

§ 980, ² 1 Spence's Eq. Jur. 445, 446. For an explanation of the theory upon which the early chancellors proceeded in awarding relief, see *ante*, vol. 1, §§ 428-431.

feoffor himself, and the description would apply to the case where it is created for the benefit of a third person by a slight change of language. He says: "The use consisted of three parts: 1. That the feoffee (trustee) would suffer the feoffor (*cestui que use*) to receive the profits; 2. That the feoffee, upon request of the feoffor (*cestui que use*), would execute (i. e., convey) the estates to the feoffor (*cestui que use*), or his heirs, or to any other by his directions; 3. That if the feoffee were disseised, and so the feoffor (*cestui que use*) disturbed, the feoffee would re-enter or bring an action to recover the possession."³

§ 981. Resulting Uses — Equitable Theory of Consideration. — In addition to these express uses created by the intentional words of parties, courts of equity soon invented another class, consisting of several different species, but all depending upon the same fundamental principle, and to which the names "implied," "resulting," and "constructive" have been given. The underlying principle upon which all these species were based is the equitable doctrine concerning consideration. This theory of consideration, adopted and promulgated by the chancellors, is one of the most just, most productive, and most beneficial conceptions of equity jurisprudence. It accomplished more, perhaps, than any other single doctrine in overthrowing the arbitrary dogmas of the common law concerning real property, and in building up the distinctive system of equitable estates and ownership. It is certainly very remarkable that the early chancellors, in the very infancy of equity jurisprudence, should formulate a principle so admirably comprehensive and wise, that it has been sufficient, in its subsequent development, to meet all the wants of an advancing civilization, and all the requirements of modern society. The common-law notions of title and ownership rested mainly upon the observance of external forms. Equity first introduced the principle that in all the transactions of men

³ Bacon's Reading on Uses, 9.

concerning land,— their transfers and bargains,— the consideration is the essential fact which determines the real beneficial ownership, wherever the legal title may be vested. The consideration draws to it the equitable right of property; the person from whom the consideration actually comes, under whatever form or appearance, is the true and beneficial owner. This grand principle extends not only to dealings which are intentional and rightful, but to those which are fraudulent, or in any manner wrongful or unconscientious. When once introduced, it was easily carried through all those branches of equity jurisprudence which relate to property, real or personal, and it underlies all the modern doctrines of resulting and constructive trusts, and all the remedies by which the beneficial owner is enabled to follow his equitable property in the hands of third persons. In its origin, the principle was applied to valuable or pecuniary consideration, but it was soon extended, with all of its legitimate results, to the good consideration of blood or love and affection between near relatives of the same family.¹ The theory as to consideration operated in the development of uses in the following manner: Prior to the statute of uses in the reign of Henry VIII., a gift of land to a person and his heirs accompanied by livery of seisin — that is, a transfer by feoffment — was effectual in *law* to convey the entire estate without any consideration. The law did not require a consideration, and moreover, if a deed or charter of feoffment was delivered, its seal raised a conclusive presumption of a consideration.² Equity broke through this doctrine by means of its

¹ It thus appears that the special rules which regulate resulting trusts from the payment of the purchase price between parent and child, etc., are not, as they have been regarded by some writers, exceptions to the general doctrine; they are the necessary consequences of the one universal principle which regards valuable consideration between strangers, and good consideration between members of the same family, as the sources of equitable rights of ownership. A beautiful consistency runs through all the rules of equity concerning resulting trusts.

² 1 Spence's Eq. Jur. 449, 450.

principle concerning consideration. It established the rule that if a conveyance of the fee was made without any use being declared, and without any consideration, although the legal title passed to the feoffee, a use *ipso facto* arose and resulted in favor of the feoffor, so that, having parted with the legal estate, he remained clothed with all the equitable interests, rights, and authority which the court of chancery gave to the *cestui que use*; the equitable estate in fee vested in him.³ This rule, however, did not apply to conveyances between parent and child, and other near family relatives, since the "good" consideration of blood or marriage relationship operated between such persons, in the same manner as valuable consideration between strangers, to transfer the whole estate, legal and equitable, free from any resulting use.⁴ As a corollary to the foregoing rule, it was further settled that whenever an owner conveyed land to a feoffee upon some particular use declared in favor of a third person, so much of the use as had not been disposed of resulted back to himself. In other words, if the use declared in favor of the third person did not, for any reason, equal in extent and exhaust the legal estate given to or held by the feoffee, then a use for the residue or surplus of such estate resulted to the feoffor.⁵ Carrying out the same principle of consideration in cases of *purchase*, equity also established the doctrine, that where no declaration of use was made so as to control, a use arose in favor of the person from whom the consideration came, whatever position he might occupy with respect to the legal title. In pursuance of this doctrine, where a purchase was made by one person in the name of another, the party receiving the legal title held it for the use of the one who

³ 1 Spence's Eq. Jur. 450, 453.

⁴ 1 Spence's Eq. Jur. 450.

⁵ 1 Spence's Eq. Jur. 451-453. This particular rule applied to every condition of circumstances, both where the use in favor of the third person wholly failed, for any reason, to be operative, and where it partially failed to exhaust the estate held by the feoffee.

advanced or paid the price. Here, also, an apparent, but not a real, exception arose from the fact that good consideration of blood and marriage operated between near relatives in the same manner as a money consideration between strangers. In case of a purchase by a parent in the name of his child, no use was held to result for the benefit of the parent paying the price, but the purchase was presumptively regarded as an advancement.⁶ As a second illustration of the same general doctrine, whenever an owner agreed for a valuable consideration to sell his estate, although there was no conveyance, and there were no words of inheritance in the contract, equity declared that a use was created in favor of the vendee, by means of the consideration, and that the vendor held the legal title as his trustee. The same rule was extended to cases between near relatives, where the consideration was that of marriage or blood. If a person, on consideration of marriage or blood, covenanted to settle an estate on an intended husband or wife, or on his children, or other nearest blood relatives, equity held that a use was thereby created in favor of the husband, wife, children, or relatives, and treated the covenantor as a trustee for their benefit.⁷ Finally, the principle of consideration was extended by analogy to cases of fraud, actual or constructive, accident, and mistake.⁸ This last application of the doctrine became, in time, the most efficient means in the hands of courts of equity for working substantial justice in disregard of legal forms. Whenever one person, through mistake or fraud, or in violation of fiduciary relations, obtained the legal title and apparent ownership of property which in justice and good conscience belonged to another, such property was immediately impressed with a use in favor of the latter equitable owner.⁹

⁶ 1 Spence's Eq. Jur. 451-453.

⁷ 1 Spence's Eq. Jur. 451-453.

⁸ 1 Spence's Eq. Jur. 453, 454.

⁹ 1 Spence's Eq. Jur. 453, 454.

§ 982. Double Nature of Property in Land — The Use and the Seisin.— From these doctrines concerning express uses, and especially concerning those implied from the acts or omissions of parties, it appears that equity at an early day introduced the notion of a *use* connected with and forming a part of *every* ownership of land. The very conception of property in land was thus changed from its primitive unity and simplicity, and it was made to involve, as an essential element, the notion of the use in connection with the mere legal proprietorship and seisin. According to this theory, every ownership — property itself — consisted of a legal title and of a use. These two might be combined and held by the same person, and their union would thus constitute the highest or ideal dominion; or they might be, and often were, separated, and held by different persons; but of the two the use was the more important, since it represented the real, substantial usufructuary proprietorship, while the other might be the naked legal estate, drawing after it or conferring no beneficial rights of enjoyment whatsoever. While the legal title and seisin always existed in some person, and remained subject to the common-law dogmas, the use, being a creature of equity, was entirely free from the feudal burdens, and from the restrictions growing out of the common-law theory as to seisin.¹ It even lacked some

¹ For example, the use might be devised or aliened without livery of seisin; it might be cut up into different parts; it might be created or conveyed so as to take effect upon future contingencies; it might be limited in fee after a prior limitation in fee. A use could be declared to commence *in futuro*; provision could be made for revoking uses declared in favor of certain persons or for certain objects, even though in fee, and for substituting others in their place; a use could be declared by a husband for the benefit of and given to his wife; and even could be created by an owner in his own favor, and so as to take effect in himself. While the use could thus be created and conveyed upon future and contingent limitations, in violation of the strict common-law rules respecting the creation of legal estates as contingent remainders, the *legal* title and seisin were conceived of as always vested in some person, ready at the proper time to be united with the use, and thus to produce in the holder of the two a perfected and complete ownership.

other common-law incidents, like dower. It was descendible, like the legal estate; but this was substantially the only feature of uses in which the early chancellors applied the maxim, *Æquitas sequitur legem*.² In every other respect they disregarded the narrow dogmas of the common law, and seemed intent on building up a system of landed ownership which should, as far as practicable, satisfy the needs of commerce, and at the same time maintain the dignity of families and the supremacy of the aristocracy.³

§ 983. The Statute of Uses.—Several statutes were enacted, from time to time, designed to prevent some of the particular effects produced by uses, and especially the statutes of mortmain were extended so as to prohibit uses in favor of ecclesiastical corporations; but it was not until the reign of Henry VIII. that any legislative attempt was made to destroy them. That monarch became exceedingly displeased at his losses of revenue resulting from the practical abrogation of wardships and other feudal incidents, and determined to cut up the cause of the evil, as he regarded it, from the very roots. In the twenty-third year of his reign, he procured a bill to be introduced into Parliament which would have limited the power of conveying land to uses; it passed the House of Lords, but was rejected by the Commons.¹ In the twenty-seventh year of his reign (A. D. 1535) he introduced a second bill, which he doubtless supposed would be effectual. It was drawn up with great care by some of the most distinguished lawyers of the time. The preamble with which it opens describes the evil nature and effects of uses, from the monarch's point of view, in the most sweeping and condemnatory manner.²

§ 982, ² See *ante*, vol. 1, §§ 425–427.

§ 982, ³ 1 Spence's Eq. Jur. 454–456.

§ 983, ¹ 1 Spence's Eq. Jur. 461, 462–465.

§ 983, ² The preamble represents uses as an unmitigated evil, as a constant source of fraud and covin; it recites the effects which they produce in abolishing the feudal incidents of property, and stigmatizes them as crying grievances; it laments "the trouble and inquietness and utter subversion of the an-

From the vigorous denunciations of the preamble, we should naturally suppose that the enacting part would have been equally violent and sweeping; that, like statutes of many American states, it would, in express terms, have abolished all uses or confidences, and have prohibited the conveyance of land upon trust or to the use of any one, or in any other manner than by the common-law mode of feoffment and livery of seisin. For some reason, which has never been explained by the legal writers, the statute attempted no such thing. It did not forbid conveyances to uses, but, on the contrary, assumed that they would continue as be-

cient laws of the realm" resulting from "the imaginations and subtle inventions and practices" which were known as uses and confidences.

I have said in the text, that no sufficient reason for the halting nature of the enacting clause as compared with the fierce assaults of this preamble has ever been given by the text-writers. It is certainly impossible that the learned lawyers who drew up the statute did not or could not foresee the construction which would be put upon it by the courts; they knew, of course, the cases which were omitted from its operation, and they must have anticipated the contrivance by which the court of chancery so soon evaded the only restrictive provision which they introduced. I venture to suggest, as a solution of the difficulty, and as an explanation of the whole statute, that while the preamble expressed the feelings and wishes of the king, the whole act was intentionally and most carefully drawn, so as to blind him, and lead him to suppose that his old feudal privileges would be restored, but at the same time to accomplish *no real change* in a system of land ownership which had become firmly established, and was sustained by an overwhelming preponderance of public opinion throughout the realm. The history of the time shows that Parliament seldom, if ever, dared *openly* to resist and defeat the clearly expressed will of Henry VIII. The quibble by which the court of chancery, taking advantage of the narrowness of the common-law tribunals, evaded the intent of the statute as expressed in its preamble, and restored, or rather preserved, the whole system of equitable trust estates, substantially as they existed before the act, would never have been endured unless the system itself had been fully approved by the general opinion of the nation and by the Parliament itself. This is evident from the fact that Parliament did not in the least interfere to check the legislative work of chancery by which the statute was virtually avoided. All these facts prove most conclusively that the clerical chancellors had built up an harmonious and consistent system of equitable land ownership, founded upon general and just principles, which was greatly preferred by the nation itself to the harsh and narrow doctrines of the common law. The only important doctrine of the common law which the chancellors shrank from attacking was that concerning descent and inheritance.

fore. The only change or relief which it proposed was a contrivance “to turn the equitable estates of the *cestuis que usent* into legal estates.” This it accomplished by a provision that in certain classes of conveyances to use, a legal estate of the same kind and extent as the use should by virtue of the statute immediately pass to and vest in the *cestui que use*, so that he would at once acquire the legal title and ownership of the same degree, in place of the mere equitable title and ownership which he would formerly have held under the name of “the use.” And, what is still more strange, the operation of this provision was confined to cases where the land was so conveyed or held that the feoffee or other holder of the legal estate was *seised* of it to the use of another,—that is, where the feoffee or other holder of the legal estate had the land in fee, fee-tail, or for life; all other possible cases were left untouched by an enactment which promised so much in its preamble.³

§ 984. *Uses not Embraced within the Statute.*—Notwithstanding this statute, the equitable estates of the same nature as uses continued under the name of trusts. In the first place, many species of existing uses were wholly untouched by the statute. The general doctrine was established, that when any control or discretion is given to the feoffee or trustee in the application of the rents and profits,

³ The following is the operative clause, unnecessary repetitions only omitted: Be it enacted, “where any person or persons *stand or be seised* . . . of any lands, tenements, or other hereditaments, to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, etc., . . . that in every such case all such person or persons that have . . . any such use, confidence, or trust in fee-simple, fee-tail, for life, or for years, or otherwise, . . . shall from henceforth stand and be seised and adjudged in lawful seisin, estate, and possession of and in the same lands, tenements, and hereditaments . . . of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and the estate that was in such person or persons that were or shall be seised of any lands, tenements, or hereditaments to the use or trust of any such person or persons shall be from henceforth adjudged to be in him or them that have, or hereafter shall have, such use or trust, after such quality, manner, etc., as they had before in or to the use or trust that was in them.”

or where he is required to do any specific acts in regard to the land, and in all similar instances of *express active* trust, the legal estate remains in the feoffee or trustee to enable him to perform the trust reposed.¹ All such cases, though perhaps within the letter, were held not to be within the design and scope of the statute. Secondly, where only a term of years is conveyed, or assigned to, or is held by one person to the use of another, it was decided that the statute does not operate, but that the legal and equitable estates remain distinct; since the language is, "where any person is *seised* to the use of," and the courts gave the most technical and narrow interpretation to the word "*seised*."² Thirdly, the statute did not purport to interfere with uses or trusts of things in action, or in other kinds of personal property.³ Finally, the jurisdiction of chancery over the various uses which are created by implication or operation of law—the resulting and constructive uses—was held to be unaffected by the statute.⁴ The operation of the statute was thus confined to one class of uses,—passive uses in land, where the feoffee or holder of the legal title was seised of the land to the use of another,—that is, held an

¹ As examples where the trustee is directed or empowered to pay annuities, or to make repairs, or to maintain the *cestui que use*; or the trust is to reconvey the land to another, or to sell it for the purpose of raising a fund to pay debts or legacies, and the like: *Wright v. Pearson*, 1 Eden, 119, 125, per Lord Northington; *Nevil v. Saunders*, 1 Vern. 415; *Pybus v. Smith*, 3 Brown Ch. 340; *Shapland v. Smith*, 1 Brown Ch. 75; *Harton v. Harton*, 7 Term Rep. 652, 654; *Silvester v. Wilson*, 2 Term Rep. 444, 450.

² Bacon's Reading on Uses, 42; Dyer, 369 a. This must not be confounded with the case where the holder of the legal estate is seised, but the use declared thereon in favor of some person is only for a term of years; e. g., A, being owner in fee, "bargains and sells" to B, a term of years.

³ Bacon's Reading on Uses, 43.

⁴ 1 Spence's Eq. Jur. 466, 467, 493-512; Sugden's Gilbert on Uses, introd., pp. lx., lxi., 75, note 5; *Rigden v. Vallier*, 2 Ves. Sr. 252, 257, per Lord Hardwicke.

(a) And to the same effect are the American decisions: *Wehb v. Hayden*, 166 Mo. 39, 65 S. W. 760; *People's Loan & Ex. Bk. v. Garlington*, 54 S. C. 413, 71 Am. St. Rep. 800, 32 S. E. 513; *Ure v. Ure*, 185 Ill. 216, 56 N. E. 1087; but see *Appeal of Clark*, 70 Conn. 195. 39 Atl. 155.

estate in fee, fee-tail, or for life; but the use itself might be for a term of years, or for any higher interest.

§ 985. A Use upon a Use not Executed by the Statute.—Even the operation of the statute in this single class of express passive uses was soon defeated by the combined action of the law and equity courts. If an estate was given to A in fee, to the use of B in fee, then by the express command of the statute the legal estate passed through A as a mere conduit, and became vested in the *cestui que use*, B. The statute said nothing, in terms, of a conveyance in fee to A, to the use of B in fee, to the use of or in trust for C in fee. Such a form of conveyance, or one identified with it in legal import, having arisen, the courts of law, either from a narrowness of construction most astonishing, or, which is probably the true explanation, from a deliberate design of interpreting the statute so as to give an opportunity for its complete evasion, held that there could be no use executed upon a use,¹ but that when the legal estate was carried, by virtue of the statute, to the first *cestui que use*, it must there remain vested in him. By virtue of this ruling, the legal estate in the case supposed passed through A and became vested in B, while C, who was intended by the conveyance to be the final and actual beneficiary, took nothing.² Here was an opportunity which the court of chancery could not overlook. It seized hold of the construction thus given by the law courts, and declared that, although the legal title was vested in B by virtue of the statute, he could not, in good conscience, hold it for his own benefit, but he must hold it for the benefit of and in trust for C, who thereby obtained an equitable estate through the

¹ It may be proper to remark that the word "executed," in these old decisions, and as a technical term in English conveyancing, simply designates the passing of the legal estate through the first holder (the trustee), and vesting it in the person described as the *cestui que use*, performed by operation of the statute. In this sense of the word, the use is "executed" when the legal estate is vested in the *cestui que use*.

² See *Tyrrel's Case*, Dyer, 155 a.; 1 Coke, 136 b, 137; *Hopkins v. Hopkins*, 1 Atk. 581, 590, 592, per Lord Hardwicke; *Sanders on Uses*, 92, 93.

conveyance, which the court of chancery would maintain and protect.³ This doctrine of chancery was acquiesced in at once, and has remained unquestioned by the courts to the present day. The practical result was, that by making a slight alteration in the formal language of conveyances, so that an estate should be conveyed to or held by one person, to the use of a second, to the use of or in trust for a third, this third person would acquire an equitable estate distinct from the legal estate, vested by operation of the statute in the second party; and the whole system of express passive uses was thus restored, or revived to the same extent as before the passage of the act.⁴

³ *Hopkins v. Hopkins*, 1 Atk. 581, 590, 591, per Lord Hardwicke; *Willett v. Sandford*, 1 Ves. Sr. 186, per Lord Hardwicke.^a

⁴ As a matter of fact, in creating these express passive uses by conveyances *inter vivos*, the old form of feoffment to A, to the use of B, to the use of C, was seldom, if ever, employed after the "statute of uses," since it still required livery of seisin to be made to the feoffee, A. Other forms of conveyance became universal, in which the use upon a use was created by means of the equitable principle concerning the use arising and following the consideration. In family settlements, where the good consideration of blood or affection is sufficient, if A, the owner of land, covenanted to stand seised of it for his son B, then a use thereby arose in favor of B, and the statute executed this use by passing the legal estate directly to B, who thereby became seised in law. If, however, A wished to create a passive trust for his son B, he covenanted to stand seised of the land for C to the use of or in trust for his son B, and the legal estate was thereby vested by the statute in C, but was held by him simply as a trustee for the intended beneficiary, B. This came to be the universal form of deed for the purpose of creating passive trusts in family or marriage settlements. Wherever the conveyance was between strangers, so that a pecuniary consideration was requisite, another form of deed was adopted. As has already been stated, the doctrine had long been settled that if A, the owner of land, agreed to sell it to B for a valuable consideration, a use was raised by the consideration in B's favor. Carrying out this doctrine, if a deed of conveyance from A, the owner, to B recited or admitted that a consideration had been received, this recital was regarded as evidence of the fact sufficient to raise a use in B's favor. Finally, it was settled that if in a deed of conveyance the words "bargain and sell" were employed as operative words of transfer, they conclusively imported a pecuniary consideration, and a use arose therefrom in favor of the grantee. A deed, therefore, from A, by which he bargained and sold

(^a) See *In re Brooke*, [1894] 1 Ch. 43, for a late case commenting on the difference between the ancient use and the modern trust.

§ 986. *Trusts after the Statute.*—Although the beneficial or equitable interests which had existed under the denomination of “uses” prior to the statute were thus kept in existence, and continued to be under the exclusive jurisdiction of chancery, it was found convenient to give them a new name. The “use” had, by virtue of the statute, passed within the cognizance of the law courts, and thenceforth it played a most important part in the English theory and practice of conveyancing; and, as such, it does not fall within the scope of a treatise upon equity jurisprudence.¹

land to B, created the use in B's favor, which the statute executed by transferring the legal estate. If, however, A designed to create a passive trust for B as the beneficiary, his deed would be modified in form, so as to be a bargain and sale of the land to C to the use of or in trust for B. By operation of the statute the legal estate would thereby be vested in C, but would be held by him as a trustee for B, the intended beneficiary. This became the common form of deeds creating express passive trusts *inter vivos*, where the parties were not near family relatives. Wherever an estate was given by will, and the testator wished to create a passive trust which should be valid notwithstanding the statute, express words were necessary declaring or creating in some manner one use upon another.

¹ The foregoing account of the text shows the origin of trusts as they exist in England under the statute of uses, and its judicial interpretation. The question then arises, How far does the statute exist in this country, and affect the creation of trusts? Since the statute never applied to personal property, and under the judicial construction never embraced active uses and trusts, it follows that the question suggested practically means, how far do express *passive* trusts in lands exist in the states of this country? and how far does their creation depend upon the statute of uses? As such express passive trusts are very rare indeed in the United States, and are opposed to our prevailing notions of landed property and modes of dealing with it, this question is plainly more theoretical than practical. Still, the operation of the statute has sometimes been discussed by American courts, and in one state in particular it has been a frequent subject for judicial inquiry. In several of the states, as will more fully appear in a subsequent paragraph, all express passive trusts in land, and all express active trusts, with the exception of certain specified species, have been completely abrogated and abolished. The statute of uses clearly has no operation in those states, since it has been superseded by more destructive legislation. In some of them certainly, and doubtless in all, an attempt to create a passive trust—a conveyance or devise to A in trust for B—would vest the whole estate directly in the beneficiary, B; while an attempt to create an active trust not authorized by the statute would simply be void, except so far as it might operate as a valid “power in trust”: See *post*, § 1002. In most of the remaining states,

The beneficial interests which equity recognized and protected — both those kinds which were held not to have been

as Mr. Perry shows in his admirable treatise, the statute of uses has either been substantially re-enacted, or adopted and held to be in force as a part of the English legislation regarded as operative and binding in this country. He gives an abstract of the statutes in various states. Vermont, Ohio, Tennessee, and perhaps a few others, seem to be either wholly or partially excepted from this statement: See Perry on Trusts, sec. 299, and note, containing abstract of statutes; *Gorham v. Daniels*, 23 Vt. 600; *Helfenstine v. Garrard*, 7 Ohio, 274; *Hutchins v. Heywood*, 50 N. H. 491; *French v. French*, 3 N. H. 234; *New Parish v. Odiorne*, 1 N. H. 232, 236;^a *Witham v. Brooner*, 63 Ill. 344.^b In this class of states, therefore, there can be no doubt that a conveyance of land to A, for the use of or in trust for B, would operate to transfer the legal estate, and vest it directly in B. For example, it is held, in Georgia, since a statute of 1866 concerning married women's separate estate, that a conveyance to a trustee for her in fee, with no remainder over, and no active duties prescribed for the trustee to perform, passes the legal title to her immediately; the trust is thus at once executed: *Sutton v. Aiken*, 62 Ga. 733. In Alabama it is held that under the statute of uses (27 Henry VIII.), which forms a part of the common law of the state, the extent of the trustee's legal estate is to be determined, not by words of inheritance, but by the whole object and extent of the trust upon which the land is conveyed; and when the objects of the trust are fully accomplished, the estate of the trustee ceases, and the whole title, legal and equitable, thereupon vests by operation of law in the beneficiary: *Schaffer v. Lavretta*, 57 Ala. 14; *Tindal v. Drake*, 51 Ala. 574; see *Booker v. Carlile*, 14 Bush, 154. In states where the statute 27 Henry VIII. has not been re-enacted, or treated as actually in force, the same result is reached; mere passive uses are executed by virtue of the common law prevailing in those commonwealths, since the notion of the actual beneficial ownership kept permanently separated from the dry legal estate is repugnant to American modes of dealing with real property: See *Sherman v. Dodge*, 28 Vt. 26, 31; *Gorham v. Daniels*, 23 Vt. 600; *Bryan v. Bradley*, 16 Conn. 474, 483; *McNab v. Young*, 81 Ill. 11, 14; *Guest v. Farley*, 19 Mo. 147, 149; *Coughlin v. Seago*, 53 Ga. 250; *Adams v. Guerard*, 29 Ga. 651; 76 Am. Dec. 624; *Bowman v. Long*, 26 Ga. 142, 147; *Booker v. Carlile*, 14 Bush, 154.^c Can an express passive trust in land be created in the American states?

(a) See, also, *Fellows v. Ripley*, 69 N. H. 410, 45 Atl. 138.

(b) But see *Silverman v. Kirstufek*, 162 Ill. 222, 44 N. E. 430, to the effect that a partnership is not a person within the meaning of the statute. See, also, *Speed v. St. Louis*, etc., R. R. Co., 86 Fed. 325; *Holmes v. Pickett*, 51 S. C. 271, 29 S. E. 82; *Simms v. Buist*, 52 S. C. 554, 30 S.

E. 400; *Hughes v. Farmer's Sav. Bldg., etc., Assn.*, 46 S. W. 362 (Tenn.). The statute is in force in Colorado: *Teller v. Hill*, (Colo. App.) 72 Pac. 811; in Maryland: *Graham v. Whitridge*, (Md.) 58 Atl. 36.

(c) *Wooley v. Preston*, 82 Ky. 415; *Henderson v. Adams*, 15 Utah, 30, 48 Pac. 398.

affected at all by the statute, and those which were rescued from its operation by the construction described in the last

In several of the states, as has already been shown, it would be impossible, being expressly prohibited by statute. In other states, where the statute 27 Henry VIII. prevails, would the interpretation first given in *Tyrrell's Case*, that a use upon a use is not executed, be followed? By some American courts the rule of *Tyrrell's Case* has been disapproved: See *Thatcher v. Omans*, 3 Pick. 521, 528; by other courts it has been approved. It has been held that where land was conveyed by a deed of bargain and sale to the use of a third person, the use was not executed, and so remained valid as a trust: See *Guest v. Farley*, 19 Mo. 147; *Jackson v. Cary*, 16 Johns. 302; *Jackson v. Myers*, 3 Johns. 388, 396; 3 Am. Dec. 504; *Price v. Sisson*, 13 N. J. Eq. 168, 173; *Croxall v. Shererd*, 5 Wall. 268, 282. I would remark, that to give this effect to deeds in which the operative words are "bargain and sale," in my opinion, violates the theory of conveyancing and of the effect and operation of deeds as established by modern statutes in a majority of the states. By modern statutes, in many if not most of the states, deeds of land operate as grants to convey the entire legal estate and seisin, by force of their words of transfer, and sometimes their being recorded; and it is a misapprehension, in the face of such legislation, to regard any deeds in these states as transferring the legal estate by virtue of the statute of uses. To say, therefore, in most of our states, that a deed of bargain and sale raises a use which the statute of uses executes, and that where a use or trust is expressly limited by a deed of bargain and sale, it is not executed by the statute, are, as it seems to me, wholly inconsistent with the simplicity of the law as now established by statute throughout the larger part of the United States. This view is not, however, at all antagonistic to the conclusion that an owner may, by deed or by will, give land in express terms to A, to the use of B, to the use of C, and that such a form of limitation would create a valid *passive* trust in C's favor. In some states, where there is no hostile legislation, this result may still be possible, although the question is almost entirely speculative and theoretical.

With regard to the cases held not to be within the force and operation of the statute 27 Henry VIII., the American law is generally in harmony with that settled by the English courts. Trusts of personal property were not embraced within the statute, and such trusts are generally valid in this country, as in England, except so far as they have been regulated or restricted by statutes of various states: See *Perry on Trusts*, sec. 303; *Denton v. Denton*, 17 Md. 403.^d Express active trusts in land were also untouched by the statute, and they are generally valid in the United States as in England, with special statutory restriction, however, in several of the states: See *Perry on Trusts*, sec. 306; *Morton v. Barrett*, 22 Me. 257, 261; 39 Am. Dec. 575; *New Parish v. Odiorne*, 1 N. H. 232; *Chapin v. Univ. Soc.*, 8 Gray, 580; *Stanley v. Colt*, 5 Wall. 119, 168.^e

(^d) *Owens v. Crow*, 62 Md. 491;
Van Zandt v. Garretson, 21 R. I.
 352, 43 Atl. 633.

(^e) See *Silverman v. Kirstufek*,
 162 Ill. 222, 44 N. E. 430; *Dakin v.*
Savage, 172 Mass. 23, 51 N. E. 186.

paragraph — were styled trusts; the person holding the legal title was termed the trustee; while the holder of the

To this last statement concerning active trusts there is one marked exception. A doctrine has been settled by the courts of Pennsylvania very different in some respects from that prevailing in other states and in England, and unless this fact is carefully observed, the Pennsylvania decisions would be quite misleading as general authorities. Without entering into any examination of them, I shall merely state these important points of difference, and cite some of the decisions by which they are illustrated.

One special rule established in Pennsylvania is, that an express trust for the separate use of a woman, even where active duties are given to the trustee, so that the trust is really active, cannot be created, unless she is already married, or unless it is made in contemplation of her marriage: See *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Phila. 96; *Ogden's Appeal*, 70 Pa. St. 501; and cases cited below. This particular rule often operates in connection with others which are to be mentioned. The two main points of peculiarity in the law as settled in Pennsylvania are the following: 1. Some species of trusts are treated as executed by the statute as though they were wholly passive, so that the entire estate, legal and equitable, vests at once in the beneficiary, which by the general law of England and of this country are not thus executed, on the ground that they are in reality active trusts; as, for example, where land is given upon trust to convey it to the *cestui que trust*: See *Bacon's Appeal*, 57 Pa. St. 504; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Yarnall's Appeal*, 70 Pa. St. 335; *Nice's Appeal*, 50 Pa. St. 143; *Barnett's Appeal*, 46 Pa. St. 392; 86 Am. Dec. 502. 2. Several species of trusts are treated as *passive*, which by the general doctrine are undoubtedly active. Certain trusts which require active duties by the trustees are held to be passive, and the whole estate to vest in the beneficiary. For example, a trust to receive rents and profits and pay them over is clearly active, while a trust to "permit and suffer" the beneficiary to receive is passive by the English law: *Wagstaff v. Smith*, 9 Ves. 520; but this distinction seems to be denied in Pennsylvania, and both are held to be passive: See *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351, and cases cited below. From the combination of these rules, it follows that there may be trusts strictly active which are not affected by the statute, and in which the legal and equitable estates are kept separate. But the leaning is strongly to regard trusts as passive. Many instances are treated as passive which by the generally received law are active; and especially where an active trust for any reason fails of its purpose, or its purpose is accomplished, the tendency is strongly in favor of holding it executed, and the estate as vested in the beneficiary. The following cases illustrate these tendencies: *Keene's Estate*, 81 Pa. St. 133; *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Phila. 96; *Williams's Appeals*, 83 Pa. St. 377; *Huber's Appeal*, 80 Pa. St. 348; *Phillips's Appeal*, 80 Pa. St. 472; *Ash's Appeal*, 80 Pa. St. 497; *Deibert's Appeal*, 78 Pa. St. 296; *Delbert's Appeal*, 83 Pa. St. 462; *Ashurst's Appeal*, 77 Pa. St. 464; *Earp's Appeal*, 75 Pa. St. 119; *Tucker's Appeal*, 75 Pa. St. 354; *Yarnall's Appeal*, 70 Pa. St. 335; *Og-*

beneficial or equitable estate was ordinarily known as the *cestui que trust*, or, in more modern nomenclature, as the beneficiary.

SECTION II.

EXPRESS PRIVATE TRUSTS.

ANALYSIS.

- § 987. Classes of trusts.
- §§ 988-990. Express passive trusts.
- § 989. Estates of the two parties; liability for beneficiary's debts, etc.
- § 990. Rules of descent, succession, and alienation.
- §§ 991-995. Express active trusts.
- § 992. Classes of active trusts.
- § 993. Voluntary assignments for the benefit of creditors; English doctrine.
- § 994. The same; American doctrine.
- § 995. Deeds of trust to secure debts.
- §§ 996-999. Voluntary trusts.
- § 997. The general doctrine; incomplete voluntary trusts not enforced.
- § 998. When the donor is the legal owner.
- § 999. When the donor is the equitable owner.

den's Appeal, 70 Pa. St. 501; *Westcott v. Edmunds*, 68 Pa. St. 34; *Megargee v. Naglee*, 64 Pa. St. 216; *Parker's Appeal*, 61 Pa. St. 478; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586; *Bacon's Appeal*, 57 Pa. St. 504; *Koenig's Appeal*, 57 Pa. St. 352; *Freyvogel v. Hughes*, 56 Pa. St. 228; *Wickham v. Berry*, 55 Pa. St. 70; *Shankland's Appeal*, 47 Pa. St. 113; *Barnett's Appeal*, 46 Pa. St. 392; 86 Am. Dec. 502.¹

In earlier decisions these views were carried to a still greater length: See *Kuhn v. Newman*, 26 Pa. St. 227; *Whitchote v. Lyle's Ex'r*, 28 Pa. St. 73; *Williams v. Leech*, 28 Pa. St. 89; *Price v. Taylor*, 28 Pa. St. 95; 70 Am. Dec. 105; *Bush's Appeal*, 33 Pa. St. 85; *Naglee's Appeal*, 33 Pa. St. 89; *McKee v. McKinley*, 33 Pa. St. 92; *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399; *Rush v. Lewis*, 21 Pa. St. 72. The foregoing *résumé* shows that the Pennsylvania cases cannot always be taken as safe authority in other states upon the subject of active and passive trusts, and the extent to which they are executed by the "statute of uses."

(*) *Philadelphia Trust Co.'s Appeal*, 93 Pa. St. 209; *Bristor v. Tasker*, 135 Pa. St. 110, 20 Am. St. Rep. 853, 19 Atl. 851. For examples

of trusts held active, see *Stanbaugh's Estate*, 135 Pa. St. 585, 19 Atl. 1058; *Livezey's Appeal*, 106 Pa. St. 201.

- §§ 1000, 1001. Executed and executory trusts.
- § 1001. Definition and description.
- § 1002. Powers in trust.
- §§ 1003–1005. Legislation of various states.
- § 1004. Judicial interpretation; validity of trusts.
- § 1005. Interest, rights, and liabilities of the beneficiary.

§ 987. **Classes of Trusts.**—Having thus explained the origin of trusts and their historical development until the jurisdiction substantially as it now exists had become firmly established, I shall now proceed to consider the various kinds and classes which are recognized by equity and form a part of its jurisprudence. All possible trusts, whether of real or of personal property, are separated by a principal line of division into two great classes: Those created by the intentional act of some party having dominion over the property, done with a view to the creation of a trust, which are express trusts; those created by operation of law, where the acts of the parties may have had no intentional reference to the existence of any trust,—implied, or resulting, and constructive trusts.^a Express trusts are again separated into two general classes,—private and public. Private trusts are those created by some written instrument, or in some trusts of personal property by a mere verbal declaration, for the benefit of certain and designated individuals, in which the *cestui que trust* is a known person or class of persons. Public, or, as they are frequently termed, charitable, trusts are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating, body of individuals, in which the *cestuis que trustent* may be a portion or class of a public community,—as, for example, the poor or the children of a particular town or parish. As a general rule, property of every kind and form, real and personal, may be made the subject of an express trust or of one arising by operation of law. All persons who have the capacity to hold and dispose of property can impress a trust upon it; and, generally, all persons capable of holding

(a) The text is quoted in *Heil v. Heil*, (Mo.) 84 S. W. 45.

property may be made trustees.¹ All persons capable of

¹ It might not be expedient to appoint married women or infants trustees; but they *may* discharge the duties of the office: *Lake v. De Lambert*, 4 Ves. 593, 595; *Smith v. Smith*, 21 Beav. 385; *In re Kaye*, L. R. 1 Ch. 387.^b Property subject to an express or implied trust might devolve upon a person wholly *non sui juris*, as an idiot; equity would either enforce the trust against the property, or appoint another trustee.^c

(b) See, also, ——— v. Hancock, 17 Ves. 384; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599 (an infant cannot disaffirm, on the ground of his minority, his deed made in execution of a trust, which a court of equity would have compelled him to perform); *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Starr v. Wright*, 20 Ohio St. 97; *Prouty v. Edgar*, 6 Iowa 353; *Thompson v. Dulles*, 5 Rich. Eq. 370; *Bridges v. Bidwell*, 20 Nebr. 185, 29 N. W. 302. As the decree of an equity court did not operate *in rem*, there was, at common law, no means of divesting an infant trustee of his title though the property was being injured by his mismanagement: See *Anonymous*, 3 P. Wms. 389, n. (a), where the infant trustee was ordered to convey when he became of age unless cause was shown to the contrary within six months of his majority; to the same effect, *Perry v. Perry*, 65 Me. 399; *Whitney v. Stearns*, 11 Met. 319; *Coffin v. Heath*, 6 Met. 76. But the infant may be enjoined from interfering with the property: *Sutphen v. Fowler*, 9 Paige 280. Though not liable for mismanagement of the property, an infant trustee was liable for any property gained by his wrongful act: *Overton v. Banister*, 3 Hare 503; *Lempriere v. Lange*, 12 Ch. Div. 675; see the cases in connection with trusts *ex maleficio*, § 1053; see *Jeron v. Bush*, 1 Vern. 342, Ames Cas. on Trusts, 217, where the breach was after the

trustee attained his majority. In a proper case the court may now generally divest the infant trustee of the title to property held in trust; this is due to statute alone: See *In re Follen*, 14 N. J. Eq. 147 (the statute does not extend to resulting nor constructive trusts); *Livingston v. Livingston*, 2 Johns. Ch. 537; *Thompson v. Dulles*, 5 Rich. Eq. 370 (though the infant was not a bare, naked trustee).

A married woman, as trustee, may deal with the property as she could with her individual estate and no more freely, except where allowed by statute: *Still v. Ruby*, 35 Pa. St. 373, Ames Cas. on Trusts, 219; *Wallace v. Bowen*, 28 Vt. 638; *Springer v. Berry*, 47 Me. 330; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622 (citing cases to show that she could not be a trustee for her husband at common law); *People v. Webster*, 10 Wend. 554 (aside from statute, a husband should join in actions in regard to the property). A *feme covert* was appointed a trustee in *Milbank v. Crane*, 25 How. Pr. 193.

(c) The original rule in regard to lunatics or those physically unable to convey property was the same as in the case of infants: In *Pegge v. Skynner*, 1 Cox Eq. Cas. 23, Ames Cas. on Trusts, 218, the court ordered one afflicted with paralysis to convey "when he should be capable of so doing"; see also *Hall v. Warren*, 9 Ves. 605. The rule has since been

holding property, even those *non sui juris*, and such persons only, may be beneficiaries.² Equity will enforce all lawful

² Wherever the common-law rule prevails forbidding aliens from acquiring or holding real estate by an absolute right, they cannot be made beneficiaries, and hold the equitable interest under a trust in their favor; but this rule does not prohibit trusts of personal property on behalf of aliens: *Du Hourmelin v. Sheldon*, 4 Mylne & C. 525; 1 Beav. 79; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343, 352; *Leggett v. Dubois*, 5 Paige, 114; 28 Am. Dec. 413; *Hubbard v.*

changed by statute in some jurisdictions: See *Swartwout v. Burr*, 1 Barb. 495; *Re Wadsworth*, 2 Barb. Ch. 381. For the vesting of title to trust property by order of court, under the English statutes, see *In re Trubee's Trusts*, [1892] 3 Ch. 55; *In re Leon*, [1892] 1 Ch. 348; *In re Gregson*, [1893] 3 Ch. 233; *London & County Banking Co. v. Goddard*, [1897] 1 Ch. 642.

It was formerly contended that a corporation could not be a trustee: *Chudleigh's Case*, 1 Co. 122, a; the reason given was that "it is a dead body, although it consists of natural persons; and in this dead body confidences can not be put, but in bodies naturall"; *Popham*, 72. But a corporation may now generally be a trustee, either by the appointment of the settler, or by the court: *Atty.-General v. Landisfield*, 9 Mod. Rep. 286, *Ames Cas. on Trusts*, 216; *Chambers v. City of St. Louis*, 29 Mo. 543; *Trustees of the South New-Market Methodist S. v. Peaslee*, 15 N. H. 317 (recognizing the rule but refusing to allow the corporation to act as trustee because it was "foreign to their institutions"); *Sheldon v. Chappell*, 47 Hun 59; *Ex parte Greenville*, 7 Rich. Eq. 471; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. See *In re Franklin's Estate*, 150 Pa. St. 437, 30 Am. St. Rep. 817, 24 Atl. 626, holding that a municipal corporation is not capable of executing a purely private trust

and quoting from *Philadelphia v. Fox*, 64 Pa. St. 169, to the effect that the liabilities of such a trust are inconsistent with the proper administration of the public duties imposed upon the corporation.

There has been some discussion as to whether a *cestui* can also be a trustee and it is generally held that if there are several trustees there is no objection: *Rankin v. Metzger*, 69 App. Div. 264, 74 N. Y. Supp. 649; *Summers v. Higley*, 191 Ill. 193, 60 N. E. 969; *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32. But if a *cestui* become a sole-trustee he should apply for the appointment of another trustee, or proceed under the direction of the court: *Irving v. Irving*, 21 Misc. Rep. 743, 47 N. Y. Supp. 1052; see, also, *Woodbridge v. Bockes*, 170 N. Y. 596, 63 N. E. 362.

It has been held that an executor may also be a trustee: *Appeal of Shey*, 73 Conn. 122, 46 Atl. 832; *In re Post's Estate*, 30 Misc. Rep. 551, 64 N. Y. Supp. 369. But the general rule seems to be that an executor cannot be deemed to hold a fund as trustee until the trust fund has been in some way legally ascertained, identified, and separated from the funds of the estate, and the trustee has entered upon the duties of his office as trustee as distinct and separate from his functions as executor: *Evans v. Moore*, [1891] 3 Ch. 119; *In re Williams*, 26 Misc. Rep. 636.

trusts. If a trust should be created for an illegal or fraudulent purpose, equity will not enforce it, nor, it seems, relieve the person creating it by setting aside the conveyance.³ When, however, a trust is unlawful because it is one which the statute forbids, or which conflicts with the statute concerning perpetuities, and the like, the whole disposition is void.⁴

§ 988. **Express Passive Trusts.**—Express private trusts are of two kinds,—passive or simple, and active or special. An express passive or simple, or, as it is sometimes called,

Goodwin, 3 Leigh, 492; *Atkins v. Kron*, 5 Ired. Eq. 207; *Taylor v. Benham*, 5 How. 233.^d

³ Unless, perhaps, the illegal purpose wholly fails to take effect: See *Symes v. Hughes*, L. R. 9 Eq. 475; *Brackenbury v. Brackenbury*, 2 Jacob & W. 391; *Childers v. Childers*, 1 De Gex & J. 482.^e

⁴ See *post*, §§ 1003–1005, concerning the legislative system in many of the states.^f

57 N. Y. Supp. 943 (citing *In re Hood's Estate*, 98 N. Y. 363; *Cluff v. Day*, 124 N. Y. 203, 26 N. E. 306; *In re Underhill*, 35 App. Div. 434, 54 N. Y. Supp. 967; *Johnson v. Lawrence*, 95 N. Y. 165); *Bemmesly v. Woodward*, 136 Cal. 326, 68 Pac. 1017. See *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7, to the effect that executor, and trustee, have not the same meaning.

It has been held that a court of equity cannot be a trustee: *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918. But by statute there is a different rule in New York: *Correll v. Lauterbach*, 159 N. Y. 553, 54 N. E. 1089, 12 App. Div. 531, 42 N. Y. Supp. 143.

It has been held that on the death of a sole trustee, the title to the trust property descends to his eldest son as common-law heir: *Cone v. Cone*, 61 S. C. 512, 39 S. E. 748.

(d) Nor can they be trustees in such case: *King v. Bays*, *Dyer*, 283b, *Ames Cas. on Trusts*, 216.

(e) See the following cases, dealing

with trusts that were invalid in part only, or were held wholly invalid because the valid and invalid clauses and dispositions were inseparably connected: *In re Piercy*, [1895] 1 Ch. 83; *Cross v. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. 125, 15 L. R. A. 606; *In re Denis' Estate*, 201 Pa. St. 616, 51 Atl. 335; *In re Willey's Trust*, 128 Cal. 1, 60 Pac. 471; *Carpenter v. Cook*, 132 Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997; *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32. See *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880; *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 453, 64 Pac. 1000, to the effect that if the entire disposition is a general scheme and is void in part the entire trust fails.

(f) See, also, the cases *supra*, note d, and *Whittfield v. Foster*, 124 Cal. 418, 57 Pac. 219; *Johnston's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621, 39 Atl. 879.

pure, trust exists when land is conveyed to or held by A in trust for B, without any power expressly or impliedly given to A to take the actual possession and management of the land, or to exercise acts of government over it except by the direction of B.¹ In such a case the naked legal title alone is vested in the trustee, while the equitable estate of the *cestui que trust* is to all intents the beneficial ownership, entitling him to the possession, the rents and profits, and the management and control, according to the extent of his estate. These passive trusts are considered in equity as virtually equivalent to the corresponding legal ownerships; the trust is regarded rather as fastened upon the estate than upon the person of the trustee;² it is never suffered to fail for want of a trustee, either when the designated trustee dies, or refuses to act, or is an improper person.³ As a general principle, the rules of law, excepting

¹ 1 Spence's Eq. Jur. 495-497; *Cook v. Fountain*, 3 Swanst. 585, 591, 592, per Lord Nottingham; *Lloyd v. Spillet*, 2 Atk. 148. A trust merely to "permit and suffer" the *cestui que trust* to receive the rents and profits is not an active trust: *Wagstaff v. Smith*, 9 Ves. 520.^a For peculiar doctrine in Pennsylvania concerning passive trusts, see *ante*, note under § 986, and cases cited.

² *Adair v. Shaw*, 1 Schoales & L. 262, per Lord Redesdale.

³ *Gravenor v. Hallam*, Amb. 643; *Pitt v. Pelham*, 1 Cas. Ch. 176; *Brown v. Higgs*, 8 Ves. 561, 569; *Newlands v. Paynter*, 4 Mylne & C. 408; *Attorney-General v. Stephens*, 3 Mylne & K. 347; *Lewis v. Lewis*, 1 Cox, 162; and although no trustee was ever expressly appointed, or from any cause there may be no acting trustee, the person acquiring the legal interest in the property will be bound by the trust to which it is subject: *Id.* It is a fundamental principle of equity that "the trust follows the legal estate wherever it goes, except it comes into the hands of a *bona fide* purchaser for a valuable

(^a) See, also, *Farmers' National Bank v. Moran*, 30 Minn. 165, 14 N. W. 805. See the following cases, as mere examples of what have been held passive trusts: *In re Cunningham and Frayling*, [1891] 2 Ch. 567; *Nunnsen v. Lyons*, 97 Md. 31, 39 Atl. 533; *Carpenter v. Cook*, 132 Cal. 621, 84 Am. St. Rep. 62, 64 Pac. 997. See *Reynolds v. Reynolds*, 61 S. C. 243,

39 S. E. 391, for a case of active trust; *McComb v. Title Guarantee & Trust Co.*, 36 Misc. Rep. 370, 73 N. Y. Supp. 554; *Huntington v. Spear*, 131 Ala. 414, 30 South. 787; *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541. For a good statement of the distinction between active and passive trusts, see *Holmes v. Walter*, 118 Wis. 409, 95 N. W. 380.

those growing out of the doctrine of tenure, have been applied by analogy as far as practicable to these corresponding passive trust estates.⁴ A person cannot hold property under a passive trust for himself, for generally, when the legal estate and an equal or less equitable estate unite in the same owner, a merger takes place;^c but this rule is not universal, since the two estates *may* be kept separate and subsisting, in order to protect the equitable interests of the owner.⁵ Such express passive trusts in land are certainly very infrequent in this country, although they may occasionally exist, where not prohibited by statute.⁶ Trusts in personal property, however, which are essentially passive, are not at all uncommon.⁷

consideration without notice": Attorney-General v. Lady Downing, Wilm. 1, 21, per Wilmot, C. J.^b

⁴ Watts v. Ball, 1 P. Wms. 108; Burgess v. Wheate, 1 Eden, 177, 184, 195, per Sir T. Clarke; p. 223, per Lord Mansfield; p. 250, per Lord Northington; Cholmondeley v. Clinton, 4 Bligh, 1, 115, per Lord Redesdale.

⁵ Brydges v. Brydges, 3 Ves. 120, 126; Wade v. Paget, 1 Brown Ch. 363; Badgett v. Keating, 31 Ark. 400; Bolles v. State Trust Co., 27 N. J. Eq. 308; and see *ante*, section on merger, §§ 787, 788. A trust is not rendered void by the court appointing the *cestui que trust* the trustee: Rogers v. Rogers, 18 Hun, 409.

⁶ They would probably most often appear in connection with the separate estates of married women: See Boyd v. England, 56 Ga. 598; Sutton v. Aiken, 62 Ga. 733.^d

⁷ For example, A may deposit money in a bank, in "trust for B," or may deposit in the name of B, "in trust for C," and thus create a valid trust which is really passive, since the trustee is not charged with any duties of management, such as receiving the interest and paying it over; in fact, he holds the *corpus* of the property in trust for the beneficiary. As illustrations, see Martin v. Funk, 75 N. Y. 134; 31 Am. Rep. 446; Boone v. Citizens' Sav. Bank, 84 N. Y. 83; 38 Am. Dec. 498; Weber v. Weber, 58 How. Pr. 225; Stone v. Bishop, 4 Cliff. 593; Rogers Locomotive Works v. Kelly, 19 Hun, 399.^e

(b) To the effect that the court will appoint new trustees to prevent the trust from failing, see Farmers' Loan & Trust Co. v. Pendleton, 37 Misc. Rep. 256, 75 N. Y. Supp. 294; Keith v. Scales, 124 N. C. 497, 32 S. E. 809; Willis v. Alvey, 30 Tex. Civ. App. 96, 69 S. W. 1035.

(c) This section is cited to this effect in Tilton v. Davidson, 93 Me. 55, 56 Atl. 215.

(d) Dean v. Long, 122 Ill. 447, 14 N. E. 34.

(e) Leighton v. Bowen, 75 Me. 504.

§ 989. Estates of the Two Parties.—The estate of the naked trustee in a passive trust, and *a fortiori* of the trustee in an active trust, is the only legal ownership,* although it must be used, in equity, only for the purposes of carrying out the trust and protecting the rights of the beneficiary.^b The trustee, having the legal interest, is the proper person to bring actions at law,^c and to do other things which can be done only by one having the legal estate.¹

¹ May v. Taylor, 6 Man. & G. 261. When money is deposited in a bank to the credit of A, in trust for B, A, or upon his death his administrator, is *prima facie* the proper person to demand and receive payment from the bank: Boone v. Citizens' Sav. Bank, 84 N. Y. 83; 38 Am. Dec. 498; Stone v. Bishop, 4 Cliff. 593.

(a) As to whether the trustee is the "owner" within the meaning of statutes see *In re Barney*, [1894] 3 Ch. 562; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843. To the effect that the trustee gets the legal title see *Van Grutten v. Foxwell*, [1897] A. C. 658; *In re Paget*, [1898] 1 Ch. 290; *In re Averill*, [1898] 1 Ch. 523; *Gandy v. Fortner*, 119 Ala. 303, 24 South. 425; *In re Willey's Trust*, 128 Cal. 1, 60 Pac. 471; *Kelly v. Hoey*, 35 App. Div. 273, 55 N. Y. Supp. 94; *Bloodgood v. Mass. B. & L. Assn.*, 19 Misc. Rep. 460, 44 N. Y. Supp. 63; *Simpson v. Eriseur*, 155 Mo. 157, 55 S. W. 1029; *Schiffman v. Schmidt*, 154 Mo. 204, 55 S. W. 451; *Brace v. Van Elps*, 13 S. Dak. 452, 83 N. W. 572.

(b) See the following cases holding that the trustee does not enjoy the property beneficially. *Sterling v. Sterling*, 77 Minn. 12, 79 N. W. 525; *Hafner v. City of St. Louis*, 161 Mo. 34, 61 S. W. 632; *Smith v. Security L. & T. Co. of Cass.*, 8 N. D. 451, 79 N. W. 981; *Brown v. Richter*, 25 App. Div. 239, 49 N. Y. Supp. 368; *Neal v. Bleckly*, 51 S. C. 506, 29 S. E. 249; *Perkins v. Burlington Land and*

Imp. Co., 112 Wis. 509, 88 N. W. 648; *In re Foster's Estate*, 179 Pa. St. 610, 36 Atl. 343.

(c) As recognizing this, see *Barker v. Furlong*, [1891] 2 Ch. 172; *Simpson v. Eriseur*, 155 Mo. 157, 55 S. W. 1029; *Price v. Krasuoff*, 60 S. C. 172, 38 S. E. 413 (the trustee is the only necessary party to the suit). If the suit by the trustee is barred, suit by the *cestui* is also barred: *Schiffman v. Schmidt*, 154 Mo. 204, 55 S. W. 451; *Hafner v. City of St. Louis*, 161 Mo. 34, 61 S. W. 632. See the case of *Snelling v. American F. L. & T. Co.*, 107 Ga. 852, 73 Am. St. Rep. 160, 33 S. E. 634, recognizing the rule but holding that the *cestui* was not bound in a case where the trustee was liable personally and had been sued by his creditors. See *Williams v. Papworth*, [1900] A. C. 563, which is governed by statute. As regarding the right of the *cestui* to sue see *Butler v. Butler*, 41 App. Div. 477, 58 N. Y. Supp. 1094; *Thompson v. Remsen*, 27 Misc. Rep. 279, 58 N. Y. Supp. 424; *Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992; *Anderson v. Daly*, 38 App. Div. 505, 56 N. Y. Supp. 511.

The estate of the *cestui que trust*, while regarded in equity as the real ownership,^d is governed, so far as practicable, by the legal rules applicable to similar estates at law. The language of the instrument creating or declaring the trust is interpreted by courts of equity in accordance with the rules followed by courts of law. The interest of the *cestui que trust* is alienable; if real estate, it may be conveyed by ordinary deed; if personal, it may be assigned;^e but the rule is established in England that notice must be given to the trustee, in order to perfect an assignment by a *cestui que trust* of personalty, and to protect the assignee.² The estate cannot, by any restrictions annexed to the trust, be rendered inalienable, nor can it be stripped of other incidental rights of ownership.³ It is also liable for the debts of the beneficiary.⁴ It cannot be so created that, while it is subsisting and enjoyed by the beneficiary, it shall be ab-

² This rule is adopted in only a portion of the American states: See *ante*, §§ 695-697, where the English and American cases are cited.

³ *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 475.

⁴ *Pratt v. Colt*, 2 Freem. Ch. 139; *Forth v. Duke of Norfolk*, 4 Madd. 503; *Hutchins v. Heywood*, 50 N. H. 491; *Kennedy v. Nunan*, 52 Cal. 326.

(d) Obviously, this statement is not intended to apply to those cases of passive trusts that are governed by statutes analogous to the statute of uses, and in which the legal title is passed immediately to the *cestui que trust*: See, for example, *Hallyburton v. Slagle*, 130 N. C. 482, 41 S. E. 877; *Jordan v. Philips and Crew Co.*, 126 Ala. 561, 29 South. 831. See *In re Mills' Trusts*, [1895] 2 Ch. 564, to the effect that the *cestui* is the "true owner" within the meaning of a statute. See generally *Dalrymple v. Security L. & T. Co.*, 9 N. D. 306, 83 N. W. 245; *Trask v. Sturges*, 31 Misc. Rep. 195, 63 N. Y. Supp. 1084. It is held in such cases that the *cestui* may obtain possession of the property: *In re Morrey Kyrles Settlement*, [1900] 2 Ch. 839; *In re*

Richardson, [1900] 2 Ch. 778; *Wade v. Powers*, 20 Ga. 645. See notes 1 and d to § 991. See the following cases dealing with the state of the *cestui's* title: *Buel v. Odell*, 19 App. Div. 605, 46 N. Y. Supp. 306 (inalienable by statute); *First Nat. Bank v. Miller*, 24 App. Div. 551, 49 N. Y. Supp. 981; *Narron v. Wilmington & W. R. Co.*, 122 N. C. 856, 29 S. E. 356, 40 L. R. A. 415; *Johnson v. Blake*, 124 N. C. 106, 32 S. E. 397; *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467; *Atkins v. Atkins*, 70 Vt. 565, 41 Atl. 503; *Cornwell v. Wulff*, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53; *Ryland v. Banks*, 151 Mo. 1, 51 S. W. 720; *McDougall v. Dixon*, 19 App. Div. 420, 46 N. Y. Supp. 280.

(e) See *post*, § 1005.

solutely free from such liability. The trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming insolvent, or upon a judgment being recovered against him, and shall thereupon vest in another person; but the *cestui que trust* cannot *hold and enjoy* his interest entirely free from the claims of creditors.⁵ These rules are sub-

⁵ *Nichols v. Levy*, 5 Wall. 433, 441; *Hallett v. Thompson*, 5 Paige, 533; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Easterly v. Keney*, 36 Conn. 18, 22; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480. In *Nichols v. Levy*, *supra*, Swayne, J., said: "It is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity for his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency with a limitation over to a third person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go." In the more recent case of *Nichols v. Eaton*, 91 U. S. 716, the court went somewhat further. A trust was created to pay income to A during his life; if he became insolvent, his interest was instantly to cease, and was to pass to and vest in another person; but in that case the trustees were authorized, in their discretion, but without it being obligatory upon them, to apply a portion of the income to A's use. The court held that the discretion and authority thus given to the trustees did not render the disposition and limitation over void, nor the income liable to the claims of A's creditors after his insolvency. While the rule stated in the text is general, it has been adopted by some courts only in a modified form. In Pennsylvania, property may be given by a third person to A upon such a trust for his life that he has no control whatever over the property, and a proviso attached that his interest is to be free from all liability to his creditors is held to be valid and operative. The same result may be accomplished in the creation of the trust, by clothing the trustees with a discretion as to the amount of income which they shall apply to the use of the beneficiary, A: *Keyser v. Mitchell*, 67 Pa. St. 473; *Rife v. Geyer*, 59 Pa. St. 393, 396; 98 Am. Dec. 35; *Shryock v. Waggoner*, 28 Pa. St. 430; *Brown v. Williamson's Ex'rs*, 36 Pa. St. 338; *Eyriek v. Hetrick*, 13 Pa. St. 438; *Shankland's Appeal*, 47 Pa. St. 113; *Girard L. Ins. Co. v. Chambers*, 46 Pa. St. 485; 86 Am. Dec. 513; *Norris v. Johnston*, 5 Pa. St. 287; *Vaux v. Parke*, 7 Watts & S. 19; *Fisher v. Taylor*, 2 Rawle, 33. But a person *sui juris* cannot convey his property upon trusts for himself free from the claims

(f) Quoted in *Honnett v. Williams*, 66 Ark. 148, 49 S. W. 495.

"Spendthrift Trusts."—In many instances, particularly of late years,

those possessed of property have desired to place all or a portion of it in trust in such manner that certain intended beneficiaries would receive

ject to a most important exception in the case of the married woman's separate estate,—property held upon trust

of his creditors: *Ashurst's Appeal*, 77 Pa. St. 464; *Mackason's Appeal*, 42 Pa. St. 330; 82 Am. Dec. 517. See also, as to the extent to which the beneficiary's estate may be made free from liability, *Leavitt v. Beirne*, 21 Conn. 1, 8; *Johnston v. Zane's Trustees*, 11 Gratt. 552, 570; *Markham v. Guerrant*, 4 Leigh, 279; *Hill v. McRae*, 27 Ala. 175; *McIlvaine v. Smith*, 42 Mo. 45; 97 Am. Dec. 295; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56.

the benefit of the income for their maintenance. The fact that in a large number of these cases the beneficiary has been a person of profligate habits or not possessed of sound business ability, has led the legal profession to refer to such dispositions of property as "Spendthrift Trusts". The failure of some of the courts to notice the difference in the wording of the various instruments under discussion, and the general, unclassified manner in which the subject has frequently been treated has led to considerable confusion.

The English Cases.—If the interest given the beneficiary in such cases is an absolute vested right to property which he may reach if he so desires, any attempt to restrain his right as to alienation or to defeat the right of his creditors, is unavailing: *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; *Woodmester v. Walker*, 2 Russ. & M. 194; *Jones v. Salter*, 2 Russ. & M. 208; *Brown v. Pocock*, 2 Russ. & M. 210; and see *Gray, Restraint on Alienation*, Par. 167j. In any case where the trustee cannot exclude the beneficiary from the receipt of the money and the direction is "to pay", the creditor or assignee may obtain the money: *Rippon v. Norton*, 2 Beav. 63; *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare 185; *Wallace v. Anderson*, 16 Beav. 533. In such case, however, the assignee or creditor should obtain only the

amount which the *cestui* could demand.

But if the trustee has a discretionary power either to pay the *cestui que trust* or to exclude him altogether the assignee or creditor can obtain nothing: *In re Bullock*, 60 L. J. (Ch.) 341; *Twopenny v. Peyton*, 10 Sim. 487. The reason of this is clear. The *cestui* has no property right until the trustee, in his discretion, decides to pay over the money. If the *cestui* has become bankrupt, the trustee will not decide to pay it to the *cestui's* creditors.

Some authorities have stated that when the trustee is to "apply" the income for the support of the *cestui* and has no authority to pay elsewhere, the creditors or assignee can obtain the income. In support of the statement are cited *Green v. Spicer*, 1 Russ. & M. 395; *Snowden v. Dales*, 6 Sim. 524; *Rippon v. Norton*, 2 Beav. 63; *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare 185; *Wallace v. Anderson*, 16 Beav. 533. On close examination, it is found that the cases cited do not support the contention; while there are other English cases, both early and late, that are *contra*. Thus, in *Green v. Spicer*, the words were "pay and apply"; in *Snowden v. Dales* "allow and pay"; in *Younghusband v. Gisborne* "to pay"; in *Rippon v. Norton*, "pay and apply"; in *Kearsley v. Woodcock*, "pay, apply and dispose". It is obvious that from cases with such

for her separate use. It is the familiar doctrine with reference to such separate estate,—the very essential element

wording, no proper inference can be drawn as to the distinction to be made between the terms “to pay” and “to apply”, for the testator evidently used them as synonymous. When the trustees are “to apply” for the support of the *cestui* at their discretion, or apply to other purposes, and they apply it all for other purposes, it is obvious that the assignee has no cause for complaint: Lord v. Bunn, 2 Y. & C. C. C. 98; Holmes v. Penny, 3 K. & J. 90; and see Twopenny v. Peyton, *supra*. But in the cases last mentioned it is said that the trustee cannot pay to the *cestui* after receiving notice of the assignment: See Lord v. Bunn, 2 Y. & C. C. C. 98; In re Coleman, 39 Ch. D. 443; In re Neil, 62 L. T. R. 649. The support of such holding must be that as soon as the trustee decides to pay to the *cestui* there arises a right on the part of the *cestui* to obtain that which the trustee has decided to pay. The trustee's having exercised his discretion and decided “to pay” the *cestui* gives that person a vested property right to which the assignment attaches. But it should be borne in mind that the assignment cannot, of itself, create any rights in favor of the *cestui* and the assignee is still restricted to that which the *cestui* could demand.

But where the *cestui* has not such an estate that he can demand a conveyance, the trustee may “apply” a portion for the support of the *cestui* even after notice of an assignment, and the assignee has no right for complaint: In re Coleman, 39 Ch. D. 443. This is the leading English case dealing with the distinction between the terms “to pay” and “to apply”; the court says: “If the trustee were to

pay an hotel keeper to give him a dinner he would get only the right to eat the dinner and that is not property which would pass by assignment. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by assignment”. Referring to Green v. Spicer and Younghusband v. Gisborne, *supra*, the court says: “In those cases the income was directed to be applied solely for the benefit of the insolvent, which made it his property, and an attempt was then made to prevent its being dealt with as his property if he became bankrupt”. The case of In re Coleman is in exact accord with the early English case of Godden v. Crowhurst, 10 Sim. 642, wherein the court in speaking of the trust said: “Nothing was of necessity to be ‘paid’, but the property was to be ‘applied’, and this might be done without receiving any money at all. The result is that the assignees are not entitled to any thing at all”. The distinction was thus nicely made in 1842 after the decision of Green v. Spicer and Snowden v. Dale, *supra*, and furnishes a precedent which prevents In re Coleman from being a departure from the supposed rule of those cases. The late case of In re Bullock, 60 L. J. Ch. 341, is a strong support to this distinction and shows clearly the present state of the English law.

The line on which the cases divide is clear and distinct and is simply this: Has the *cestui* such vested interest, or such absolute property rights that he can force the trustee to pay him or deliver goods or property to him? If he has such interest

that it may be settled to her own separate use so as to be held by her entirely free from her husband's control and

the assignee or creditor can obtain it, and if he has not, the assignee or creditor can obtain nothing. The point is, not that one cannot be given an interest that will be beyond the reach of his creditors, but rather that one cannot be given an absolute property interest that will be beyond the reach of those creditors. This absolute property interest is the interest spoken of when it is said that a *cestui's* interest is subject to the demands of his creditors.

It is well settled that the estate may be given to the *cestui* subject to a condition that he will not become bankrupt or assign or alienate the property, and that upon the happening of any of the specified events the property is to pass to another: See the author's text, *supra*; In re Bullock, 60 L. J. Ch. 341. See, also, Metcalfe v. Metcalfe, [1891] 3 Ch. 1; In re Sartoris, [1892] 1 Ch. 11; In re Loftus-Otwey, [1895] 2 Ch. 235. It is equally well settled, however, that a person cannot convey his property to trustees to hold for his own benefit until he becomes bankrupt and thereby defeat the rights of his creditors. In re Brewer's Settlement, [1896] 2 Ch. 503. A valuable discussion of this subject will be found in Gray's Restraints on Alienation, Pars. 134 to 277.

American Cases.—"Spendthrift" trusts in some form have been recognized and upheld, either by decision or statute, in the following states:

California.—Section 859 of the Civil Code provides: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits,

beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person in the same manner as personal property which cannot be reached by execution." See *Magner v. Crooks*, 139 Cal. 640, 73 Pac. 585. Spendthrift trusts were valid before the statute: *Seymour v. McAvoy*, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544.

Connecticut.—Where the trustee is given an uncontrollable discretion, the creditors of the *cestui* cannot reach the fund. Where, however, the trustee is obliged to apply the whole income to the support of the *cestui*, creditors may reach it: *Huntington v. Jones*, 72 Conn. 45, 43 Atl. 564. See, also, *Donalds v. Plumb*, 8 Conn. 447; *Leavitt v. Burns*, 21 Conn. 1; *Farmers' Sav. Bank v. Brewer*, 27 Conn. 600; *Easterly v. Kenney*, 36 Conn. 18; *Talland Ins. Co. v. Underwood*, 50 Conn. 493; *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46.

Delaware.—*Gray v. Corbett*, 4 Del. Ch. 135 (*semble*).

Georgia.—*Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415; *Moore v. Sinnott*, 117 Ga. 1010, 44 S. E. 810.

Illinois.—*Steib v. Whitehead*, 111 Ill. 247.

Indiana.—*Thompson v. Murphy*, 10 Ind. App. 464, 37 N. E. 1094 (*semble*).

Kentucky.—"Estates of every kind held or possessed in trust shall be subject to the debts or charges of the person to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or pos-

from the claims of his creditors. It is also the established doctrine, designed to protect her from the moral influence

sessed as they own or shall own in the use or trust thereof"; Gen. St., sec. 21, art. 1, c. 63. Accordingly, the interest of the *cestui* will be subjected to the payment of his debts unless a discretionary power is given to the trustee to withhold all payment or benefit from him. In the following cases it was held that creditors could reach the fund: *Bland v. Bland*, 90 Ky. 400, 29 Am. St. Rep. 390, 14 S. W. 423, 9 L. R. A. 599; *Hancock v. Twyman*, 19 Ky. Law Rep. 2006, 45 S. W. 68; *Knefler v. Shreve*, 78 Ky. 297; *Wooley v. Preston*, 82 Ky. 415; *Parsons v. Spencer*, 83 Ky. 305; *Eastland v. Jordan*, 3 Bibb 186; *Jones v. Langhorn*, 3 Bibb 453. In the following case the creditors were not given relief: *Davidson v. Kemper*, 79 Ky. 5. In *Marshall's Trustee v. Rash*, 87 Ky. 117, 12 Am. St. Rep. 467, 7 S. W. 879, it was held that a discretion as to management, as to amount to be paid, and as to manner of payment, will not deprive creditors of their rights. A gift with a *cesser* clause is valid: *Bull v. Kentucky Nat. Bank*, 90 Ky. 452, 14 S. W. 425, 12 L. R. A. 37.

Maine.—*Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266.

Maryland.—*Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92; *Maryland Grange Agency v. Lee*, 72 Md. 161, 19 Atl. 534; *Jackson Square L. & S. Ass'n v. Bartlett*, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416. A trust was supported on the ground of implied *cesser* in *Cherbonnier v. Bussey*, 92 Md. 413, 48 Atl. 923. A spendthrift trust cannot be created in the donor's favor: *Warner v. Rice*, 66 Md. 436, 8 Atl. 84; *Brown v. McGill*, 87 Md. 161, 67 Am. St. Rep.

334, 39 Atl. 613, 39 L. R. A. 806; *Wenzel v. Powder*, (Md.) 59 Atl. 194.

Massachusetts.—"A testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him, or be subject to be taken by his creditors. But in order to give such a qualified estate, instead of an absolute one, the language of the testator must be such as to clearly import an intention to do so": *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786. The distinction between the two classes is well stated in *Evans v. Wall*, 159 Mass. 164, 38 Am. St. Rep. 406, 34 N. E. 183: "In applying this rule it has been held that, when one is entitled to the whole income, his creditors may reach it, even though it is mentioned that it is given for his support; but, when one is entitled merely to be supported out of a trust fund, the value of his support cannot be reached." In the following cases the language was held sufficient to create a spendthrift trust: *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Foster v. Foster*, 133 Mass. 179; *Slattery v. Watson*, 151 Mass. 266, 21 Am. St. Rep. 448, 23 N. E. 843, 7 L. R. A. 393; *Baker v. Brown*, 146 Mass. 369, 15 N. E. 783; *Wemyss v. White*, 159 Mass. 484, 34 N. E. 718; *Minot v. Tappan*, 127 Mass. 333; *Billings v. Marsh*, 153 Mass. 311, 25 Am. St. Rep. 635, 26 N. E. 1000, 10 L. R. A. 764; *Munroe v. Dewey*, 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340. In the following cases the language was not sufficient to create a spendthrift trust: *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E.

of her husband, that in creating the trust a clause may be inserted against "anticipation," by which her power of

376; *Evans v. Wall*, 159 Mass. 164, 38 Am. St. Rep. 406, 34 N. E. 183. In general, see the following earlier cases: *Braman v. Stiles*, 2 Pick. 460, 13 Am. Dec. 445; *Perkins v. Hayes*, 3 Gray 405; *Palmer v. Stevens*, 15 Gray 343; *Ames v. Clark*, 106 Mass. 573; *Hall v. Williams*, 120 Mass. 344; *Bridgen v. Gill*, 16 Mass. 522; *Chase v. Chase*, 2 Allen 101; *Williams v. Bradley*, 3 Allen 270; *Loring v. Loring*, 100 Mass. 340; *Sparhawk v. Cloon*, 125 Mass. 263. A spendthrift trust in favor of the settlor is invalid: *Pacific Bank v. Windram*, 133 Mass. 175; *Jackson v. Sedlitz*, 136 Mass. 342.

Mississippi.—*Leigh v. Harrison*, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49.

Missouri.—*Partridge v. Cavender*, 96 Mo. 457, 9 S. W. 785; *Lampert v. Haydell*, 20 Mo. App. 216; affirmed, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. 780, 2 L. R. A. 113; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968. A spendthrift trust cannot be created in the donor's favor: *McIlvane v. Smith*, 42 Mo. 45, 97 Am. Dec. 295. And the court has gone so far as to hold that when there is any valuable consideration moving from the beneficiary, the trust is invalid: *Bank of Commerce v. Chambers*, 96 Mo. 459, 10 S. W. 38.

New Jersey.—Under the statute in this state, creditors cannot reach trust property where the trust "has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself": See *Hardenburgh v. Blair*, 30 N. J. Eq. 645; *Lippincott v. Evans*, 35 N. J. Eq. 553; *Force v. Brown*, 32 N. J. Eq. 118; *Frazier v. Barnum*, 49 N. J. Eq. 316, 97 Am. Dec. 666;

Hunterdon Freeholders v. Henry, 41 N. J. Eq. 388, 4 Atl. 858; *Halstead v. Westervelt*, 41 N. J. Eq. 100, 3 Atl. 270.

New York.—The statute provides: "Where a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable, in equity, to the claims of the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution at law": 1 Rev. St., p. 729, § 57. See, also, *Everett v. Peyton*, 167 N. Y. 117, 60 N. E. 423; *Keeney v. Morse*, 71 App. Div. 104, 75 N. Y. Supp. 728; *Schuler v. Post*, 46 N. Y. Supp. 18, 18 App. Div. 374. See, in general, the following earlier cases: *Bryan v. Knickerbacker*, 1 Barb. Ch. 409 (independently of statute); *Ho-reas v. Healy*, 15 Barb. 296; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113 (cesser clause valid); *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Brown v. Harris*, 25 Barb. 134; *Ireland v. Ireland*, 18 Hun, 362; *Wetmore v. Truslow*, 51 N. Y. 339.

North Carolina.—"It shall and may be lawful for any person by deed or will to convey any property to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken

aliening her interest is taken away during her marriage; and, as the rule is generally accepted, the restraint of such

in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant; provided that this section shall apply only to grants and conveyances where the property conveyed does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars": Code of 1883, sec. 1335. See *Monroe v. Trenholm*, 112 N. C. 634, 17 S. E. 439, 114 N. C. 590, 19 S. E. 377; *Gray v. Hawkins*, 133 N. C. 1, 45 S. E. 363.

Pennsylvania.—Board of Charities and Corrections v. Lockard, 198 Pa. St. 572, 48 Atl. 496, 82 Am. St. Rep. 817; *Winthrop Co. v. Clinton*, 196 Pa. St. 472, 46 Atl. 435, 79 Am. St. Rep. 729; *In re Moore's Estate*, 198 Pa. St. 611, 48 Atl. 884; *In re Barker's Estate*, 159 Pa. St. 518, 28 Atl. 365; *In re Hibb's Estate*, 143 Pa. St. 217, 22 Atl. 882; *In re Mehaffey's Estate*, 139 Pa. St. 276, 20 Atl. 1056; *In re Stambaugh's Estate*, 135 Pa. St. 585, 19 Atl. 1058; *In re Mannerback's Estate*, 133 Pa. St. 342, 19 Atl. 552; *In re Brooks' Estate*, 140 Pa. St. 84, 21 Atl. 240; *Eberly's Appeal*, 110 Pa. St. 95, 1 Atl. 330; *In re Minnich's Estate*, 206 Pa. St. 405, 55 Atl. 1067; *Shankland's Appeal*, 47 Pa. St. 113; *Fisher v. Taylor*, 2 Rawle 33; *Holdship v. Patterson*, 7 Watts 547; *Ashurst v. Given*, 5 W. & S. 323; *Vaux v. Parke*, 7 W. & S. 19; *Norris v. Johnson*, 5 Pa. 287; *Brown v. Williamson*, 36 Pa. St. 338; *Rees v. Livingston*, 41 Pa. St. 113; *Still v. Spear*, 45 Pa. St. 168; *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502; *Girard Life Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513 (trust insufficient); *Rife v. Geyser*, 59 Pa. St. 393, 98 Am. Dec.

351; *Keyser v. Mitchell*, 67 Pa. St. 473; *Huber's Appeal*, 80 Pa. St. 348; *Overman's Appeal*, 88 Pa. St. 276. The extent of the doctrine in this state is illustrated by *In re Beck's Estate*, 133 Pa. St. 51, 19 Am. St. Rep. 623, 19 Atl. 302. The will directed that a sum "be paid directly to the said E. B. by my executor, without diminution for the payment of her said indebtedness." It was held that creditors could not reach the sum so long as it remained in the executor's hands. See, also, *In re Goe's Estate*, 146 Pa. St. 431, 28 Am. St. Rep. 805, 23 Atl. 383. A spendthrift trust cannot be created in favor of the donor: *Ghormley v. Smith*, 139 Pa. St. 584, 23 Am. St. Rep. 215, 21 Atl. 135, 11 L. R. A. 565; *Mackason's Appeal*, 42 Pa. St. 330, 82 Am. Dec. 517. The trustee cannot be the *cestui*: *Hahn v. Hutchinson*, 159 Pa. St. 133, 28 Atl. 167. A good illustration of what has been held not sufficient to constitute a spendthrift trust is found in *Park v. Matthews*, 36 Pa. St. 28. "Testatrix bequeathed \$5000 to her brother, to be received and held by trustees, and the interest or proceeds to be annually paid over to the legatee for his use and benefit. The legatee's creditor attached the interest. We hold that it was attachable, because it was his, in law and equity. If the trustees had withheld it from him, he could have sued for and recovered it. Wherever a party has a right of action, his creditors may attach the debt, unless it be for wages."

Rhode Island.—Where the *cestui* takes no vested interest and there is merely a discretionary power in the executors to apply it for his benefit, creditors cannot reach the fund:

clause may operate during any future as well as present marriage.⁶

§ 990. Rules of Descent and Succession.—The rules concerning descent, devolution, and succession, applied to the equitable estates of beneficiaries, are generally the same

⁶Hawkes v. Hubback, L. R. 11 Eq. 5; In re Gaffee's Trusts, 1 Macn. & G. 541; Rennie v. Ritchie, 12 Clark & F. 204; Tullett v. Armstrong, 4 Mylne & C. 377; 1 Beav. 1; Baggett v. Meux, 1 Phill. Ch. 627; 1 Coll. C. C. 138; Shirley v. Shirley, 9 Paige, 363; Waters v. Tazewell, 9 Md. 291; Fears v. Brooks, 12 Ga. 195, 197; Fellows v. Tann, 9 Ala. 999, 1003. By some American courts the clause against anticipation has been held valid only during the existing marriage: See Dubs v. Dubs, 31 Pa. St. 149; Wells v. McCall, 64 Pa. St. 207; Apple v. Allen, 3 Jones Eq. 120; Miller v. Bingham, 1 Ired. Eq. 423; 36 Am. Dec. 58.

Stone v. Westcott, 18 R. I. 685, 29 Atl. 838.

Where the *cestui* has a vested equitable interest, the creditors can reach it: Tillinghast v. Bradford, 5 R. I. 205.

South Carolina.—Where the *cestui* has a vested interest, it is subject to his debts; but where there is a pure and absolute discretion in the trustee with power to appoint to other uses, there is nothing that can be subjected to payment of debts: Heath v. Bishop, 4 Rich. Eq. 46, 55 Am. Dec. 654; Wiley v. White, 10 Rich. Eq. 294.

Tennessee.—Staub v. Williams, 5 Lea 458; Jourolman v. Massengill, 86 Tenn. 81, 5 S. W. 719 (overruling earlier cases). The statute in this state is very broad. Code, § 4283, provides: "The creditor whose execution has been returned unsatisfied, in whole or in part, may file a bill in chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stock, choses in action, or money due to such defendant, or held in trust for him, except when the trust has been created by, or the property so held has proceeded from, some person

other than the defendant himself, and the trust has been declared by will duly recorded, or deed duly registered." This has been interpreted to deprive the creditor of his right to proceed against the trust estate: Porter v. Lee, 88 Tenn. 782, 14 S. W. 218. Under the statute, it is held that although the creditors may not be able to reach the *cestui's* interest either at law or in equity, it may still be alienable: Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035. A trust with a cesser clause is valid: First National Bank v. Nashville Trust Co., (Tenn. Ch. App.) 62 S. W. 392.

Texas.—Wood v. McClelland, (Tex. Civ. App.) 53 S. W. 381; McClelland v. McClelland, (Tex. Civ. App.) 37 S. W. 350; Patten v. Herring, 9 Tex. Civ. App. 640, 29 S. W. 388.

Vermont.—Wales v. Bowdish, 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819; Barnes v. Dow, 59 Vt. 530, 10 Atl. 258; White v. White, 30 Vt. 338.

Virginia.—The statute makes estates of every kind subject to debts: Code of 1887, § 2428. Accordingly, it is held that "where trustees are directed to apply the income of a trust fund for the support and benefit of the debtor, and for other purposes, but have no right to exclude

which regulate corresponding legal estates.¹ Those rules, however, which result from the doctrine of tenure do not apply, and therefore it is settled in England that the equitable estate of the beneficiary in lands held in trust for him is not subject to escheat, but the trustee holds the land absolutely.² As a consequence of the general doctrine, estates of inheritance held in trust for the wife are subject to the

¹ *Burgess v. Wheate*, 1 Eden, 177; *Trash v. Wood*, 4 Mylne & C. 324, 328 (descent); *Price v. Sisson*, 13 N. J. 168, 174; *Croxall v. Shererd*, 5 Wall. 267, 281. The rule in *Shelley's* case extends to trust estates: *Jones v. Morgan*, 1 Brown Ch. 206, 222.^a

² *Burgess v. Wheate*, 1 Eden, 177; *Onslow v. Wallis*, 1 Macn. & G. 506; *Sweeting v. Sweeting*, 33 L. J. Ch. 211. It is doubtful whether this particular rule prevails in the United States; it should not, upon principle, since with us the doctrine of escheat to the state is not in the least based upon the notion of tenure: See *Matthews v. Ward*, 10 Gill & J. 443, 454. Where the trust is one of personalty, on the death of the beneficiary intestate and without any next of kin, the crown or the state succeeds to his property, upon other grounds than that of common-law escheat: *Burgess v. Wheate*, *supra*; *Williams v. Lonsdale*, 3 Ves. 752; *Taylor v. Haygarth*, 14 Sim. 8; *Cradock v. Owen*, 2 Smale & G. 241.^b

the debtor, then the assignee and the creditors can claim from the trustee the amount which the debtor could have claimed should have been applied to his benefit": *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384, qualifying the earlier case of *Garland v. Garland*, 87 Va. 758, 13 S. E. 478, 13 L. R. A. 212, 24 Am. St. Rep. 682. See, also, *S. N. Honaker & Sons v. Duff*, 101 Va. 675, 44 S. E. 900. It would seem from the discussion that if the trustee has the right to exclude the *cestui*, the fund cannot be reached by creditors.

(^a) *Sprague v. Sprague*, 13 R. I. 701; *Taylor v. Lindsay*, 14 R. I. 518; *Lindsey v. Eckles*, 99 Va. 668, 40 S. E. 23. See as to the English rule, *Banks v. Sutton*, 2 P. Wms. 700; *The King v. Ex'rs of Sir John Decombe*, Cro. Jac. 512, Ames Cas. on Trusts 353 (chattel interests of the *cestui* were forfeited to the crown on his being attainted of felony);

Anonymous, reported in Year Book, 5 Edw. IV., 7, pl. 18, Ames Cas. on Trusts 352. See *King's Atty. v. Sands*, Freeman's Ch. Cas. 129, Ames Cas. on Trusts 354, for an illustration of the operation of the rule; *Middleton v. Spicer*, 1 Br. Ch. Cas. 201 (the crown took a chattel real on failure of heirs).

(^b) See, also, *Johnston v. Spicer*, 107 N. Y. 198, 13 N. E. 753; *Commonwealth v. Naile*, 88 Pa. St. 429 (the "escheat" was due to statutory provision); *Smith v. McCann*, 24 How. 405 (approving *Matthews v. Ward*, *supra*). In *Fox v. Horsh*, 1 Ir. Eq. 358, the court admitted the right of the state to succeed to personalty, held in trust for a corporation, when the corporation was dissolved, but held the choses in action became extinct as no one could demand the money; it would seem the state could have done so; see the English case of *Bishop v. Curtis*, 18 Q. B. 878.

husband's curtesy;³ but by a strange inconsistency of the English law, the wife had no dower in similar estates held in trust for her husband.⁴

§ 991. **Express Active Trusts.**—Active or special trusts are those in which, either from the express directions of the language creating the trust, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the *cestuis que trustent*. They may, except when restricted by statute, be created for every purpose not unlawful, and, as a general rule, may extend to every kind of property, real and personal. In this class the interest of the trustee is not a mere naked legal title, and that of the *cestui que trust* is not the real ownership of the subject-matter. The extent and incidents of the rights held by the respective parties must, of course, vary with the nature of the trust itself and the duties which the trustee is

³ *Roberts v. Dixwell*, 1 Atk. 607; *D'Arcy v. Blake*, 2 Schoales & L. 387; *Cooper v. Macdonald*, L. R. 7 Ch. Div. 288; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Follett v. Tyrer*, 14 Sim. 125; *Morgan v. Morgan*, 5 Madd. 408; *Dubs v. Dubs*, 31 Pa. St. 149; *Cushing v. Blake*, 30 N. J. Eq. 689.^c

⁴ *D'Arcy v. Blake*, 2 Schoales & L. 387; *Dixon v. Saville*, 1 Brown Ch. 325. A different rule generally prevails in the United States: See *Cushing v. Blake*, *supra*.^d

(^c) *Sweetapple v. Bindon*, 2 Vern. 536, *Ames Cas. on Trusts* 379; *Watts v. Ball*, 1 P. Wms. 108, *Ames Cas. on Trusts* 379; *Rawlings v. Adams*, 7 Md. 26; *Houghton v. Hopgood*, 13 Pick. 154; *Alexander v. Warrance*, 17 Mo. 228 ("the law is clearly settled, that a husband is entitled to curtesy in the equitable estate of his wife"); *Dubs v. Dubs*, 31 Pa. St. 149; *Norman v. Cunningham*, 5 Gratt. 63.

(^d) See, also, *Bottomly v. Lord Fairfax*, *Precedents in Ch.* 336 ("the court hath never yet gone so far as to allow her dower in such case"); *Atty-Gen. v. Scott*, *Cas. Temp. Talb.* 138 ("How the difference now received, between tenant by the curtesy

and tenant in dower, ever came to be established, I cannot tell; but that it is established is certain"). The difference in the United States is generally due to statute: See *Reed v. Whitney*, 7 Gray 533; *Bush v. Bush*, 5 Del. Ch. 144; *In re Ransom*, 17 Fed. 331. See, as following the original rule, *Hamlin v. Hamlin*, 19 Me. 141; *Cornog v. Cornog*, 3 Del. Ch. 407 (*semble*, but dower allowed in mortgaged property, on the ground that the mortgagee got a legal estate); *Kenyon v. Kenyon*, 17 R. I. 539, 23 Atl. 101, 24 Atl. 787; see, also, *Hopkinson v. Dumas*, 42 N. H. 296.

called upon to perform. It is a universal rule, however, that the trustee's estate and power over the subject-matter are commensurate with the duties which the trust devolves upon him, and are sufficient to enable him to perform all those duties.¹ The trustee is generally entitled to the posses-

1 Spence's Eq. Jur. 496, 497; Lord Glenorchy v. Bosville, Cas. t. Talb. 3; Williams's Appeals, 83 Pa. St. 377, 387; Delbert's Appeal, 83 Pa. St. 462.^a For the somewhat exceptional views maintained in some states concerning active trusts, see *ante*, note under § 986. Trusts once active may be accomplished and become passive, and a question may then arise, whether the legal estate of the trustee still continues, or whether it passes to and vests in the beneficiary by operation of the statute of uses. If the existence and separation of the two estates did not originally depend alone upon the trustee's having active duties to perform, — that is, if the trust was originally created for some other purpose beside the active duties on behalf of the beneficiary, — then, upon the accomplishment or ceasing of these active duties, the legal estate will not *ipso facto* vest in the beneficiary by operation of the statute: Perry on Trusts, sec. 351. But the beneficiary may then be entitled to a conveyance of the legal estate from the trustee: Sherman v. Dodge, 28 Vt. 26, 30; Leonard's Lessee v. Diamond, 31 Md. 536, 541. After a great lapse of time and a long-continued possession by the beneficiary or person representing his interests, a conveyance may be presumed: Leonard's Lessee v. Diamond, *supra*; Den v. Bordine, 20 N. J. L. 394; Aiken v. Smith, 1 Sneed, 304. On the other hand, where the active duties conferred upon the trustee constituted the only ground for keeping the two estates separate and distinct, upon the ceasing of those duties the legal title will vest in the *cestui que trust* by operation of the statute: Perry on Trusts, sec. 351; Welles v. Castles, 3 Gray, 323.^b It is said that if all the beneficiaries are in existence and *sui juris*, and consent, a court may decree the conveyance of the trust property to them, although the trust has not been completed nor ceased; Perry on Trusts, secs. 274, 922; Smith v. Harrington, 4 Allen, 566; Bowditch v. Andrew, 8 Allen, 339; Culbertson's Appeal, 76 Pa. St. 145, 148; but see Douglas v. Cruger, 80 N. Y. 15, which holds that a court of equity has

(^a) See *In re Dyson and Fawke*, [1896] 2 Ch. 720; *In re Montagu*, [1897] 2 Ch. 8; *In re Cole's Estate*, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402 (discussing the power to repair, and tax *corpus* of estate in repairs). See, generally, *Zabriskie v. Morris*, etc., R. R. Co., 33 N. J. Eq. 22; *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737; *In re Bellinger*, [1898] 2 Ch. 534. As to what constitutes an active trust, see *Carney v. Byron*, 19 R. I. 283, 36 Atl. 5; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. 252; *Walton v.*

Ketchum, 147 Mo. 209, 48 S. W. 924; *Eldred v. Meek*, 183 Ill. 26, 75 Am. St. Rep. 86, 55 N. E. 536. To the effect that a discretion on the part of the trustee makes the trust active, see *In re Kreb's Estate*, 184 Pa. St. 222, 39 Atl. 66; *Danahy v. Noonan*, 176 Mass. 467, 57 N. E. 679.

(^b) *Lang v. Lang*, 62 Md. 33; *Ottomeyer v. Pritchett*, 178 Mo. 160, 77 S. W. 62; *Temple v. Ferguson*, 110 Tenn. 84, 100 Am. St. Rep. 791, 72 S. W. 455 (trust for married women).

sion and management of the property,^d and to the receipt

no power to decree the determination of an existing and valid trust. Such a conveyance is prohibited by the statutes of New York and of the other states which have followed the New York type of legislation.^e

(c) In *Sanders v. Vautier*, 4 Beav. 115, Ames Cas. on Trusts 454, the court said: "Where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute, indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is able to give a valid discharge." This principle is expressly approved in *Harbin v. Masterman*, [1894] 2 Ch. 184; *In re Johnston*, [1894] 3 Ch. 204 (even to the extent of refusing to allow the trustee to exercise a discretion given by the will). In the case of *In re Stone*, 138 Mass. 476, the *cestui* for life obtained a conveyance of a legal estate and terminated a trust that was intended for the benefit of her children after her death. In *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320, 15 N. E. 786, the court allowed the *cestui* to obtain a conveyance, not provided for by the trust will, on his reaching the age of thirty years. The court said: "There is no doubt of the power and duty of the court to decree the termination of the trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination. Where property is given to certain persons for their benefit, and in such manner that no other person has or can have an interest in it, they are in effect the absolute owners of it and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." The court

cited *Smith v. Harrington*, 4 Allen 566; *Bowditch v. Andrew*, 8 Allen 339; *Inches v. Hill*, 106 Mass. 575; *Stone, Petitioner*, 138 Mass. 476; *Underwood v. Boston, etc., Bank*, 141 Mass. 305, 4 N. E. 822; and the above statement is quoted with approval in *Hunt v. Hunt*, 124 Mich. 502, 83 N. W. 371. But see, *contra*, *Claffin v. Claffin*, 149 Mass. 19, 14 Am. St. Rep. 393, 20 N. E. 454, 3 L. R. A. 370, Ames Cas. on Trusts 455 where the court states: "We have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute;" the *cestui* was therefore refused a conveyance although able to give a valid discharge; and see the case of *Lent v. Howard*, 89 N. Y. 169, depending on statute. See the cases cited in the note to sec. 1065. In order to obtain a conveyance, before the settlor intended the *cestui* to have the property, it is generally essential that the *cestui* have the entire beneficial interest and that there be no discretion on the part of the trustee to exclude him from taking: *Weatherall v. Thornburg*, L. R. 8 Ch. Div. 261; *Harbin v. Masterman*, *supra*; *Russell v. Grinnell*, 105 Mass. 425; *Cooper v. Cooper*, 36 N. J. Eq. 121. In accord with the rule of *Sears v. Choate*, *supra*, see *Tilton v. Davidson*, 98 Me. 55, 56 Atl. 215; *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566.

(d) In the case of *Tidd v. Lister*, 5 Mad. 429, Ames Cas. on Trusts 465,

of its rents and profits; and in many cases he has, from the very nature of the trust, authority to sell or otherwise dispose of it. The interest of the beneficiary is necessarily more limited than in passive trusts, and it sometimes cannot with accuracy be called an equitable *estate*.^a He always has the right, however, to compel a performance of the trust according to its terms and intent.^f

§ 992. *Classes of Active Trusts.*^a—Although active trusts may be created for a great number of special purposes, those which are the most frequent and important may be reduced to the four following generic classes: 1. Where the trust is simply to convey the property to some designated person, or class of persons.¹ 2. Where the primary

¹ This species is often found in connection with other kinds. Trusts for investment and accumulation almost invariably terminate with a trust to

a *cestui que trust* of a life estate, where the trustee was bound to perform active duties, sought the possession of the estate and it was refused, though the court admitted that there might be special circumstances in some cases that would vary the rule; a receiver was appointed instead. The right of the *cestui que trust* of a life estate to the possession of the property is affected largely by statute in England, and possession is frequently given him; *West v. Wythes*, [1893] 2 Ch. 369; *In re Bently*, 64 L. J. Ch. 782; *In re Bagat*, [1894] 1 Ch. 177 (though it is still largely within the discretion of the court); *In re Newen*, [1894] 2 Ch. 297. In *Williamson v. Wilkins*, 14 Ga. 416, where the *cestui* of a life estate was allowed to collect the dividends of stock, and thereby save the trustee's commission, it was said: "And courts in deciding this question, will be governed mainly by the general scope and object of the trust, and the nature of the duties which the trustee is required to discharge. . . . If a court of Equity will put the tenant

for life in the personal possession and occupation of property, if it be beneficial or requisite for its due enjoyment, as in the case of a family residence or slaves, as it undoubtedly will, much more will it do that which asks no surrender of the *corpus*;" *Wade v. Power*, 20 Ga. 645 (if the trust is passive, the equitable life tenant may have possession); *Young v. Miles*, 10 B. Mon. 287. In *Wickham v. Berry*, 55 Pa. St. 70, the *cestui* for life was not allowed the possession of land on the ground that the trustee had special active duties to perform.

(e) As to provisions imposing a restraint on alienation, and freeing the interest of the beneficiary from the claims of his creditors, see *ante*, § 989, cases cited in note.

(f) See *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. Rep. 845, 45 L. ed. 1183; *Goble v. Swobe*, 64 Nebr. 838, 90 N. W. 919.

(a) This section is cited in *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266.

object is to sell or dispose of the entire trust property in some manner and to use the proceeds for some ulterior purposes.² In all instances of this class, where the trust is to sell the *corpus* of the property and to distribute the proceeds among creditors, legatees, and the like, the beneficiaries plainly acquire no proper estate in the original trust fund prior to its sale; their right and interest attach to the proceeds of this fund, which are to be paid to or distributed among them. In order to make their right fully available, and to guard their interest as much as possible against the large authority given to the trustees, equity has invented in such cases the doctrine of *conversion*, by which real property is regarded as personal, and personal property as real.^{3 c} 3. This class

convey the accumulations to specified beneficiaries; in trusts for applying rents and profits to particular uses, there is generally a provision for conveying the capital fund, at the expiration of the period limited, to some designated persons by way of remainder. Trusts merely to convey the property, unaccompanied by any other duties of the trustee, are uncommon.^b Such *dispositions* are very frequent in English marriage settlements, but they are usually accomplished by means of powers, rather than by trusts.

² Among the most important instances belonging to this class are conveyances or assignments by a debtor upon trust to sell the property and pay debts with the proceeds, including the official assignments made to assignees in bankruptcy, insolvency, and other analogous proceedings. Also, a devise or bequest of property by will, upon trust to sell, mortgage, or lease the same, and with the proceeds to pay the testator's debts, or legacies, or annuities, or other charges and liabilities, or to pay "portions" to daughters and younger sons. This last object, which is very common in England, is often found in family settlements as well as in wills. A trust to exchange lands, or to dispose of property, and with the proceeds purchase other kinds or forms, falls under the same class.

³ It is in trusts of this form, to sell land and pay over the proceeds, and in those exactly opposite, to use money in the purchase of land which is then to be conveyed, that the doctrine of conversion finds its special field of operation: See *Fletcher v. Ashburner*, 1 Brown Ch. 497; 1 Lead. Cas. Eq. 1118; *Greenhill v. Greenhill*, 2 Vern. 679; *Guidot v. Guidot*, 3 Atk. 254, 256; *Wheldale v. Partridge*, 5 Ves. 388, 396; *Biddulph v. Biddulph*, 12 Ves. 161; *Stead v. Newdigate*, 2 Mer. 521; *Ashby v. Palmer*, 1 Mer.

(b) For example, see *Preachers' Aid Society v. England*, 106 Ill. 125.

(c) The text is cited in *McCulloch*

v. Chatfield, 67 Fed. 877, 15 C. C. A. 48, 32 U. S. App. 323, a case involving a trust of this character.

includes all those trusts where the primary object is to hold and invest the entire property and its proceeds, and thus to accumulate for some ulterior purposes.⁴ 4. This class includes all those trusts of which the primary object is to hold the *corpus* of the property, receive its rents, profits, and income, and apply them to some prescribed uses.⁵ More than one of these four general objects may be embraced in the same trust. In instances of the third and fourth classes, the beneficiaries may have a direct equitable interest in the trust property itself, which is plainly more than a *mere* right of action, but is not so substantial an estate as that held by the *cestui que trust* under a simple passive trust.

§ 993. Assignments for the Benefit of Creditors.—Among the active trusts which are quite frequent in this country are voluntary and general assignments by failing debtors of their property to trustees upon trust to pay the creditors

296; *Elliott v. Fisher*, 12 Sim. 505; *Griffith v. Ricketts*, 7 Hare, 299; *Farrer v. Earl of Winterton*, 5 Beav. 1; *Craig v. Leslie*, 3 Wheat. 563; *Peter v. Beverly*, 10 Pet. 532, 534, 563; *Gott v. Cooke*, 7 Paige, 521, 523, 534; *Lorillard v. Coster*, 5 Paige, 173, 218.

⁴ Sometimes land or personal property is given on trust to receive the income, and continually to invest it in the purchase of other lands, or interest-bearing securities, during the period of the trust; sometimes land is given on trust to sell and to invest the proceeds in securities, and to re-invest the income in the same manner; sometimes personal property is directed to be converted into money, and the proceeds to be invested in lands, the income of which is to be accumulated by the constant purchase of other lands, etc. In all these forms provision is made for the disposition of the accumulated fund at the expiration of the period, in some manner on behalf of the beneficiaries. The periods for which such trusts may be created are now limited by statute in England and in this country, so as to prevent a "perpetuity."

⁵ The forms of this class also are various. Real or personal property, or both, is sometimes given by will upon trust to hold the capital and apply the income to the payment of debts, legacies, annuities, etc.; property, real or personal, or both, is given by will or by deed in trust to receive the rents and profits and pay the same to, or apply them to the use of, designated beneficiaries during their lives, or for some specified period. In this manner provision is often made for wives in marriage settlements, and for widows and children by will.

of the assignor.¹ The doctrine is settled in England that, primarily, such assignments do not create a trust nor clothe the creditors with the character of *cestuis que trustent*; they rather confer a power upon the trustee, and make him an agent for the debtor to dispose of the property under the debtor's directions. It follows from this view that until the assignment has been communicated to the creditors, it may be revoked, or altered, or superseded by the assignor, at his own will.² But when the fact of such assignment has been communicated to creditors, and their position is altered by it, and especially if they have assented to it, then it becomes irrevocable as to such creditors, and they can enforce its trusts and take the benefit of its provisions in their behalf.³ If creditors make themselves actual parties by executing the deed of assignment, it of course becomes irrevocable as to them; their rights under it are fixed.⁴

¹ These general assignments are not common in England, since they interfere with the modern bankrupt laws; so far as they do not conflict with those laws they are valid. In some of the states the whole ground is covered by local insolvent laws; in others, assignments for the benefit of creditors are strictly regulated and limited by statutes.

² *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & M. 451; *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Acton v. Woodgate*, 2 Mylne & K. 492; *Browne v. Cavendish*, 1 Jones & L. 606; and see *Brooks v. Marbury*, 11 Wheat. 78.

³ There is some discrepancy in the language of different decisions upon this point. Some seem to require that a creditor should do some affirmative act showing his assent; others appear to hold that after information of the assignment is communicated to a creditor his assent will be presumed, unless the contrary is shown,—unless he indicates his dissent in some manner: *Acton v. Woodgate*, 2 Mylne & K. 492; *Browne v. Cavendish*, 1 Jones & L. 606; *Simmonds v. Palles*, 2 Jones & L. 489; *Field v. Lord Donoughmore*, 1 Dru. & War. 227; *Biron v. Mount*, 24 Beav. 642; *Nicholson v. Tutin*, 2 Kay & J. 18; *Kirwan v. Daniel*, 5 Hare, 493, 499; *Griffith v. Ricketts*, 7 Hare, 299, 307; *Smith v. Hurst*, 10 Hare, 30; *Cornthwaite v. Frith*, 4 De Gex & S. 552; *Cosser v. Radford*, 1 De Gex, J. & S. 585; *Synnot v. Simpson*, 5 H. L. Cas. 121, 133; *a Glegg v. Rees*, L. R. 7 Ch. 71.

⁴ *Mackinnon v. Stewart*, 1 Sim., N. S., 76, 88; *Le Touche v. Earl of Lucan*, 7 Clark & F. 772; *Montefiore v. Browne*, 7 H. L. Cas. 241, 266. If the assignment prescribes a time within which it must be executed by the creditors, those who refuse to execute, and those who claim adversely to

(a) This case is followed on this point by *Priestly v. Ellis*, [1897] 1 Ch. 489.

§ 994. **The American Doctrine.**—With a few exceptions, the American courts have not adopted this English theory with respect to the nature of such assignments. The doctrine is generally settled in this country that voluntary general assignments for the benefit of creditors, if otherwise valid, are not mere agencies of the debtor; they create true trust relations, and the creditors are true beneficiaries. When once duly executed, they are irrevocable, and the creditors, on being informed of their existence, may take advantage of the provisions in their own favor, and may enforce the trusts declared without making themselves parties, or doing any act indicating their own acceptance or assent.¹ Although the assignee is thus a trustee for the

it, or act inconsistently with it, will be excluded from its benefits: *Johnson v. Kershaw*, 1 De Gex & S. 260; *Watson v. Knight*, 19 Beav. 369; *Field v. Lord Donoughmore*, 1 Dru. & War. 227; *Forbes v. Limond*, 4 De Gex, M. & G. 298. But mere delay in executing the deed will not debar those creditors who do not act under it or accept it: *Nicholson v. Tutin*, 2 Kay & J. 18; *Raworth v. Parker*, 2 Kay & J. 163; *Whitmore v. Turquand*, 3 De Gex, F. & J. 107; *In re Baber's Trusts*, L. R. 10 Eq. 554; *Biron v. Mount*, 24 Beav. 642.

¹ *Ellison v. Ellison*, 1 Lead. Cas. Eq., 4th Am. ed., 423; *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 129; 7 Am. Dec. 478; *Shepherd v. McEvers*, 4 Johns. Ch. 136, 138; 8 Am. Dec. 561; *Nicoll v. Mumford*, 4 Johns. Ch. 522, 529; *Pfaff v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Ward v. Lewis*, 4 Pick. 518, 523; *New England Bank v. Lewis*, 8 Pick. 113, 118; *Pingree v. Comstock*, 18 Pick. 46, 50; *Read v. Robinson*, 6 Watts & S. 329; *McKinney v. Rhoads*, 5 Watts, 343; *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; 51 Am. Dec. 428; *Stimpson v. Fries*, 2 Jones Eq. 156; *Tennant v. Stoney*, 1 Rich. Eq. 222; 44 Am. Dec. 213; *England v. Reynolds*, 38 Ala. 370; *Pearson v. Rockhill*, 4 B. Mon. 296; *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 210.^a But see *Gibson v. Rees*, 50 Ill. 383. The doctrine which generally pre-

(a) This section is cited generally in *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863. In support of this proposition of the text, see *Golden's Appeal*, 110 Pa. St. 581, 1 Atl. 660; *Cohen v. Morris*, 70 Ga. 313; *McIlhenny v. Todd*, 71 Tex. 400, 10 Am. St. Rep. 753, 9 S. W. 445; *Fuller v. Hashbrouck*, 46 Mich. 78, 3 N. W. 697; *Wilhelm v. Byles*, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113; *Preston*

v. Spaulding, 120 Ill. 209, 10 N. E. 903; *Weider v. Maddox*, 66 Tex. 372, 59 Am. Rep. 617; *Wynne v. Hardware Co.*, 67 Tex. 40 (assignee liable for refusing to perform); *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863 (creditor may maintain bill against personal representative of deceased assignee for enforcement of the trust).

creditors, yet he is at the same time so far a representative of the debtor that he must be governed by the express terms of the trust; he cannot indirectly modify the provisions of the assignment.² The doctrine generally prevails in the American states, that unless prohibited by statutes, voluntary general assignments by failing debtors for the benefit of their creditors, even when preferring individuals or classes among the beneficiaries, are valid. The necessary delay incident to the execution of the trust is not within the meaning and scope of the statute which avoids transfers in fraud of creditors.³

vails, in the absence of statutory regulations, seems to be as follows: A creditor is not bound to accept the provision made in his behalf, nor does the assignment preclude him from suing the debtor and obtaining a judgment upon his claim; but he cannot reach the *assigned property* in satisfaction of his judgment, unless he is able to procure the assignment to be set aside as fraudulent against creditors. In many of the states the acceptance by the creditor of the provision made in the assignment in part payment of his demand will not prevent him from subsequently enforcing the balance of the claim against the debtor's after-acquired property, since the assignment is purely voluntary, and is not *per se* a composition with creditors, nor does it operate as a discharge in bankruptcy. A clause inserted in the assignment to the effect that a creditor must release and discharge his entire demand as a condition to his claiming any benefits under the trust is held in many states to render the whole assignment void, on the ground that it necessarily hinders and delays creditors. Such provisions, however, seem to be sustained as valid and operative by the courts of other states.^b

² *In re Lewis*, 81 N. Y. 421; *Nicholson v. Leavitt*, 6 N. Y. 510, 519, 57 Am. Dec. 499. In the first case, it was held that an assignee could not prefer a particular debt not preferred by the terms of the assignment.

³ *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 499; *Hauselt v. Vilmar*, 76 N. Y. 630; *Halsey v. Whitney*, 4 Mason, 206, 227-230; *Ogden v. Larrabee*, 57 Ill. 389.^c The validity of the assignment depends upon the question whether it falls within the

(b) *Clayton v. Johnson*, 36 Ark. 406, 38 Am. Rep. 40 (valid); *Collier v. Davis*, 47 Ark. 367, 58 Am. Rep. 758 (void).

(c) See, also, *Richardson v. Marquize*, 59 Miss. 80, 42 Am. Rep. 353; *Kyle v. Harvey*, 25 W. Va. 716, 52 Am. Rep. 235. As to preferences not

invalidating the assignment, see *Albany, etc., Steel Co. v. Southern Agrl. Works*, 76 Ga. 135, 2 Am. St. Rep. 26; *Estes v. Gunter*, 122 U. S. 450, 7 Sup. Ct. Rep. 1275, 30 L. ed. 1228; *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123, 2 S. E. 909.

§ 995. *Deeds of Trust to Secure Debts.*—A special form of trust for the benefit of creditors peculiar to the law of this country has become quite common in several of the states, and requires a brief description. A “deed of trust to secure a debt” is a conveyance made to a trustee as

inhibitions of the statute of 13 Eliz., c. 5, and analogous statutes of the American states. If executed with an actual intent to hinder, delay, or defraud creditors, as shown by extrinsic evidence, or if it contains provisions which necessarily operate to hinder or delay creditors, and therefore raise a conclusive presumption of such an intent, the assignment will be declared void. Various provisions have been thus condemned by the courts, although there is not a perfect uniformity among the decisions. A provision which creates a trust in favor of the debtor himself, to be operative before all the creditors are fully paid, will always render the assignment void: See *Stickney v. Crane*, 35 Vt. 89; *Therasson v. Hickok*, 37 Vt. 454; *McGregor v. Chase*, 37 Vt. 225; *Frink v. Buss*, 45 N. H. 325; *Fairchild v. Hunt*, 14 N. J. Eq. 367; *Hyslop v. Clarke*, 14 Johns. 458; *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297; *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329; *Sheldon v. Dodge*, 4 Denio, 217; *Lentilhon v. Moffat*, 1 Edw. Ch. 451; *Grover v. Wakeman*, 11 Wend. 187, 201, 203; 25 Am. Dec. 624; 4 Paige, 23; *Halstead v. Gordon*, 34 Barb. 422; *Schlussel v. Willett*, 34 Barb. 615; *Barney v. Griffin*, 2 N. Y. 365; *Leitch v. Hollister*, 4 N. Y. 211; *Litchfield v. White*, 7 N. Y. 438; 57 Am. Dec. 534; *Kellogg v. Slawson*, 11 N. Y. 302, 304; *Nichols v. McEwen*, 17 N. Y. 22; *Campbell v. Woodworth*, 24 N. Y. 304; 33 Barb. 425; *Dunham v. Waterman*, 17 N. Y. 9; 72 Am. Dec. 406; *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 499; *Brigham v. Tillinghast*, 13 N. Y. 215; *Rapalee v. Stewart*, 27 N. Y. 310; *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122; *Griffin v. Marquardt*, 21 N. Y. 121; *Jessup v. Hulse*, 21 N. Y. 168; *Wilson v. Robertson*, 21 N. Y. 587; *Coyne v. Weaver*, 84 N. Y. 386; *McConnell v. Sherwood*, 84 N. Y. 522; 38 Am. Rep. 537; *Townsend v. Stearns*, 32 N. Y. 209; *Benedict v. Huntington*, 32 N. Y. 219; *Spaulding v. Strang*, 37 N. Y. 135; 38 N. Y. 9; *Cuyler v. McCartney*, 40 N. Y. 221; *Putnam v. Hubbell*, 42 N. Y. 106; and see 1 Am. Lead. Cas. 56–75.^d An assignment including property of the debtor which has been levied on by execution against him is valid, and passes the title, subject to the lien of the levy: *Mumper v. Rushmore*, 79 N. Y. 19. An assignment may be made by a debtor of a part of his property, in trust, to pay some particular creditor or creditors; its validity would depend upon the same question, whether it was made with a fraudulent intent: See *State v. Benoist*, 37 Mo. 500; *Robbins v. Fitz*, 33 N. Y. 420.^e

(d) *Knapp v. McGowan*, 96 N. Y. 75; *Bagley v. Bowe*, 105 N. Y. 171, 59 Am. Rep. 488, 11 N. E. 386; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282.

(e) As to preferences rendering the assignment invalid, see *Preston v. Spaulding*, 120 Ill. 209, 10 N. E. 903; *Moore v. Church*, 70 Iowa 208, 59 Am. Rep. 439, 30 N. W. 855.

security for a debt owing to the beneficiary,— a creditor of the grantor,— and conditioned to be void on payment of the debt by a certain time, but if not paid the trustee to sell the land and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor. The object of such deeds is, by means of the introduction of trustees, as impartial agents of the creditor and debtor, to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment.¹ A distinction, however, should be noted, in this connection, between unconditional deeds of trust to raise funds for the payment of debts, and deeds of trust in the nature of mortgages, the former being absolute and indefeasible conveyances for the purposes of the trust, while the latter are conveyances by way of security, subject to a condition of defeasance.^{2 a} In many states, deeds of trust to secure debts are much favored, either on account of the intervention of disinterested third parties, whose position as trustees secures to the debtor fair dealing, or the absence of any necessity for the intervention of the courts; though in some states they are required to be judicially foreclosed, and are therefore of no practical advantage.³ Indeed, in a majority of the states, this form of security has come into general, and in some instances universal, use. An intimate relation exists between deeds of trust to secure debts and mortgages, especially mortgages containing powers of sale; in fact, the former are generally

¹ *Taylor v. Stearns*, 18 Gratt. 244, 278.

² *Hoffman v. Mackall*, 5 Ohio St. 124, 130; 64 Am. Dec. 637; *Newman v. Samuels*, 17 Iowa, 528; *Turner v. Watkins*, 31 Ark. 429; *Soutter v. Miller*, 15 Fla. 625. But see *State Bank v. Chapelle*, 40 Mich. 447, when a conveyance to a trustee for sale and payment of debts was treated as a mortgage.

³ *Iowa*: Code 1880, sec. 3319; *Ingle v. Culbertson*, 43 Iowa, 265. *Kansas*: *Samuel v. Holladay*, 1 Woolw. 400. *Kentucky*: *Campbell v. Johnston*, 4 Dana, 178.

(a) The text is quoted in *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563, 573, a case involving a deed of trust of the former character.

See, also, *Catlett v. Storr*, 70 Tex. 485, 7 S. W. 844; *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. 507.

considered as being in legal effect mortgages.⁴ Where a mortgage is regarded as a conveyance of the legal estate, a deed of trust can be no less a conveyance of the legal estate, and where a mortgage is considered as but a mere lien, a deed of trust is generally considered as nothing more than a lien.⁵ A reconveyance, as a general rule, is not necessary on payment of the debt secured by a deed of trust, satisfaction being entered in the margin, as in the case of a mortgage.⁶ Statutes relating to the recording of mortgages

⁴ *Woodruff v. Robb*, 19 Ohio, 212; *Sargent v. Howe*, 21 Ill. 148; *Newman v. Samuels*, 17 Iowa, 528, 535; *Lenox v. Reed*, 12 Kan. 223, 227; *Webb v. Hoselton*, 4 Neb. 308; 19 Am. Rep. 638; *Wright v. Bundy*, 11 Ind. 398, 405 (where it was held a railroad might make a deed of trust under an authority to mortgage its property); *Bennett v. Union Bank*, 5 Humph. 612 (a bank authorized to hold land mortgaged to it for security may take a deed of trust); *Turner v. Watkins*, 31 Ark. 429; *Blackwell v. Barnett*, 52 Tex. 326.^b *Contra*, *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480. See also *Wilkins v. Wright*, 6 McLean, 340; *Bank of Commerce v. Lanahan*, 45 Md. 396.^c

⁵ *Iowa*: *Newman v. Samuels*, 17 Iowa, 528, 535. *Kansas*: *Lenox v. Reed*, 12 Kan. 223, 227. *Nebraska*: *Webb v. Hoselton*, 4 Neb. 308. *Michigan*: *Flint etc. Ry Co. v. Auditor-General*, 41 Mich. 635.^d *Texas*: *Wright v. Henderson*, 12 Tex. 43; *Walker v. Johnson*, 37 Tex. 127, 129; *McLane v. Paschal*, 47 Tex. 365; *Blackwell v. Barnett*, 52 Tex. 326. *California*: A deed of trust is not a mortgage: *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480.^e As to the distinction between mortgages and deeds of trust, see *Wilkins v. Wright*, 6 McLean, 340, Fed. Cas. No. 17,666; *Bank of Commerce v. Lanahan*, 45 Md. 396.

⁶ *Ingle v. Culbertson*, 43 Iowa, 265; *Smith v. Doe*, 26 Miss. 291; *Crosby v. Huston*, 1 Tex. 203. But see *Wilkins v. Wright*, 6 McLean, 340, Fed. Cas. No. 17,666. An entry of satisfaction by one who fraudulently pretends to be the holder of all the notes described in the deed does not discharge the property as against an innocent holder for value of a note so secured: *Gottschalk v. Neal*, 6 Mo. App. 596.

(^b) See, also, *Austin v. Sprague Mfg. Co.*, 14 R. I. 464; *Jackson v. Harby*, 65 Tex. 710; *Barth v. Deuel*, 11 Colo. 494, 19 Pac. 471.

(^c) *Stanhope v. Dodge*, 52 Md. 483; *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480.

(^d) *Wisconsin*.—*Wisconsin Central R. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837.

(^e) *California*.—*Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480.

embrace deeds of trust, without special mention of the latter,⁷ as also do those relating to powers of sale contained in mortgages.⁸ While a mortgage with power of sale may be assigned, in the absence of words restricting an assign-

⁷ *Woodruff v. Robb*, 19 Ohio, 212; *Crosby v. Huston*, 1 Tex. 203, 239; *Magee v. Carpenter*, 4 Ala. 469; *Wood v. Lake*, 62 Ala. 489; *Schultze v. Houfes*, 96 Ill. 335.

⁸ *Alabama*: Code 1876, secs. 2198, 2877-2889.^f *California*: Civ. Code, sec. 2932; but see *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480.^g *Dakota*: Rev. Code 1877, pp. 613-616, 275. *Illinois*: Rev. Stats. 1877, p. 676;^h and see *Bloom v. Van Rensselaer*, 15 Ill. 503; *Farrar v. Payne*, 73 Ill. 82. *Indiana*: 2 Rev. 1876, p. 261;ⁱ and see *Rowe v. Beckett*, 30 Ind. 154; 95 Am. Dec. 676; *Martin v. Reed*, 30 Ind. 218. *Iowa*: Code 1873, sec. 3319; see also *Pope v. Durant*, 26 Iowa, 233; *Fanning v. Kerr*, 7 Iowa, 450. *Kansas*: Gen. Stats. 1868, c. 114, sec. 18; 2 *Dassler's Stats.* 1876, sec. 5631. *Kentucky*: Rev. Stats. 1873, p. 588;^j see also *Campbell v. Johnston*, 4 Dana, 178; *Lyons v. Field*, 17 B. Mon. 543, 549; *Smith v. Vertrees*, 2 Bush, 63; *Reid v. Welsh*, 11 Bush, 450. *Maryland*: Code 1860, p. 445.^k *Massachusetts*: Gen. Stats., c. 140, secs. 38-44;^l Stats. 1868, c. 197.^m *Michigan*: Comp. Laws 1871, pp. 1921-1925.ⁿ *Minnesota*: Rev. 1866, pp. 562-565; Stats. at Large 1873, pp. 900-907.^o *Mississippi*: Laws 1876, p. 37. *Missouri*: *Wagner's Stats.* 1870, p. 954, sec. 2; also pp. 94, 956, 1347; see also *Lass v. Sternberg*, 50 Mo. 124; *McKnight v. Wimer*, 38 Mo. 132; *Tatum v. Holliday*, 59 Mo. 422. *Nevada*: Comp. Laws 1873, secs. 1292-1295, 1309-1311.^p *New York*: 2 *Fay's Dig. of Laws* 1876, pp. 65-67;^q and see *Elliott v. Wood*, 45 N. Y. 71; 53 Barb. 285; *Sherwood v. Reade*, 7 Hill, 431; reversing 8 Paige, 633; *Hubbell v. Sibley*, 5 Lans. 51; *Cohoes Co. v. Goss*, 13 Barb. 137; *Lawrence v. Farmers' etc. Co.*, 13 N. Y. 200. *Rhode Island*: Gen. Stats., c. 165, sec. 15.^r *Tennessee*: Code 1858, secs. 2124-2127;^s and see *Caldwell v. Bowen*, 4 Sneed, 415. *Virginia*: Code 1873, c. 113, secs.

(^f) *Alabama*.—Code 1886, secs. 1844, 1879-1891.

(^g) *California*.—*Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480.

(^h) *Illinois*.—*Hurd's Rev. Stats.* 1889, c. 95.

(ⁱ) *Indiana*.—1 Rev. Stats. 1883, secs. 1096, 1097.

(^j) *Kentucky*.—C. 63, art. 1.

(^k) *Maryland*.—2 Pub. Gen. Laws 1888, art. 66.

(^l) *Massachusetts*.—Pub. Stats. 1882, c. 181, secs. 14-20.

(^m) *Massachusetts*.—Pub. Stats. 1882, c. 24, sec. 19.

(ⁿ) *Michigan*.—*Howell's Stats.* 1882, c. 293.

(^o) *Minnesota*.—2 *Kelly's Stats.* 1891, c. 76, tit. 1.

(^p) *Nevada*.—Gen. Stats. 1885, secs. 3253-3256, 3270-3272.

(^q) *New York*.—Code Civ. Proc. secs. 2387-2409.

(^r) *Rhode Island*.—Pub. Stats. 1882, c. 176, sec. 15; and see *Austin v. Sprague Mfg. Co.*, 14 R. I. 464.

(^s) *Tennessee*.—Code 1884, secs. 2947-2950.

ment, and the power of sale passes thereby to the assignee, a deed of trust to secure a debt, being a confidence reposed, cannot be delegated, and no assignment is possible, without an express and positive permission in the deed.⁹ The duties of the trustee of a deed of trust require the utmost good faith and impartiality as regards both the debtor and the creditor. He is personally liable, in a suit at law for damages to the party aggrieved, for a failure to use reasonable diligence, or an abuse of his discretionary powers;¹⁰ and a sale may be enjoined or set aside at the instance of the injured party.¹¹ It is not necessary that the person who is

5, 6.* This state has legislated to some extent on deeds of trust; as also *West Virginia*: Code 1870, c. 72, secs. 5-10; and Amendments 1870, c. 51. *Wisconsin*: 2 Rev. Stats. 1871, pp. 1777-1782.†

⁹ *Whittelsey v. Hughes*, 39 Mo. 13; *McKnight v. Wimer*, 38 Mo. 132; and see *Pickett v. Jones*, 63 Mo. 195, 199.‡

¹⁰ *Sherwood v. Saxton*, 63 Mo. 78; *State v. Griffith*, 63 Mo. 545; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69; the remedy is at law, and not in equity, for a failure to pay over to the proper party the excess of the proceeds over and above the debt and reasonable expenses.

¹¹ *Terry v. Fitzgerald*, 32 Gratt. 843; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Eitelgeorge v. Mutual etc. Ass'n*, 69 Mo. 52; *Cassidy v. Cook*, 99 Ill. 385, 389: "A trustee's duties are not merely formal. It is his duty, in the faithful discharge of his trust, to inform himself as to the condition of the property which he is about to sell, and to adopt that course which, in his judgment, will bring the highest price." But the fact that the property was bought on behalf of the creditor, or that the price bid was low, does not necessarily invalidate the sale: *Landrum v. Union Bank*, 63 Mo. 48. But a sale will not be set aside, as against innocent remote purchasers without notice, for such irregularities as over-statement of the account of indebtedness, or a sale, if *bona fide*, of lots *en masse*: *Fairman v. Peck*, 87 Ill. 156; *Farrar v. Payne*, 73 Ill. 82. And if the face of the deed does not show that it was made contrary to the terms of the deed of trust, a subsequent grantee, without actual notice of any defects in the sale, will acquire such title as will not be set aside: *Gunnell v. Cockerill*, 84 Ill. 319; *Watson v. Sherman*, 84 Ill. 263. But only a party to or person interested

(*) *Virginia*.—Code 1887, secs. 2441, 2442, 2465-2468, 2498, 2935.

(†) *Wisconsin*.—Sanborn and Berryman's Stats. 1889, secs. 3523-3543; and see *Wisconsin Central R. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837.

(‡) *City of St. Louis v. Priest*, 88 Mo. 612. The deed may provide for a successor to the trustee named: *Irish v. Antioch College*, 126 Ill. 638, 9 Am. St. Rep. 638, 18 N. E. 768.

to execute the power in a trust deed should join in the deed, or execute any formal writing showing his acceptance of the trust;¹² nor is it necessary that the beneficiary should signify his assent by any formal writing, for his assent is presumed, since the deed is for his benefit.¹³ Where a trustee has accepted the trust, he cannot renounce it without the consent of the beneficiary, or of a court of equity;¹⁴ and he may be compelled to discharge the trust.¹⁵

§ 996. **Voluntary Trusts.**— The particular question to be examined under this head, and which renders it one of such great practical importance, is, When will trusts, and transactions in the nature of trusts, which are purely voluntary, virtual gifts be treated as binding and enforceable in equity? The answer, it will be seen, turns upon the distinction between trusts which are executed — that is, completely created or declared — and those which are merely executory, incomplete, — that is, promises to create a trust. The full discussion of the subject also involves the difference between assignments perfect and imperfect, and declarations of trust. Underlying the whole theory of voluntary trusts is the principle that while the maxim, *Ex nudo pacto non oritur actio*, operates in equity even more strictly than at the common law, so that a promise without any valuable consideration has no binding efficacy, still a valid trust may be created without any valuable consideration; if a trust has been completely declared, the absence of a valuable con-

in a trust deed can complain of irregularities in the execution of the trust: *Wade v. Thompson*, 52 Miss. 367. ^w

¹² *Leffler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672; *Crocker v. Lowenthal*, 83 Ill. 579.

¹³ *Wiswall v. Ross*, 4 Port. 321; *Shearer v. Loftin*, 26 Ala. 703.

¹⁴ *Drane v. Gunter*, 19 Ala. 731.

¹⁵ *Sargent v. Howe*, 21 Ill. 148. ^x

(^w) See, also, *Muller's Adm'r's v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, and note, 6 S. E. 223; *Hurt v. Cooper*, 63 Tex. 362; *Grover v. Hale*, 107 Ill. 638; *Williamson v. Stone*, 128 Ill. 129, 22 N. E. 1005.

(^x) *Commonwealth v. Susquehanna, etc.*, R. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225. Or may be removed: *Lewis's Adm'r v. Glenn*, 84 Va. 947.

sideration is entirely immaterial.¹ Another principle frequently applicable in cases of this kind is, that equity generally regards an imperfect conveyance or assignment as a contract to convey or assign; but whether such contract is binding or not must depend upon the circumstances.²

¹ *Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Ex parte Pye*, 18 Ves. 140; *Kekewich v. Manning*, 1 De Gex, M. & G. 176, 190; *Dickinson v. Burrell*, L. R. 1 Eq. 337, 343.^a

² *Parker v. Taswell*, 2 De Gex & J. 559.

(a) In *re Knapps' Settlement*, [1895] 1 Ch. 91; *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089 (trust for the management of realty, and division of the proceeds among the beneficiaries); *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Lynn v. Lynn*, 135 Ill. 19, 25 N. E. 634; *Chilvers v. Race*, 196 Ill. 71, 63 N. E. 701; *Jones' Adm'rs v. Moore*, 102 Ky. 591, 44 S. W. 126 (account-book the subject of the gift); *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184, 15 S. W. 660 (a voluntary, undelivered assignment of notes upheld). In *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836, 32 L. R. A. 377, the court, in upholding a voluntary bank deposit, on the intention to create a trust as gathered from the entire circumstances, said: "It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the *cestui*; for then he creates an estate no longer his own. He may retain the legal title giving him the control, but for the benefit of the *cestui*, according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts;" see, also, *Dresser v. Dresser*, 46 Me. 48; *Gerrish v. New Bedford Inst.*

for Sav., 128 Mass. 159, 35 Am. Rep. 370; *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507 (refusing to set aside a voluntary trust settlement); *Scrivens v. North Eastern S. B.*, 166 Mass. 255, 44 N. E. 251 (the donee having allowed the donor to retain possession of the bank-book and use part of the money); *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916 (deposit in bank); *Hoboken Bk. of Sav. v. Schwoon*, 62 N. J. Eq. 503, 50 Atl. 490; *Tarbox v. Grant*, 56 N. J. Eq. 199, 39 Atl. 378; *Studebaker Bros. Mfg. Co. v. Hunt*, (Tex. Civ. App.) 38 S. W. 1134; *Lines v. Lines*, 142 Pa. St. 149, 24 Am. St. Rep. 487, 21 Atl. 809 (trust of personalty); *Estate of Smith*, 144 Pa. St. 428, 27 Am. St. Rep. 641, 22 Atl. 916 (bonds, in the possession of the testator, were marked "Held for K", and the testator had informed third parties of his intention to give to "K"); *Wagoner's Estate*, 174 Pa. St. 558, 52 Am. St. Rep. 828, 32 L. R. A. 766, 34 Atl. 114 (see as to a contingent trust); *Potter v. Fidelity Ins., T. & S. D. Co.*, 199 Pa. St. 360, 49 Atl. 85; *Connecticut R. Sav. Bank v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487 (citing the text and recent cases supporting it).

§ 997. **The General Doctrine — Incomplete Voluntary Trusts not Enforceable.**—The general doctrine is well settled. A perfect or completed trust is valid and enforceable, although purely voluntary. A voluntary trust which is still executory, incomplete, imperfect, or promissory will neither be enforced nor aided.¹ In order to render the voluntary trust

¹ It seems appropriate, in order to illustrate this general doctrine, of which all the decided cases are mere applications, to quote the language of a few leading and modern cases in which the subject was fully examined and the conclusions accurately stated.^a In *Milroy v. Lord*, 4 De Gex, F. & J. 264, 274, *Turner, L. J.*, thus formulated the doctrine, and his statement has been approved by nearly every subsequent decision: "I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done, in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the prop-

(a) In *re Breton's Estate*, 17 Ch. Div. 416 (following *Milroy v. Lord*, and apparently disapproving *Fox v. Hawkes, post*); see *In re Vernon*, 32 Ch. Div. 165 (entries in an account book taken as a declaration of trust); *Gannon v. Merguire*, 22 App. Div. 43, 47 N. Y. Supp. 870; *Goodman v. Crawley*, 161 Mo. 657, 61 S. W. 850; *McDonald v. Am. Nat. Bank*, 25 Mont. 456, 65 Pac. 896; *Skeen v. Morriott*, 22 Utah 73, 61 Pac. 296, and *Krankel's Executors v. Krankel*, 20 Ky. Law Rep. 901, 42 S. W. 1084 (citing the text); *Fisher v. Hampton Transp. Co.*, (Mich.) 98 N. W. 1012; *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338 (the settlor had voluntarily assigned a policy of insurance to his mother, acknowledged it before a notary, and sent a copy to the company; he notified the mother that he would "keep it" for her, but subsequently

assigned it to a third party; the court held the delivery, and therefore the assignment, incomplete, and no trust created. The case contains a valuable discussion of delivery, which is often of importance in determining whether a trust has been established under such circumstances); *Badgeley v. Votrain*, 68 Ill. 25, 18 Am. Rep. 541; *McCartney v. Ridgway*, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250 (where the policy was assigned and no notice given to the insuring company). In *Barnum v. Reed*, 136 Ill. 398, 26 N. E. 572, it being uncertain whether a bank deposit was intended as a trust, or a gift to take effect upon the death of the donor, it was not enforced.

Bank Deposits.—The cases cited in regard to complete and incomplete voluntary trusts are many of them

valid and effectual, the party creating it, either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the prop-

erty be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of these modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which the case must be tried." In *Richards v. Delbridge*, L. R. 18 Eq. 11, 13, Sir George Jessel, M. R., said: "The principle is a very simple one. A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus

cases of the transfer of, or creation of bank deposits; in addition to them it has been deemed advisable to place the following cases in a separate group.

1. *The creation held complete:* Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382, 33 Atl. 836, 32 L. R. A. 377 (deposit in trust for A. B. F., but additional facts aided the result); *Curtis v. Portland Sav. Bk.*, 77 Me. 151, 52 Am. Rep. 750 (the bank-book was delivered and it was held a trust attached to the gift *causa mortis*); *Northrop v. Hale*, 72 Me. 275 (money deposited in the name of N. and the bank-book retained; held, extrinsic evidence could be introduced to show N.'s rights); *Alger v. North End Sav. Bk.*, 146 Mass. 418, 4 Am. St. Rep. 331, 15 N. E. 916; *Scott v. Berkshire Bk.*, 140 Mass. 457, 2 N. E. 925; *Connecticut River Saving Bk. v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487 (the deposit was in the depositor's

name in trust for the donee but the intention was really to evade a tax, and not to pass the benefit to the donee; the court cites *Pom. Eq. Jur.* §§ 996-998, with approval). See the following cases in which it was held that the deposit in bank created a trust in favor of the intended beneficiary: *Milholland v. Whalen*, 89 Md. 212, 43 Atl. 43, 44 L. R. A. 205; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62, 51 Atl. 249; *Becker v. Union Dime Sav. Inst.*, 15 App. Div. 553, 44 N. Y. Supp. 521; *Proseus v. Porter*, 20 App. Div. 44, 46 N. Y. Supp. 656; *Farleigh v. Cadman*, 159 N. Y. 169, 53 N. E. 808; *Bishop v. Seamen's Bk. for Savings*, 33 App. Div. 181, 53 N. Y. Supp. 488; *Jennings v. Hennessey*, 26 Misc. Rep. 265, 55 N. Y. Supp. 833 (see as to the revocation of such trusts); *Martin v. Martin*, 46 App. Div. 445, 61 N. Y. Supp. 813; *Williams v. Brooklyn Sav. Bk.*, 51 App. Div. 332, 64 N. Y. Supp. 1021; *Board of Dom. Missions of R. Ch. in Am.*

erty and render the transaction binding upon him. A person holding property, real or personal, and intending to make a voluntary disposition thereof for the benefit of another, may do so in either one of three modes: 1. He may

completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title may so deal with the property as to deprive himself of its legal ownership, and declare that he will hold it from that time forward on trust for the other person. It is true, he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, 'I give or grant certain property to A B.'” He cites *Morgan v. Malleston*, L. R. 10 Eq. 475, and *Richardson*

v. Mechanics' Sav. Bk., 40 App. Div. 120, 54 N. Y. Supp. 28, 57 N. Y. Supp. 582 (though the bank-book was retained); *Robinson v. Appleby*, 69 App. Div. 509, 75 N. Y. Supp. 1; *Booth v. Oakland Bk. of Savings*, 122 Cal. 19, 54 Pac. 370.

2. *The creation held incomplete:* *Augusta Saving Bk. v. Fogg*, 82 Me. 538, 20 Atl. 92 (failure to deliver the bank-book); *Noyes v. Inst. for Sav.*, etc., 164 Mass. 583, 49 Am. St. Rep. 484, 42 N. E. 103 (deposit in name of depositor and another, payable “to either or survivor,” and bank-book retained; early Massachusetts cases cited); *Beaver v. Beaver*, 117 N. Y. 421, 18 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940 (deposit by father in the name of his son, and the pass-book retained, held not alone enough to indicate a trust); *Cunningham v. Davenport*, 147 N. Y. 43, 49 Am. St. Rep. 641, 32 L. R. A. 373, 41 N. E. 412 (deposit in bank in A's name was changed to B's name, but there was no intention that B should have the

fund); *Pope v. Burlington Sav. Bk.*, 56 Vt. 284, 48 Am. Rep. 781 (deposit was in the name of the donee but subject to control by donor during his life; citing the text at § 996 *et seq.*); *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545 (stating that acceptance by the donee is necessary, and that cases holding otherwise are those in case of death only); *Sherman v. New Bedford, etc., Bk.*, 138 Mass. 581 (the deposit and the pass-book were in B's name but A retained the book and drew the interest; the court concluded that, as A had not intended a present gift, the trust was not complete); *Cummings v. Bramhall*, 120 Mass. 552 (transfer of bank shares to self as trustee, and the donee not notified); *Nutt v. Morse*, 142 Mass. 1, 6 N. E. 763 (deposit in the name of donees and notice given them); *Norway Savings Bank v. Merriam*, 88 Me. 146, 33 Atl. 840 (the donor of a bank deposit having retained the bank-book); see *Noyes v. Inst. for S. in N.*, 164 Mass. 583,

make a simple conveyance or assignment of it directly to the donee, so as to vest in the latter whatever interest and title the donor has, without the intervention of any trust; 2. He may make a transfer of it to a third person upon trusts declared in favor of the donee; 3. He may retain the

v. Richardson, L. R. 3 Eq. 686. "The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee there must be an expression of *intention to become a trustee*, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." He then quotes and approves the language cited above from Milroy v. Lord. "If the decisions in Morgan v. Malleson and Richardson v. Richardson were right, there never could be a case where an expression of present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce." The case of Kekewich v. Manning, 1 De Gex, M. & G. 176, is also a most important one, and contains an examination of nearly all the previous authorities. See also Warriner v. Rogers, L. R. 16 Eq. 340; Heartley v. Nicholson, L. R. 19 Eq. 233; Jones v. Lock, L. R. 1 Ch. 25. The decisions of Page Wood, V. C., in Richardson v. Richardson, L. R. 3 Eq. 686, and of Lord Romilly, M. R., in Morgan v. Malleson, L. R. 10 Eq. 475, have been greatly shaken, even if not entirely overruled, by the subsequent cases cited above in the sixteenth, eighteenth, and nineteenth volumes of Equity Cases; but they are approved in the still more recent case of Baddeley v. Baddeley, L. R. 9 Ch. Div. 113.

49 Am. St. Rep. 484, 42 N. E. 103 (bank deposit); Welch v. Henshaw, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. 659 (citing many Massachusetts cases); Sherman v. New Bedford, etc., Bank, 138 Mass. 581 (deposit in bank with no delivery of the bank-book); Lane v. Ewing, 31 Mo. 75, 77 Am. Dec. 632; approved in Leeper v. Taylor, 111 Mo. 312, 19 S. W. 955, citing the text; Wadd v. Hazelton, 137 N. Y. 215, 33 Am. St. Rep. 707, 33 N. E. 143, 21 L. R. A. 693.

In the following cases it was held that no trust arose on the facts of the various cases, though the same principle that governed the preceding cases was expressly recognized: Yorkshire Inv. & Am. Mortgage Co.

v. Fowler, 78 Fed. 56; McNamara v. McDonald, 69 Conn. 484, 61 Am. St. Rep. 48, 38 Atl. 54; People's Sav. Bk. v. Webb, 21 R. I. 218, 42 Atl. 874; Jenkins v. Baker, 36 Misc. Rep. 55, 72 N. Y. Supp. 546 (a very valuable case for general discussion); Lee v. Kennedy, 25 Misc. Rep. 140, 54 N. Y. Supp. 155; Sullivan v. Sullivan, 39 App. Div. 99, 56 N. Y. Supp. 693; Schwind v. Ibert, 60 App. Div. 378, 69 N. Y. Supp. 921; Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116; Harrison v. Totten, 29 Misc. Rep. 700, 62 N. Y. Supp. 754. In nearly all of the above cases the case of Martin v. Funk, *supra*, was cited with approval. See Ames Cas. on Trusts, p. 43, note.

title, and declare himself a trustee for the donee, and thus clothe the donee with the beneficial estate. In either of these modes, if the transaction is imperfect and executory, equity will not aid nor enforce it; and if the intention of the party is to adopt one of the methods, a court of equity will

In the recent case of *Young v. Young*, 80 N. Y. 422, 436, 36 Am. Rep. 634, the subject was examined in an exhaustive manner by Rapallo, J. I quote his very instructive opinion.^b "The only question remaining is, whether a valid declaration of trust is made out. . . . The difficulty in establishing such a trust is, that the donor did not undertake or attempt to create it, but to vest the property directly in the donees. He simply signed a paper certifying that the bonds belonged to his sons. He did not declare that he held them in trust for the donees, but that they owned them, subject to the reservation, and were at his death to have them absolutely. If this instrument had been founded upon a valuable consideration, equity might have interfered and effectuated its intent by compelling the execution of a declaration of trust, or by charging the bonds, while in his hands, with a trust in favor of the equitable owner: *Day v. Roth*, 18 N. Y. 448. But it is well settled that equity will not interpose to perfect a defective gift, or voluntary settlement made without consideration. If legally made, it will be upheld, but it must stand as made, or not at all. When, therefore, it is found that the gift which the deceased attempted to make failed to take effect for want of delivery or of a sufficient transfer, and it is sought to supply this defect and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to [citing many cases]. It is established as unquestionable law that a court of equity cannot, by its authority, render that gift perfect which the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust merely on account of that imperfection: *Heartley v. Nicholson*, L. R. 19 Eq. 233. It has, in some cases, been attempted to establish an exception in favor of a wife and children, on the ground that the moral obligation of the donor to provide for them constituted what was called a meritorious consideration for the gift; but Judge Story says the doctrine seems now to be overthrown (*Eq. Jur.*, secs. 433, 987), and that the general principle is established that in no case whatever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although the beneficiaries stand in the relation of a wife or child: *Holloway v. Headington*, 8 Sim. 325; *Jefferys v. Jefferys*, 1 Craig & P. 138, 141. These posi-

(b) The case of *Young v. Young*, *supra*, has been generally approved: see *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707, 33 N. E. 143, 21 L. R. A. 693; *Barnum v. Reid*, 136 Ill. 389, 26 N. E. 572; *Hurlbut*

v. Hurlbut, 49 Hun 189, 1 N. Y. Supp. 854; *Estate of Smith*, 144 Pa. St. 428, 27 Am. St. Rep. 641, 22 Atl. 916; *Schwind v. Ibert*, 60 App. Div. 378, 69 N. Y. Supp. 921.

not resort to either of the other methods for the purpose of carrying it into effect. Whenever the party intends to make a transfer directly to the donee, he must do all that is necessary, according to the nature of the property, to pass and vest the title, by valid conveyance in case of real property,

tions are sustained by many authorities. To create a trust, the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. Though it is not necessary that the declaration of trust be in terms explicit, the donor must have evinced, by acts which admit of no other interpretation, that such legal right as he retains is held by him as trustee for the donee: *Heartley v. Nicholson*, L. R. 19 Eq. 233; *Richards v. Delbridge*, L. R. 18 Eq. 11. The settlor must transfer the property to a trustee, or declare that he holds it himself in trust: *Milroy v. Lord*, 4 De Gex, F. & J. 264. In cases of voluntary settlements or gifts, the court will not impute a trust, where a trust was not in fact the thing contemplated. . . . The words of the donor in the present case are, that the bonds are owned by the donees, but that the interest to accrue thereon is owned and reserved by the donor for so long as he shall live, and at his death they belong absolutely to the donees. No intention is here expressed to hold any legal title to the bonds in trust for the donees. Whatever interest was intended to be vested in them was transferred to them directly, subject to the reservation in favor of the donor during his life, and free from that reservation at his death. Nothing was reserved to the donor to be held, in trust or otherwise, except his right to the accruing interest which should become payable during his life. It could only be by reforming or supplementing the language used that a trust could be created, and this will not be done in case of a voluntary settlement without consideration. [Mr. Justice Rapallo then reviews the two cases of *Richardson v. Richardson* and *Morgan v. Malleeson*, *supra*, and declares that they have been overruled.] In *Moore v. Moore*, 43 L. J. Ch., N. S., 623, Hall, V. C., says: 'I think it very important, indeed, to keep a clear and definite distinction between these cases of imperfect gifts and cases of declarations of trust, and that we should not extend beyond what the authorities have already established the doctrine of declarations of trust, so'as to supplement what would otherwise be mere imperfect gifts.' If the settlement is intended to be effectuated by gift, the court will not give it effect by construing it as a trust. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. The case of *Martin v. Funk*, and kindred cases, cannot aid the respondent. In all those cases there was an express declaration of trust. In the one named, the donor delivered the money to the bank, taking back its obligation to herself *in the character of trustee* for the donee, thus parting with all beneficial interest in the fund, and having the legal title vested in her in the character of trustee only. No interposition on the part of the court was necessary to confer that character upon her; nor was it necessary, by construction or

and by valid assignment in case of personal property, and generally accompanied by an actual delivery of chattels and things in action where the donor is the legal owner. Where the donor shows an intention to adopt this first method, and thus to vest the property directly in the donee, and the

otherwise, to change or supplement the actual transaction." In *Martin v. Funk*, 75 N. Y. 134, 137, 31 Am. Rep. 446, Church, C. J.,^c thus sums up the doctrine: "It is clear that a person *sui juris*, acting freely and with full knowledge, has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not, is not sufficient, and a voluntary promise to make a gift is *nudum pactum*, and of no binding force. The act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention; and this is the rule, whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. Enough must be done to pass the title, although when a trust is declared, whether in a third person or in the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should even be informed of the trust." In *Estate of Webb*, 49 Cal. 541, 545, Crockett, J., said: "In such cases the point to be determined is, whether the trust has been perfectly created,—that is to say, whether the title has passed and the trust been declared,—and the trust being executed, nothing remains for the court but to enforce it. In discussing this question, the court say in *Stone v. Hackett*, 12 Gray, 227: 'It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding, so long as it remains executory. But it is equally true that if such a contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.' . . . This was not an executed trust, but, at most, nothing more than a voluntary executory agreement to create a trust *in futuro*, and such agreements cannot be enforced in equity."

In *Bond v. Bunting*, 78 Pa. St. 210, an opinion by Hare, J., contains a valuable discussion of the doctrine, but his conclusions are somewhat broader than seems to be sustained by the course of recent authority: *Ellison v. Ellison*, 6 Ves. 656; 1 Lead. Cas. Eq., 4th Am. ed., 382, 389, 415; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Ex parte Pye*, 18 Ves. 140; *Antrobus v. Smith*,

(c) The case of *Martin v. Funk*, has been frequently approved: see, for example merely, *Hoboken Bk. of Sav. v. Schwoon*, 62 N. J. Eq. 503, 50 Atl. 490; *Gannon v. Merquire*, 22

App. Div. 43, 47 N. Y. Supp. 870; and see, *supra*, note a. See, also, the cases cited in the note to § 1009, *infra*.

act of donation is simply an assignment of any form, *but is imperfect* so that it does not pass the title, a court of equity will not treat it as a declaration of trust constituting the donor himself a trustee for the donee; an imperfect voluntary assignment will not be regarded in equity as an agree-

12 Ves. 39; *Edwards v. Jones*, 1 Mylne & C. 226; *Fortescue v. Barnett*, 3 Mylne & K. 36; *Colman v. Sarrel*, 3 Brown Ch. 12; 1 Ves. 50; *Blakely v. Brady*, 2 Dru. & Walsh, 311; *Wheatley v. Purr*, 1 Keen, 551; *Colyear v. Lady Mulgrave*, 2 Keen, 81; *Godsal v. Webb*, 2 Keen, 99; *Holloway v. Headington*, 8 Sim. 324; *Beatson v. Beatson*, 12 Sim. 281, 294; *Searle v. Law*, 15 Sim. 95; *Dillon v. Coppin*, 4 Mylne & C. 647; *Jefferys v. Jefferys*, 1 Craig & P. 138; *Bayley v. Boulecott*, 4 Russ. 345; *Farquharson v. Cave*, 1 Coll. C. C. 356; *Meek v. Kettlewell*, 1 Hare, 464; 1 Phill. Ch. 342; *Paterson v. Murphy*, 11 Hare, 88; *Ward v. Audland*, 8 Beav. 201; *James v. Bydder*, 4 Beav. 600; *Denning v. Ware*, 22 Beav. 184; *Bridge v. Bridge*, 16 Beav. 315, 327; *Beech v. Keep*, 18 Beav. 285; *Donaldson v. Donaldson*, Kay, 711; *Voyle v. Hughes*, 2 Smale & G. 18; *Airey v. Hall*, 3 Smale & G. 315; *Parnell v. Hingston*, 3 Smale & G. 337; *In re Patterson's Estate*, 4 De Gex, J. & S. 422; *In re Way's Trust*, 2 De Gex, J. & S. 365; *Dillwyn v. Llewelyn*, 4 De Gex, F. & J. 517; *Crouch v. Waller*, 4 De Gex & J. 302; *Scales v. Maude*, 6 De Gex, M. & G. 43; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Baddeley v. Baddeley*, L. R. 9 Ch. Div. 113; *Neves v. Scott*, 9 How. 196; *Adams v. Adams*, 21 Wall. 185; *Blanchard v. Sheldon*, 43 Vt. 512; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Hunt v. Hunt*, 119 Mass. 474; *Clark v. Clark*, 108 Mass. 522; *Brahbrook v. Five Cent Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Wason v. Colburn*, 99 Mass. 342; *Sherwood v. Andrews*, 2 Allen, 79, 81; *Stone v. Hackett*, 12 Gray, 227; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Taylor v. Staples*, 8 R. I. 170, 176; 5 Am. Rep. 558; *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Trow v. Shaanon*, 78 N. Y. 446; *Curry v. Powers*, 70 N. Y. 212, 219; 26 Am. Rep. 577; *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438; *Hunter v. Hunter*, 19 Barb. 631; *Gilchrist v. Stevenson*, 9 Barb. 9; *Acker v. Phoenix*, 4 Paige, 305; *Hayes v. Kershow*, 1 Sand. Ch. 258, 261; *Bunn v. Winthrop*, 1 Johns. Ch. 329, 337; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Ownes v. Ownes*, 23 N. J. Eq. 60, 62; *Vreeland v. Van Horn*, 17 N. J. Eq. 137, 139; *Carhart's Appeal*, 78 Pa. St. 100, 119; *Trough's Estate*, 75 Pa. St. 115; *Zimmerman v. Streeper*, 75 Pa. St. 147; *Dellinger's Appeal*, 71 Pa. St. 425; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Pringle v. Pringle*, 59 Pa. St. 281; *Ritter's Appeal*, 59 Pa. St. 9; *Cressman's Appeal*, 42 Pa. St. 147; 82 Am. Dec. 498; *Lonsdale's Estate*, 29 Pa. St. 407; *Dennison v. Goehring*, 7 Pa. St. 175, 178; 47 Am. Dec. 505; *Jones v. Obenchain*, 10 Gratt. 259; *Dunbar v. Woodcock*, 10 Leigh, 628; *Reed v. Vannorsdale*, 2 Leigh, 569; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486; *Cox v. Hill*, 6 Md. 274; *McNulty v. Cooper*, 3 Gill & J. 214; *Tolar v. Tolar*, 1 Dev. Eq. 460; 18 Am. Dec. 598; *Dawson v. Dawson*, 1 Dev. Eq. 93, 400; 18 Am. Dec. 573; *Andrews v. Hobson*, 23 Ala. 219; *Pinckard v. Pinckard*, 23 Ala. 649; *Crompton v. Vesser*, 19 Ala.

ment to assign for the purpose of raising a trust. If the donor adopts the second or third mode, he need not use any technical words, or language in express terms creating or declaring a trust, but he must employ language which shows unequivocally an intention on his part to create a trust in a third person or to declare a trust in himself. It is not essential, however, that the donor should part with the possession in the cases where he thus creates or declares a trust. These conclusions are sustained by the decided weight of authority, and must be regarded as the settled rules of equity jurisprudence upon the subject.* The general doctrine which has thus been explained may find its application under two different conditions of fact: 1. Where the donor is the absolute owner of the property, holding the legal and equitable title thereof; 2. Where the donor is only the equitable owner, holding only the equitable estate, the legal title being vested in some third person as his trustee. These two conditions will be examined separately.

§ 998. Donor the Legal Owner.—The foregoing general conclusions determine all particular questions which can arise under this condition of fact. If the donor makes a

259; *Evans v. Battle*, 19 Ala. 398; *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632; *Henderson v. Henderson*, 21 Mo. 379; *Otis v. Beckwith*, 49 Ill. 121, 128; *Olney v. Howe*, 89 Ill. 556; 31 Am. Rep. 105; *Clarke v. Lott*, 11 Ill. 105; *Huston v. Markley*, 49 Iowa, 162; *Wyble v. McPheters*, 52 Ind. 393.^d

(^d) See, also, *Breton v. Woollven*, 17 Ch. Div. 418; *Allen v. Withrow*, 110 U. S. 130, 3 Sup. Ct. 517, 28 L. ed. 90; *Miller v. Clark*, 40 Fed. 15; *Willis v. Smyth*, 91 N. Y. 297; *Van Cott v. Prentice*, 104 N. Y. 52, 10 N. E. 257; *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940; *Bartlett v. Remington*, 59 N. H. 364; *Sargent v. Baldwin*, 60 Vt. 17, 13 Atl. 854; *Keyes v. Carleton*, 141 Mass. 49, 55 Am. Rep. 446, 6 N. E. 524; *Wittingham v. Lighthipe*, 46 N. J.

Eq. 429, 19 Atl. 611; *Titchenell v. Jackson*, 26 W. Va. 460; *Wimbish v. Montgomery, etc., Ass'n*, 69 Ala. 575; *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647; *Flanders v. Blandy*, 45 Ohio St. 108, 12 N. E. 321; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659.

(^e) See *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, 26 Atl. 138, quoting the text with approval, and citing a number of recent cases to illustrate the application of the rule.

complete conveyance of real property or assignment of personal property sufficient to vest the legal title in the donee; or if he completely conveys or assigns the property to a trustee upon trusts effectually created on behalf of the donee; or if he retains the legal title, but effectually declares himself a trustee for the donee, thus clothing the donee with all of the beneficial estate,—then, in each of these instances, the gift is valid although voluntary; the donee's rights are perfect, and equity will enforce them against the donor, and all persons claiming under him as volunteers.¹

¹ The practical question always is, whether the conveyance or assignment is sufficient to pass the legal title; or whether a trust *has been* effectually created or declared. While no particular express words are necessary either to create a trust in third persons, or to declare the donor a trustee, some words unequivocally showing such intent are indispensable. A mere imperfect assignment, without words indicating an intent to create a trust or to declare the donor a trustee, cannot be construed as a declaration of trust, so as to raise a trust in the donee's favor, which equity may enforce. Where the subject-matter is personal property, a parol declaration of trust, if otherwise sufficient, is effectual: See the cases cited in the last note, and especially the quotations. I add the facts of a few instructive cases by way of illustration.

In *Mitchell v. Smith*, *In re Patterson's Estate*, 4 De Gex, J. & S. 422, A, the payee of certain promissory notes, brought them to his nephew, B, and said, "I give you these notes," and added that B should have them at A's death, but the latter would like to be master of them as long as he lived. A then indorsed the notes as follows: "I bequeath,—pay the within contents to B, or his order, at my death." A retained possession of the notes until his death, a few months afterwards. Held, that B had obtained no rights whatever in the notes. This case is a good illustration of an attempted assignment which fails to pass the legal title. In *Milroy v. Lord*, 4 De Gex, F. & J. 264, A owned fifty shares of stock of a bank, which stood upon the books of the bank in his name. By the charter of the bank its shares were transferable only by entry made in the transfer-books of the corporation. A executed a voluntary deed, by which he purported to assign these shares to B, in trust for the plaintiff, C, but no transfer was made upon the bank's books. Held, that, as the assignment was incomplete and inoperative to pass the legal title to the trustee, B, no trust was effectually created in C's favor; and also, since the plain intention was to vest the trust in B, and not to constitute the donor a trustee, the assignment could not be construed as a declaration of trust binding the shares in the donor's hands. In *Scales v. Maude*, 6 De Gex, M. & G. 43, a mortgagee had written various letters to the mortgagor about the mortgage, in which he said: "I now give this gift to become due at my death, unconnected with my will"; "I hereby request my executors to cancel the mortgage deed"; "I again direct and

Where the donor has the legal title, and the property is of such a nature that a legal estate can be transferred,—that is, is land, chattels, money, and some species of things in action,—an imperfect conveyance or assignment, which

promise that my executors shall comply with my former request; that is, to cancel all deeds and papers I may have chargeable on the R. estate," etc. Held, that these expressions did not constitute a valid gift nor operate as a declaration of trust. In his opinion Lord Cranworth said: "Mere declaration of trust by the owner of property, in favor of a volunteer, is inoperative, and this court will not interfere in such a case." This broad *dictum* is clearly erroneous, for a mere declaration of trust by the owner, in favor of a volunteer, if effectually made, is operative. In the subsequent case of *Jones v. Lock*, Lord Cranworth frankly admitted his mistake. In *Jones v. Lock*, L. R. 1 Ch. 25, 28, a father put a check into the hand of his infant son, and said, "I give this to baby for himself," and then took it back and put it away. He also expressed the intention of giving the amount of it to his son. Shortly afterwards the father died, and the check was found among his papers. Held, that there was no valid gift, and no declaration of trust constituting the donor a trustee. Lord Cranworth said that the owner of property may by a declaration of trust constitute himself a trustee on behalf of a volunteer, and that a parol declaration of trust of personalty may be valid in such a case. When there has been a declaration of trust, it will be enforced even in favor of volunteers; but an imperfect gift cannot be enforced. In *Richardson v. Richardson*, L. R. 3 Eq. 686, E., by a voluntary deed, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever," of the assignor to R. absolutely. At the date of the assignment, E. was owner of certain promissory notes. These were not mentioned in the assignment. On R.'s death these notes were found in his possession, *but not indorsed by E.*, and there was no evidence of any delivery of the notes by E. to R. Page Wood, V.C., held that although the assignment did not operate *as such* to pass the legal title to the notes, still it operated as a declaration of trust by E. in R.'s favor, and R. thereby became entitled to the notes. In *Morgan v. Malleon*, L. R. 10 Eq. 475, S., the owner of a certain India bond, signed the following voluntary instrument and delivered it to M., but did not deliver the bond itself: "I hereby give and make over to M. an India bond, value one thousand pounds." On the death of S., a contest arose between M. and the executors of S., and Lord Romilly held that the assignment was operative as an effectual declaration of trust in M.'s favor, and he was entitled to the bond. The judge said that the assignment was equivalent to the words "I undertake to hold the bond for you." These two cases have been severely criticised both in England and in this country; they must be regarded as contrary to the doctrine settled by the weight of authority, and as virtually overruled. In *Warriner v. Rogers*, L. R. 16 Eq. 340, a wealthy lady gave her servant, the plaintiff, a box, which she locked and handed to him, saying that it would be of service to him, but that it must not be opened until after her death, and she retained the key. At her death the box was opened, and in it was found a writing signed by the lady, addressed to the plaintiff, stating that the contents of the box were a

does not pass the legal title, will not be aided or enforced in equity. But if the property is not of such a nature that the legal title can be transferred, then, if nothing more remains to be done or can be done by the grantor or donor,—if, as far as he is concerned, the conveyance or assignment

deed of gift of certain real and personal estate specified. The box also contained certain title deeds of real property, but no deed to the plaintiff, and no instrument of any sort purporting to assign property to him, further than the first-mentioned writing. There was also another paper left by the deceased, to the effect that the deeds were to be given to the plaintiff. Held, that all these writings did not constitute a valid declaration of trust in plaintiff's favor. Bacon, V. C., in his opinion strongly dissented from the two last-mentioned cases. In *Richards v. Delbridge*, L. R. 18 Eq. 11, D., who owned leasehold premises and a stock in trade, purported to make a voluntary transfer or gift of the whole to his grandson, E., by means of the following memorandum, which he wrote upon the lease and signed: "This deed, and all thereto belonging, I give to E. from this time forth, with all the stock in trade." The lease with the memorandum was then delivered to E.'s mother, and the donor soon afterwards died. Held, that there was no valid assignment so as to constitute a perfected gift, and that there was no valid declaration of trust: See the extract from the opinion of Jessel, M. R., quoted in the preceding note. In *Heartley v. Nicholson*, L. R. 19 Eq. 233, the owner of a share in a coal mine, in letters and by a brief written memorandum indicated his intention to give the share to the plaintiff, his daughter, and some of the writings spoke of the share as already given. Nothing was done, however, sufficient to transfer the legal title to the share. Held, that these expressions of gift, or of an intention to give, did not amount to a declaration of trust, and did not constitute the father a trustee of the share for his daughter. Notwithstanding these criticisms, the supreme court of Pennsylvania, in *Bond v. Bunting*, 78 Pa. St. 210, seem to have accepted and followed the decisions in *Richardson v. Richardson* and *Morgan v. Malleson*, as correct. •

In *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, Mrs. Susan B. deposited in a savings bank a sum of money belonging to her, declaring at the time that she wanted the account to be in trust for the plaintiff. The account was so entered in the books of the bank, and a pass-book was delivered to her, containing the following: "The Citizens' Savings Bank, in account with Susan Boone, in trust for Lillie Willard, five hundred dollars." Mrs. B. retained possession of the pass-book, and the money remained in the bank until her death. Plaintiff was ignorant of the deposit until after the donor's death. Held, that the transaction was an effectual declaration of trust, constituting the donor a trustee for the plaintiff, and clothing the plaintiff with the beneficial ownership of the money; that the donor's retention of the pass-book was not inconsistent with her position as a trustee, and that notice to the *cestui que trust* was not necessary in order to constitute a valid trust: See extract from the able opinion of Church, C. J., in the preceding note. In *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69, and *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep.

is complete, and he has done all that is necessary to be done, having regard to the nature of the property,—the conveyance or assignment will be effectual in equity, and will be enforced on behalf of the donee.² It should be observed

447, the facts were quite similar, and the trusts were upheld.^a In *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, Young placed certain bonds in two envelopes, and wrote on each envelope a memorandum, signed by him, that a specified number of the bonds therein belonged to his son W., and the residue to his son J., but that the interest to become due thereon was "owned and reserved" by himself during his life, and that at his death "they belong absolutely and entirely to W. and J. and their heirs." The donor showed these envelopes and memoranda to the wives of his sons, and made statements to them expressing his intention that the gift was to be complete and valid. The donor retained possession of the envelopes and contents until his death, about a year afterwards. Held, that there was no executed and valid gift passing the legal title, and no valid declaration of trust constituting the father a trustee for the donees: See opinion of Rapallo, J., quoted in previous note. In *Estate of Webb*, 49 Cal. 541, a person had written a letter to his sister, in which he promised to assign some securities to her, and this was held not an executed gift nor a valid trust. In *Taylor v. Henry*, 48 Md. 550, one H. deposited in a bank a sum of money, belonging to himself, to the credit of himself and his sister M., so that the account was entered, "H., M., and the survivor of them, subject to the order of either, received \$1,850." A short time after, H. drew out fifty dollars, and died in about a month, leaving the eighteen hundred dollars on deposit. Held, that since H. retained the power and dominion over the money, there was not a complete gift, and the transaction did not constitute a valid declaration of trust in M.'s favor. See also *Boykin v. Pace's Ex'r*, 64 Ala. 68; *Hill v. Den*, 54 Cal. 6; *Gadsden v. Whaley*, 14 S. C. 210.

² Illustrations of the first class, where the assignment was incomplete, and the donee acquired no right:^b *Antrobus v. Smith*, 12 Ves. 39; *Searle v. Law*,

(^a) Also in *Willis v. Smyth*, 91 N. Y. 297. See *Connecticut River Sav. Bk. v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944, 25 Atl. 487 (citing the text); *Tusch v. German Sav. Bk.*, 20 Misc. Rep. 571, 46 N. Y. Supp. 422 (the intention of a settlor, to create a trust, may control though the trust be expressed in the form of a power of attorney that, as such, was revoked).

(^b) *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213; *Clay v. Layton*, (Mich.) 96 N. W. 459 (grantor made deeds and directed that they should be

delivered after his death; no trust). Where A had B draw up an assignment of a bond and mortgage to C, declaring his intention to give them to C, but kept them a month and then had B deposit them in bank where they remained until A's death, the court held, after considering the leading cases on the subject, that the assignment was incomplete; it said, "It is also true that there must be evidence of such acts done or words used on the part of the creator of the alleged trust that the intention to create it arises

however, that by recent statutes nearly all, if not quite all, legal things in action have been rendered assignable at law, so that the cases in which the last-mentioned rule can apply have been very much limited.

§ 999. **Donor the Equitable Owner.**—Where the donor is only the equitable owner, the legal estate being vested in a third person, he may make a voluntary transfer of his interest by conveyance or assignment; and if he has done all that is within his power to pass the property directly to the

15 Sim. 95. Examples of the second class, where the donor did all that the nature of the property admitted: *c* *Edwards v. Jones*, 1 Mylne & C. 226, 238; *Fortescue v. Barnett*, 3 Mylne & K. 36; *Pearson v. Amicable Ass. Co.*, 27 Beav. 229; *Weale v. Ollive*, 17 Beav. 252; *Pedder v. Mosely*, 31 Beav. 159; *Woodford v. Charnley*, 28 Beav. 96; *Blakely v. Brady*, 2 Dru. & Walsh, 311; *Kiddill v. Farnell*, 3 Smale & G. 428.

as a necessary inference therefrom and is unequivocal. The acts must be of that character which will admit of no other interpretation than that such legal rights as the settlor retains are held by him as trustee for the donee." *Wadd v. Hazleton*, 137 N. Y. 215, 33 Am. St. Rep. 707, 21 L. R. A. 693, 33 N. E. 143.

(*c*) *Fox v. Hawks*, 13 Ch. Div. 822 (an apparently voluntary assignment was held to be a declaration of trust with the husband as trustee). An owner of an insurance policy, being indebted to an estate of which he was executor, placed the policy with the papers of the estate, and with it put a letter saying that the policy was collateral for his indebtedness to the estate; later he said he did not regard the policy as his property but as held in trust for the estate; this was considered a good declaration of trust, though the policy had remained in his possession. *Janes v. Falk*, 50 N. J. Eq. 468, 26 Atl. 138. In *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072, A took out a life insurance policy to secure B

for money advanced; he indorsed, on the face of the policy, "Payable, in case of death, to Wm. H. Richardson (B) as his interest may appear;" the policy was not delivered to B and the company was not notified, as required, but the assignment was held complete and A's administrator liable (the case was not a *voluntary* assignment but is inserted as an apt illustration of what equity may regard as a *completed* assignment); *Kimball v. Leland*, 110 Mass. 325, Ames Cas. on Trusts 155, note (a delivery of a pass-book, with power to collect the money); approved in *Foss v. Lowell Bk.*, 111 Mass. 285, Ames Cas. on Trusts 155, note (delivery of a bank-book and notice given the bank is a "complete assignment"); approved in *Davis v. Ney*, 125 Mass. 590 (bank-book delivered); *Hill v. Stevenson*, 63 Me. 364 (the delivery of the pass-book without other assignment, is complete, though there is no power to compel the bank to pay without an order from the donor); and see the cases cited in the note to § 997, *supra*.

donee, or to declare a trust in favor of the donee, the donee's rights will be protected and enforced by a court of equity.¹ Also, the donor holding the equitable estate may direct the trustee in whom is vested the legal title to hold the property in trust for the donee; and this will create a valid trust in favor of the donee, and will clothe him with the beneficial interest, even though the direction is voluntary; and it is not necessary that the trustee should give his assent.² Finally, the holder of the equitable estate may,

¹ *Kekewich v. Manning*, 1 De Gex, M. & G. 176; *In re Way's Trusts*, 2 De Gex, J. & S. 365; *Baddeley v. Baddeley*, L. R. 9 Ch. Div. 113; *Gilbert v. Overton*, 2 Hem. & M. 110; *Donaldson v. Donaldson*, Kay, 711; *Voyle v. Hughes*, 2 Smale & G. 18; *Pearson v. Amicable Ass. Co.*, 27 Beav. 229; and see *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285. Notice to the trustee is not necessary to perfect the trust: *Donaldson v. Donaldson*, *supra*; *Tierney v. Wood*, 19 Beav. 330; but may be necessary to protect the donee against third persons: *Donaldson v. Donaldson*, Kay, 711, 719.

² *McFadden v. Jenkyns*, 1 Phill. Ch. 153; *Meek v. Kettlewell*, 1 Phill. Ch. 342; *Bill v. Cureton*, 2 Mylne & K. 503; *Rycroft v. Christy*, 3 Beav. 238; *Bentley v. Mackay*, 15 Beav. 12; *Gilbert v. Overton*, 2 Hem. & M. 110. A receipt in the form, "Received of B, for the use of A, one hundred pounds, to be paid to A at B's death," is a sufficient declaration of trust: *Moore v. Darton*, 4 De Gex & S. 517; *Grant v. Grant*, 34 Beav. 623, 626; *Paterson v. Murphy*, 11 Hare, 88. A banker who debits himself in his books with money on behalf of another person thereby declares himself a trustee of it: *Stapleton v. Stapleton*, 14 Sim. 186; and a declaration of trust otherwise sufficient will be valid, although the donor retain possession and control of the fund: *Wheatley v. Purr*, 1 Keen, 551; *Vandenberg v. Palmer*, 4 Kay & J. 204.^a

(^a) But in such cases as *McFadden v. Jenkyns*, *supra*, where a debt is attempted to be changed into a trust, it must be borne in mind that ordinarily there is no specific *res* set aside; this may prevent the creation of a trust in many such cases, and Lord Lyndhurst seems to have given the subject less notice than it deserved: See *Burrowes v. Gore*, 6 H. L. Cas. 907, *Ames Cas. on Trusts* 48, note 1, for a discussion of the point; see also *In re Caplen's Estate*, 45 L. J. Rep. 280; *Eaton v. Cooke*, 25 N. J. Eq. 55. If, in the attempt to change the nature of the obligation,

a novation takes place, the beneficiary obtains an enforceable right: See *Hurlbut v. Hurlbut*, 49 Hun 189, 1 N. Y. Supp. 854. In either case it should be borne in mind that one party alone cannot change the relation: *Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617. But if both the debtor and creditor release their previous rights the trust created would be founded upon a valuable consideration; if the trust relation is changed to a legal right, the same is true: *Topham v. Morecraft*, 8 El. & B. 972; *Roper v. Holland*, 3 Adol. & El. 99.

by a sufficient declaration of trust, constitute himself a trustee for the donee with respect to the property, subject to the same limitations which apply to such declarations of trust by a donor who holds the legal estate. In conclusion, it may be truly said that each case of voluntary trust or transfer depends largely upon an interpretation of the language used by the donor; whether the language operates as a complete transfer, or is an effectual declaration of trust, must always be the vital question.

§ 1000. Executed and Executory Trusts.—This distinction between “executory” and “executed” trusts is solely concerned with questions of construction and interpretation of the instrument creating the trust, and of enforcement of the trust thus created,—namely, whether the strict rules of law governing limitations, and especially the rule in Shelley’s case, are or are not to be applied in such construction, interpretation, and enforcement. Whenever a trust is executed, it is always construed in conformity with the strict legal rules concerning limitations of estates, and the rule in Shelley’s case is made operative if the terms of the successive trusts bring it within that rule, even though the apparent intention of the one creating the trust is thereby defeated. Wherever a trust is executory, the intention of the party is followed in its construction and enforcement, the strict legal rules concerning limitations are not invoked, and the rule in Shelley’s case is not permitted to operate. Executory trusts and questions concerning them ordinarily arise from marriage articles or inchoate marriage agreements in which a complete settlement is not made, but the party covenants that he will settle property or convey property upon trusts for the benefit of his family, and from wills in which the testator does not devise property upon completed trusts, but devises to trustees upon trusts for them to settle it. In these and similar instances a court of equity is called upon to determine the nature of the settlements to be made, and in doing so it carries out the intention of

the covenantor or testator, actual or presumed, without regard to the strict legal rules of limitation. As such instruments are comparatively infrequent in this country, and the subject rarely comes before the American courts, it will be sufficient to state the more general doctrines as established by decisions, without going into any minute detail of special rules.¹

§ 1001. Definition and Description.— A trust is *executed* when no act is necessary to be done to give effect to it when the trust is fully and finally declared in the instrument creating it.^a A conveyance of land to A in trust for B, a devise of land to A in trust to receive the rents and profits and apply them to the use of B, are examples. It is plain that all ordinary express passive or active trusts are thus executed. A trust is *executory* when some further act is directed to be done, in order to complete and perfect the trust intended to be created.^b A misconception should here be guarded against. When, by the terms of the trust *as created*, and for the purpose of carrying it into effect, the trustee is directed to do some act with the property, the trust is not thereby executory. Giving property to a trustee

¹ The doctrine of executory trusts is one of great practical importance in England. It is fully discussed in *Lord Glenorchy v. Bosville*, Cas. t. Talh. 3; 1 Lead. Cas. Eq., 4th Am. ed., I, 13, 36, and the editor's notes.

(a) Cited, with approval, in *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269. See the following cases as examples of executed trusts: *Stratton v. Gildersleeve*, 41 Atl. 1117 (N. J.); *Riggins v. Adair*, 105 Ga. 727, 31 S. E. 743; *Parrott v. Dyer*, 105 Ga. 93, 31 S. E. 417.

(b) *Pratt v. Tuttle*, 136 Mass. 233, Ames Cas. on Trusts 32, seems a good illustration of an executory trust; in that case, B was to purchase patents, and, to that end, was to make and sell patented articles and pay over one half the net profits to A, until the whole agreed price

was paid, whereupon the patents were to be transferred: *Baker v. Nall*, 59 Mo. 268; *Fisher v. Wister*, 154 Pa. St. 65, 25 Atl. 1009. See the following cases as examples of what have been held executory trusts: *Boyd v. England*, 56 Ga. 598; *Taylor v. Brown*, 112 Ga. 758, 38 S. E. 66; *Clark v. East Atlanta Land Co.*, 113 Ga. 21, 38 S. E. 323; *Sanders v. Houston Guano & Warehouse Co.*, 107 Ga. 49, 32 S. E. 610; *Reynolds v. Reynolds*, 61 S. C. 243, 39 S. E. 391; *Laguerenne v. Farrar*, 25 Tex. Civ. App. 404, 61 S. W. 953.

upon trust to convey to a person, or upon trust to convey it upon *certain specified trusts*, does not render the trust executory. In all express active trusts the trustee is directed to do some acts with the property. The essence of an executory trust does not consist in acts directed to be done by the trustee with respect to the property, but in acts directed to be done in perfecting and completing the trust itself which was not fully declared in the original instrument of creation. "If the scheme has been imperfectly declared at the outset, and the creator of the trust has merely denoted his ultimate object imposing on the trustee or on the court the duty of effectuating it in the most convenient way, the trust is called executory."¹ "All trusts are in a sense executory, because a trust cannot be executed except by conveyance, and therefore there is something always to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator [or settlor] been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from *general expressions* what his intention is? or has he so defined that intention that you have nothing to do but to take the limitations he has given you, and to convert them into legal estates?"² In a word, the distinction

¹ This very accurate statement is quoted from the text of Adams's Equity, 127, m. p. 40.

² Egerton v. Brownlow, 4 H. L. Cas. 1, 210, per Lord St. Leonards. The whole subject was very fully and ably discussed in the recent case of Cushing v. Blake, 30 N. J. Eq. 689, and as such discussions are comparatively rare in our reports, it may be proper to quote from the case at some length. William Durbridge, contemplating marriage, conveyed certain lands to Blake, for the benefit of his intended wife, a daughter of Blake. Mr. Blake executed a deed, reciting the intended marriage, the conveyance of the prop-

(c) In the first edition of this work, the word "not," which, obviously, is necessary to the sense of the passage, was, by typographical error, omitted.

(d) Quoted in In re Fair, 132 Cal. 593, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1000.

consists in the manner in which the trust is declared. The doctrine of executory trusts finds one of its most striking applications in the mode of carrying into effect and enforcing marriage articles. Where such articles or agreements

erty to himself in trust for the future wife's sole use and benefit, etc., and declaring that he held the premises only in trust for the sole and separate use of the intended wife. The deed went on to declare specific trusts in favor of the wife; that she should have possession, should receive the rents and profits, etc., and added, "on the further trust that he would, whenever required by her, in writing, during her lifetime, convey the property to such person as she should appoint, and at her death to such person as she should by her will have appointed, and on failure of such will, to her heirs at law, to hold to them, their heirs and assigns, forever." The marriage took place; the wife died, leaving one child, and without having disposed of any part of the property during her lifetime, and without making a will. Her husband survived her, and after her death conveyed his life estate in the land to the complainant, who filed a bill for a decree declaring that the husband obtained an equitable estate by the curtesy in the premises, and establishing his own title thereto. From the decree in favor of the complainant the defendant appealed. Depue, J., after discussing the nature of equitable estates, and whether dower and curtesy are allowed in them, says (p. 697): "In the present case the limitation over after the death of the wife, in default of an appointment by her, is to her heirs at law, to hold to them their heirs and assigns forever. Under the rule in Shelley's case, such a limitation gives to the wife an estate in fee-simple, in which the husband, having issue by her, would be entitled to curtesy, if her estate was a legal estate. The rule in Shelley's case is applicable to equitable as well as to legal estates: *Croxall v. Shererd*, 5 Wall. 268; and in no case whatever, of a trust executed, have the words 'heirs' or 'heirs of the body,' following a limitation to the ancestor for life, received a construction in equitable estates different from that which the same limitations would receive in legal estates: 1 Preston on Estates, 386. The counsel for the defendant has therefore placed his denial of the right of the husband to curtesy on the ground that the trust in this instance was an executory trust. In some cases, and for certain purposes, a court of equity, where the trust is what is known as an executory trust, will so deal with it as to give effect to the general intent of the creator of it, without adherence to the strict legal effect of the terms in which it is expressed. In one sense, every trust is executory. At common law every use was a trust. But by the statute of uses certain uses were converted into legal estates, and, strictly speaking, every trust executed is a legal estate. In this sense the trust must be executory, to bring the case at all within the jurisdiction of chancery: *Bagshaw v. Spencer*, 1 Ves. Sr. 142, 152. But this is not the sense in which the term 'executory trust' is used as applicable to that class of cases in which equity will deal with the subject without regard to the legal signification of the terms in which the trust is declared. The earliest reported case in which the distinction is taken between executed

to settle are general in their terms, a court of equity presumes that it was the intention of the parties to provide for the issue of the marriage, and will therefore direct a settlement to be made which does provide for the children;

and executory trusts as administered in the court of chancery is *Leonard v. Countess of Sussex*, 2 Vern. 526. This difference was first fully explained by Lord Chancellor Cowper in *Earl of Stamford v. Hobart*, 3 Brown Parl. C. 31; and notwithstanding the doubt expressed by Lord Hardwicke in *Bagshaw v. Spencer*, this distinction is completely settled in the English courts. The leading cases on the subject are *Wright v. Pearson*, 1 Eden, 119; *Austen v. Taylor*, 1 Eden, 361; *Jervoise v. Duke of Northumberland*, 1 Jacob & W. 559; *Boswell v. Dillon*, Dru. 291, and *Rochfort v. Fitzmaurice*, 2 Dru. & War. 1, in which Lord Chancellor Sugden discusses the earlier cases on the subject. From an examination of these cases and others, the distinction will be found to rest on *the manner in which the trust is declared*. Where the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust. In such a case equity will not interfere and give effect to it on a construction different from what it would receive in a court of law. It is only where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of trustees, that a court of equity regards the trust as an executory trust, and will assume jurisdiction to direct the trust to be executed upon a construction different from that which the instrument creating it would receive in a court of law. These principles are so clearly and fully stated by Lord Chancellor Sugden in *Boswell v. Dillon*, *supra*, that the following quotation may be profitably made from his opinion: 'By the term "executory trust," when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes; one, in which though something is required to be done (for example, a settlement to be executed), yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow out and execute the intention of the party as appearing in the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. [I would remark that it seems to be alike unnecessary and confusing to call such trusts executory; if they are so called, then all trusts to convey or to sell, and the like, should also be included under the same name.] The other species of executory trust is, where the testator, directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves.'" Mr. Justice Depue then cites and quotes from earlier New Jersey decisions in which the distinction had been adopted,—viz.: *Mullany v. Mullany*, 4 N. J. Eq. 16; 31 Am. Dec. 238; *Price v. Sisson*, 13 N. J. Eq. 168; *Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475,—and proceeds: "It is obvious from what has already been said that a mere direction to the trustee

and if the agreement contains technical terms, which in a fully executed trust would admit the operation of the rule in Shelley's case, and thus render the limitations in favor of the children liable to be destroyed, the court will order the

to convey in accordance with trusts which have been fully defined will not convert a trust into an executory trust in the true sense of the term: *Egerton v. Brownlow*, 4 H. L. Cas. 1, 210. In *Price v. Sisson*, *supra*, the deed creating the trust contained a direction to the trustee to convey, and yet the chancellor and this court regarded it as creating an executed trust, and subject to have its limitations construed by rules applicable to legal estates. The cases to the contrary are those in which the intent is expressed in general language, and the trusts are therefore imperfectly declared, so that it is apparent on the face of the instrument that it was contemplated that they should be executed by the trustees in a more accurate manner, to give effect to the intent expressed: *Lord Glenorchy v. Bosville*, Cas. t. Talb. 3; *Leonard v. Lady Sussex*, 2 Vern. 526; *Rochfort v. Fitzmaurice*, 2 Dru. & War. 1. Or where some of the limitations are illegal, and the court is called upon to carry into effect the trusts declared as far as the rules of law will permit: *Earl of Stamford v. Hobart*, 3 Brown Parl. C. 31; *Humbertson v. Humbertson*, 2 Vern. 737. A conveyance by the trustee may be necessary for the purpose of investing the *cestui que trust* with the legal estate; but if the trusts are fully and accurately expressed, the rights of the beneficiaries are not affected by the direction to convey; the conveyance must conform to their rights as declared, and the equitable estate immediately vests accordingly: *Stanley v. Stanley*, 16 Ves. 491; *Phipps v. Ackers*, 9 Clark & F. 583, 594, 599, 601, 604; *Bowen v. Chase*, 94 U. S. 812, 818. It was further contended that this case is excepted out of these rules for the construction of trusts in a court of equity, by the fact that the trust in question was in the nature of a marriage settlement. There is a difference in one respect between marriage articles and a devise by will. Under the artificial rule in Shelley's case, a gift to the ancestor for life, with a limitation over to heirs or heirs of the body, creates in him an estate in fee-simple or in tail, and the limitation over is capable of destruction by him, by conveyance or devise if the estate be a fee-simple, or by fine and common recovery if it be a fee-tail. When these technical terms are used in an agreement for a settlement in view of marriage, the court will infer, from the nature of the agreement, that the parties contemplated provisions for the issue of the marriage, which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be made in such a manner as will prevent the destruction of the limitations over to issue: *Blackburn v. Stables*, 2 Ves. & B. 367; *Jervoise v. Duke of Northumberland*, 1 Jacob & W. 559; *Rochfort v. Fitzmaurice*, 2 Dru. & War. 1, 18; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543. But this doctrine is applicable only so long as the agreement for a settlement remains a matter of contract. If the parties have themselves completed the settlement by a deed complete in itself and perfect, so that it requires only to be obeyed and fulfilled by the trustees, according to the provisions of the settlement, the trust will be construed in the same manner as similar trusts created for other purposes: *Neves v. Scott*,

settlement to be made in such a manner as to prevent the operation of that rule and the destruction of the limitations to the issue. This doctrine is applicable, however, only when the marriage articles are an agreement for a settlement, and not when the settlement has been completed.

9 How. 196; Tillinghast v. Coggeshall, 7 R. I. 383; Carroll v. Renich, 7 Smedes & M. 798." The court held that the settlement was a final deed of settlement, and not a mere agreement to settle; that the trusts were executed, and therefore that the husband was entitled to curtesy in his wife's equitable estate in fee-simple: See also Lord Glenorchy v. Bosville, Cas. t. Talb. 3; 1 Lead. Cas. Eq. 1, 13, 36; Egerton v. Earl of Brownlow, 4 H. L. Cas. 1; Sackville-West v. Viscount Holmesdale, L. R. 4 H. L. 543; Phipps v. Ackers, 9 Clark & F. 583, 594, 599, 601, 604; Thompson v. Fisher, L. R. 10 Eq. 207; Phillips v. James, 3 De Gex, J. & S. 72; Viscount Holmesdale v. West, L. R. 12 Eq. 280; Magrath v. Morehead, L. R. 12 Eq. 491; Loch v. Bagley, L. R. 4 Eq. 122; In re Bellasis's Trust, L. R. 12 Eq. 218; Rochfort v. Fitzmaurice, 2 Dru. & War. 1; Boswell v. Dillon, Dru. 291; Leonard v. Lady Sussex, 2 Vern. 526; Earl of Stamford v. Hobart, 3 Brown Parl. C. 31; Humbertson v. Humbertson, 2 Vern. 737; Wright v. Pearson, 1 Eden, 119; Austen v. Taylor, 1 Eden, 361; Sweetapple v. Bindon, 2 Vern. 536; Papillon v. Voice, 2 P. Wms. 471; Lord Deerpur v. Duke of St. Albans, 5 Madd. 232, 260; Jervoise v. Duke of Northumberland, 1 Jacob & W. 559; Bowen v. Chase, 94 U. S. 812, 818; Croxall v. Shererd, 5 Wall. 268, 281; Neves v. Scott, 9 How. 196; Tillinghast v. Coggeshall, 7 R. I. 383; Imlay v. Huntington, 20 Conn. 146, 162; Wood v. Burnham, 6 Paige, 513, 518; Tallman v. Wood, 26 Wend. 9, 19; Wagstaff v. Lowerre, 23 Barb. 209, 215; Mullany v. Mullany, 4 N. J. Eq. 10; 31 Am. Dec. 238; Price v. Sisson, 13 N. J. Eq. 168; Weehawken F. Co. v. Sisson, 17 N. J. Eq. 475; Dennison v. Goehring, 7 Pa. St. 175, 177; 47 Am. Dec. 505; Lessee of Findlay v. Riddle, 3 Binn. 139, 152; 5 Am. Dec. 355; Horne v. Lyeth, 4 Har. & J. 431, 434; Saunders v. Edwards, 2 Jones Eq. 134; Porter v. Doby, 2 Rich. Eq. 49; Garner v. Garner, 1 Desaus. Eq. 437, 444; Berry v. Williamson, 11 B. Mon. 245, 251; Riddle v. Cutter, 49 Iowa, 547.^e

(e) See, also, Cockrell v. Earl of Essex, 26 Ch. Div. 538; Nash v. Allen, 42 Ch. Div. 54; Ballance v. Lanphier, 42 Ch. Div. 62; Pillot v. Landon, 46 N. J. Eq. 310, 19 Atl. 25; Petition of Angell, 12 R. I. 630; and see Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899. In Lynn v. Lynn, 135 Ill. 19, 25 N. E. 634, the court said: "The gist of the Ellison Case, (Ellison v. Ellison, 6 Ves. 656) which may be regarded as a leading authority on the subject, seems to be that, where the relation of trust and ces-

tui que trust has been created by the deed the transaction will be regarded as an executed trust": Estate of Smith, 144 Pa. St. 428, 27 Am. St. Rep. 641, 22 Atl. 916 ("an executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust, and to give it effect").

In the case of a will there is no presumption of an intent to provide for children; the provisions of the will itself are the only guide in construing its terms. "If technical words are used, and are not modified or explained by the context, it seems that the trusts, whether executory or not, must be construed in accordance with their technical sense. Still, in the case of an executory trust created by a will, the intention so to modify the terms may be collected from slighter indications than would be sufficient in that of an executed trust."³ It should be observed, in this connection, that the statutory abrogation of the rule in *Shelley's* case has removed one of the most im-

³ *Adams's Equity*, 129; see *Blackburn v. Stables*, 2 Ves. & B. 367; *Jervoise v. Duke of Northumberland*, 1 Jacob & W. 559; *Rochfort v. Fitzmaurice*, 2 Dru. & War. 1, 18; *Sackville-West v. Lord Holmesdale*, L. R. 4 H. L. 543; *Trevor v. Trevor*, 1 P. Wms. 622; *Austen v. Taylor*, 1 Eden, 361; *Neves v. Scott*, 9 How. 196; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Carroll v. Renich*, 7 Smedes & M. 798; *Berry v. Williamson*, 11 B. Mon. 245, 251; *Imlay v. Huntington*, 20 Conn. 146;† and cases in last note.

As to executory trusts of chattels and other personal property, see *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387; 12 Ves. 218; *Stanley v. Leigh*, 2 P. Wms. 686, 690; *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 232; *Rowland v. Morgan*, 2 Phill. Ch. 764; *Lord Scarsdale v. Curzon*, 1 Johns. & H. 40; *Shelley v. Shelley*, L. R. 6 Eq. 540, 546.

English courts of equity exercise the very high jurisdiction of setting aside or modifying a settlement which does not carry out the presumptive intention of the articles, and is not such a one as ought to have been made, and also a settlement made by a young woman which does not contain the provisions usually inserted to protect the rights of the wife or children. No fraud or undue influence or mistake need be shown; the power is a part of the jurisdiction of equity over married women and infants, with respect to their property. It is used to prevent improvident settlements made without advice, or without a due regard for the rights of the wife or children. A settlement may therefore be set aside and modified after the death of the husband. If this particular jurisdiction is ever exercised by American courts of equity, the occasions for it must be extremely rare: *Smith v. Iliffe*, L. R. 20 Eq. 666, 668; *Wolterbeek v. Barrow*, 23 Beav. 423; *Hobson v. Ferraby*, 2 Coll. C. C. 412; *Harbidge v. Wogan*, 5 Hare, 258; *Torre v. Torre*, 1 Smale & G. 518; *Cogan v. Duffield*, L. R. 20 Eq. 789; *Taggart v. Taggart*, 1 Schoales & L. 84; *Warwick v. Warwick*, 3 Atk. 291, 293; see *Neves v. Scott*, 9 How. 196; *Garnsey v. Mundy*, 24 N. J. Eq. 243 (a conveyance in trust was set aside because improvident; etc., even though infant children of the grantor were beneficiaries).

(†) *Petition of Angell*, 13 R. I. 630.

portant occasions for applying the distinction between executed and executory trusts in many of the American states.

§ 1002. **Powers in Trust.**—Analogous to trusts proper, but differing from them in one essential feature, are powers in trust. In a true trust the legal title is in and by its creation always vested in the trustee, but to be held for the benefit of the beneficiary. In a trust power, as distinguished from a trust, the legal title is vested, not in the trustee, but in a third person, and the trustee has authority to convey or dispose of the property to or for or among the beneficiaries. A power generally is an authority given to A to convey or dispose of an interest which he does not himself hold, and of which the complete legal title is vested in another person, B.¹ Where the power is not coupled with a trust, A is clothed with a complete discretion whether he will or will not execute it; courts of equity do not control that discretion; if he utterly fails to make any appointment, they do not relieve the expected beneficiaries to or among whom the disposition might have been made. Where the power is in trust, A may have some discretion with respect to the mode in which he shall exercise it, with respect to the amounts distributed among a designated class of beneficiaries, and the like; but he has no discretion as to whether he will or will not exercise it at all. It partakes so much of the nature of a trust, that an obligation rests upon him, and an equitable right is held by the beneficiaries, — a right which equity recognizes, and to a certain extent protects; so that if A does not discharge the duty resting upon him, a court of equity will, to a certain extent, discharge the duty in his stead. A trust power may therefore be defined as follows: It is an authority given to A to dispose of property of which the legal title is held by B, to or

¹ There are various species of powers, in part depending upon the question whether the donee, A, has *any* interest in the property. Thus he might have a life estate and have power to dispose of the fee; or he might have no interest whatever, and be clothed with a naked power to dispose of property entirely held by another. It is unnecessary to go into the classification of powers.

among a specified beneficiary or class of beneficiaries, conferred in such terms that a fiduciary or trust obligation rests upon A to make the disposition, although he *may* be clothed with some discretion as to the amounts or shares which he shall confer upon the individuals constituting a class of beneficiaries, or even as to the persons whom he shall select from the class to receive the entire benefit. On the other hand, the beneficiaries may be so specified that no discretion with respect to them exists.² When the trust power is of such a nature that the donee-trustee is authorized to dispose of the property among a class, and is clothed with a discretion, a court of equity will not interfere to control that discretion, or interfere with the mode of exercising it, if he does in fact make an appointment. If, however, the donee-trustee fails to act at all, and makes no appointment, it is a settled rule that a court of equity, in enforcing the power on behalf of the beneficiaries, will always decree an equal distribution of the property among all the persons constituting the class. In New York, and other states which have followed the New York type of legislation, the subject of powers in trust has assumed a considerable importance. The statutes, while abolishing all express trusts, with few specified exceptions, provide that a disposition in the form of a trust, but not valid as a true trust under the statute, may still be valid and take effect as a power in trust. It follows that every kind of express active trust possible under the former system may now be created and made effectual as a power in trust.³

² In the leading case, *Brown v. Higgs*, 8 Ves. 561, 570, Lord Eldon said: "There are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is intrusted and required to execute; and without regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his own room and place."

³ *Harding v. Glyn*, 1 Atk. 469; 2 Lead. Cas. Eq., 4th Am. ed., 1833, 1848, 1857; *Burrough v. Philcox*, 5 Mylne & C. 72; *Grant v. Lynam*, 4 Russ. 292; *Penny v. Turner*, 2 Phill. Ch. 493; *Fordyce v. Bridges*, 2 Phill. Ch. 497;

§ 1003. **Legislation of Various States.**—Trusts have been regulated and limited by statute in several of the leading states, and this statutory system is so important that it demands a separate notice, and at least a general description.¹ The prevailing type originated in New York, and

Gough v. Bult, 16 Sim. 45; Brown v. Pocock, 6 Sim. 257; Croft v. Adam, 12 Sim. 639; Cole v. Wade, 16 Ves. 27, 42; Izod v. Izod, 32 Beav. 242; In re White's Trusts, Johns. 656; Brook v. Brook, 3 Smale & G. 280; Gude v. Worthington, 3 De Gex & S. 389; Salusbury v. Denton, 3 Kay & J. 529; Minors v. Battison, L. R. 1 App. C. 428; Willis v. Keymer, L. R. 7 Ch. Div. 181 (the trustee's discretion); Smith v. Bowen, 35 N. Y. 83; Whiting v. Whiting, 4 Gray, 236, 240; Chase v. Chase, 2 Allen, 101; Miller v. Meetch, 8 Pa. St. 417; Whitehurst v. Harker, 2 Ired. Eq. 292; Withers v. Yeadon, 1 Rich. Eq. 324; Collins v. Carlisle, 7 B. Mon. 13; Gibbs v. Marsh, 2 Met. 243.^a In many of the English cases the appointment is to be made by way of a testamentary disposition, and the beneficiaries are aided after the death of the donee-trustee without making any appointment. Under the legislation of American states, where an express active trust takes effect only as a power in trust, the power may clearly be enforced *inter vivos* against the trustee himself, under the same circumstances in which a true trust might be enforced. Examples will be found *post*, under § 1003, in connection with this modern legislation.^b

1 N. Y. Rev. Stats., pt. 2, tit. 2, c. 1, art. 2, sec. 45: Uses and trusts abolished, except as herein authorized. Secs. 46–49: In passive trusts by will or deed, the whole estate passes directly to the beneficiary. Sec. 55: Express trusts may be created for any or either of the following purposes: 1. To sell lands for the benefit of creditors; 2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of land, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules concerning the suspension of the power of alienation; 4. To receive rents and

(a) This section is cited in *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160. See, also, *Kintner v. Jones*, 122 Ind. 148, 23 N. E. 701; *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877, 14 Atl. 490; *Tempest v. Lord Camoys*, 21 Ch. Div. 571; *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 26 N. E. 730 (a power in trust to distribute the residue of an estate among such charities as certain persons named shall choose is void for uncertainty, as no class is designated from which to make a

choice); In *re Weekes' Settlement*, [1897] 1 Ch. 289 (a mere power, not exercised, will not necessarily be treated as a trust).

(b) And see *Henderson v. Henderson*, 113 N. Y. 1, 20 N. E. 814; *Syracuse Savings Bank v. Holden*, 105 N. Y. 415, 11 N. E. 950; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805. In general on the subject of this paragraph, see §§ 835, 920.

has been followed in Michigan, Wisconsin, Minnesota, California, and Dakota. The important and distinctive features which constitute this type, so far as it deals with express

profits of lands, and to accumulate the same for the benefit of minors, for and during their minority. Sec. 60: In all these express trusts the whole estate is vested in the trustee; the beneficiary takes no estate in the land, but only the right to enforce a performance by the trustee. Sec. 63: In the third and fourth classes, the beneficiary cannot assign or in any manner dispose of his interest. Sec. 65: And the trustee is also unable to convey his interest if the trust is expressed in the instrument from which he derives his estate. Secs. 75, 77, 78: Express trusts not valid under this statute are valid and effectual as powers in trust.

In the same chapter (secs. 1-21) it is provided that the power of alienation cannot be suspended by a trust or other disposition, longer than during the continuance of *two* lives in being at the time when the trust or other disposition commences. The foregoing provisions concerning express trusts relate exclusively to trusts of real property. Trusts of personal property, with respect to their form and kind and object, are not restricted, except that they are all subject to the limitations concerning the suspension of the power of alienation.

Michigan.—2 Comp. Laws 1871, p. 1331:^a The system is substantially the same as that of New York, with some additions to the express trusts allowed. Sec. 11: The following express trusts are authorized: The first, second, and third classes are identical with the corresponding classes of the New York statute: 4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for the benefit of minors during their minority. 5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations concerning the suspension of the power of alienation. 2 Comp. Laws 1871, p. 1326, sec. 15:^b The power of alienation can only be suspended during two lives in being, as in New York.

Wisconsin.—2 Taylor's Rev. Stats. 1872, p. 1129, sec. 11:^c The express trusts authorized are identical with those of the Michigan statute.^d 2 Taylor's Rev. Stats. 1872, p. 1124, secs. 15, 16:^e The limitations upon the suspension of the power of alienation are the same as in New York and Michigan.

Minnesota.—Young's Gen. Stats. 1878, p. 553, sec. 11:^f The four classes of express trusts of land authorized are the same as the four classes of the

(^a) *Michigan*.—Howell's Stats. 1882, c. 214.

(^b) Howell's Stats. 1882, sec. 5531.

(^c) *Wisconsin*.—1 Sanborn and Berryman's Stats. 1889, sec. 2081.

(^d) Subdivision 6 authorizes trusts

for the perpetual preservation and repair of tombs and cemeteries.

(^e) 1 Sanborn and Berryman's Stats. 1889, secs. 2039, 2040.

(^f) *Minnesota*.—Kelly's Stats. 1891, sec. 4013.

trusts of land, are the following: 1. All uses, and all express *passive* trusts, and all express *active* trusts except certain enumerated kinds, are abolished. 2. Certain kinds of express active trusts are allowed, wherein the trustee has

New York statute. To these is added: 5. To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind, and to invest and loan the same for the benefit of the beneficiaries of such trust, subject to the control of the courts over the acts of the trustee.

California. — Civ. Code: The general system is the same as that of New York. Sec. 847: No trusts permitted, except those authorized. Sec. 863: In all express trusts, the whole estate vests in the trustee. Sec. 867: The beneficiary may be restrained from disposing of his interest. Secs. 869, 879: If the trust is declared in the conveyance to the trustee, every act or transfer of his in contravention of the trust is absolutely void; if the trust is not so declared, it is invalid as against a *bona fide* purchaser from the trustee. The express trusts authorized are somewhat broader than those of the New York statute. Sec. 857: The following classes of express trusts are authorized: 1. To sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust; 2. To mortgage or lease real property as in same class of the New York statute; 3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter time, subject to the rules concerning the suspension of the power of alienation; 4. To receive rents and profits and accumulate the same for minors, as in New York. Secs. 715, 716, 722-726, 771: Suspension of the power of alienation can only last during the continuance of *lives in being* (not *two lives*) at the creation of the trust. Sec. 2220: Express trusts of personal property are allowed for any purpose for which a contract may lawfully be made.

Dakota. — Civ. Code 1880, p. 243, sec. 282: Identical with that of California.

Georgia. — Although the legislation of this state does not follow the foregoing type, the code contains the following provisions, which *may* limit the extent to which express trusts can be created. Code 1873, p. 399, sec. 2305: "Estates may be created, not for the benefit of the grantee, but for the use of some other person. They are termed trust estates. No formal words are necessary to create such an estate. Whenever a manifest intention is exhibited that another person shall have the benefit of the property, the grantee shall be declared a trustee. Sec. 2306: Trust estates may be created for the benefit of any female, or minor, or person *non compos mentis*." See *Gordon v. Green*, 10 Ga. 534; *Russell v. Kearney*, 27 Ga. 96; *Ingram v.*

(*) *Georgia.* — Also, on compliance with certain requisites, for the benefit of persons mentally weak, intemper-

ate, profligate, etc.: Acts of 1876, p. 26; Code 1882, sec. 2306.

the whole estate and management,^h and the beneficiary has no estate, equitable or legal, but only the right to enforce the performance of the trust according to its terms against the trustee. These permitted species are all made subject to the rules concerning perpetuities, or the periods during which the absolute power of alienation may be suspended.

3. Trusts of personal property are not embraced within this scheme, and are not substantially modified or limited, except that they are subject to the rules concerning perpetuities.¹

4. When the trust is declared in the instrument by which the estate is conveyed to the trustee, any transfer or other act of his in contravention of the trust is absolutely void; when the trust is not declared in that conveyance, it becomes inoperative as against a *bona fide* purchaser for valuable consideration and without notice of the trust.

5. In those species which are for the permanent benefit of the beneficiary,—that is, those which are not trusts to sell or dispose of the property,—the beneficiary either is or may be made unable to assign or transfer his interest.

6. The general powers, duties, and liabilities of the trustees as established by the doctrines of equity jurisprudence are not otherwise altered. The portions of this system which relate to trusts arising by operation of law — resulting and constructive — will be described in a subsequent section.

§ 1004. Judicial Interpretation — Validity of Trusts.— The following are among the most important results of the judicial interpretation given to these statutory provisions: Since all passive trusts of land are abolished, a conveyance or devise of real property to A, merely in trust for or to the use of B, would not be void, but would vest the entire

Fraley, 29 Ga. 553; Logan v. Goodall, 42 Ga. 95; Sutton v. Aiken, 62 Ga. 733; Coughlin v. Seago, 53 Ga. 250; Adams v. Guerard, 29 Ga. 651; 76 Am. Dec. 624; Bowman v. Long, 26 Ga. 142; Boyd v. England, 56 Ga. 598.

(h) Culbertson v. Witbeck Co., (Mich.) 127 U. S. 335, 8 Sup. Ct. Rep. 1136, 32 L. ed. 134.

(i) See Gilman v. McArdle, 99 N. Y. 451, 52 Am. Rep. 41, 2 N. E. 464.

estate, legal and equitable, in B, as though the transfer had been made directly to him; and the same effect would be produced if the grantor should attempt to create a trust upon a trust, by any form of limitation, to A to the use of B, in trust for C.¹ The first class of express trusts, according to the form of the New York statute, is strictly confined to sales for the benefit of creditors; by the form of the California statute, the class clearly includes every kind of active trust which empowers the trustee to sell or convey the trust land.² The second class permits a trust to mortgage or lease lands, and with the money raised by the mortgage, or the rents from the leasing, to pay any kind of testamentary gift, or to pay off any encumbrance which may be on the land, but not for the purpose of pay-

¹ This has been expressly settled in New York, and there can be no doubt that the same result would take place in the other states.^a Even if the statute of uses of Henry VIII. is not regarded as re-enacted, the provisions of the modern statutes abolishing passive uses and trusts are based upon the same policy as the original legislation. And since these state statutes are more mandatory in their language, there seems to be no room left for the interpretation which permitted a passive trust to be created by means of a use limited upon a use: *Knight v. Weatherwax*, 7 Paige, 182; *Braker v. Deveraux*, 8 Paige, 513, 518; *Johnson v. Fleet*, 14 Wend. 176, 180, per Nelson, J.; *Rathhun v. Rathhun*, 6 Barb. 98; *Knickerbocker Ins. Co. v. Hill*, 3 Hun, 577; *Rawson v. Lampman*, 5 N. Y. 456; *Wright v. Douglass*, 7 N. Y. 564; *Astor v. L'Amoreux*, 4 Sand. 524; and see *Hill v. Den*, 54 Cal. 6; *Wormouth v. Johnson*, 58 Cal. 621; *Patton v. Chamberlain*, 44 Mich. 5; *Toms v. Williams*, 41 Mich. 552.^b

² In New York a trust to sell for any other purpose than payment of creditors is void as a trust, but valid and effectual as a power in trust: *Selden v. Vermilyea*, 1 Barb. 58. In California, the following are illustra-

(a) See the following cases, referring to the New York statute and its operation: *Salisbury v. Slade*, 48 N. Y. Supp. 55, 22 App. Div. 346; *Staples v. Hawes*, 39 App. Div. 548, 57 N. Y. Supp. 452; *Seidelbach v. Knaggs*, 60 N. Y. Supp. 774, 44 App. Div. 169. See *Farmers & Merchants' Ins. Co. v. Jensen*, 58 Nebr. 522, 78 N. W. 1054, 44 L. R. A. 862, for a valuable case discussing the reasons

for holding the statute of uses a part of the common law of the state. See *Walton v. Druntra*, 152 Mo. 489, 54 S. W. 233, for the holdings in regard to the Missouri statute.

(b) See, also, *Syracuse Savings Bank v. Holden*, 105 N. Y. 415, 11 N. E. 950; *Crook v. Rindskoff*, 105 N. Y. 476, 12 N. E. 174; *Sullivan v. Bruhling*, 66 Wis. 472, 29 N. W. 211; *Farmers' Nat. Bank v. Moran*, 30

ing general creditors.³ The third class authorizes a most useful kind of trust in marriage and family settlements, and in testamentary provisions for widows and children. If the provisions of the trust unduly suspend the power of alienation, it is void. It should be observed that attempted trusts not valid as conforming to this class may be effectual as powers in trust.^{4a} By one form of the fourth class a

tions: Sale for benefit of creditors: *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480; *Gschwend v. Estes*, 51 Cal. 134; *Sharp v. Goodwin*, 51 Cal. 219; *Tyler v. Granger*, 48 Cal. 259; *Thompson v. McKay*, 41 Cal. 221, 230; *Learned v. Welton*, 40 Cal. 349; *Handley v. Pfister*, 39 Cal. 283; 2 Am. Rep. 449. For benefit of legatees: *Estate of Delaney*, 49 Cal. 76, 86; *Auguisola v. Arnaz*, 51 Cal. 435, 438.^c In my opinion, this form would include a trust simply to convey the land to some designated person or class, for the validity of the trust cannot depend upon the amount of the proceeds.

³ *Lang v. Ropke*, 5 Sand. 363.

⁴ The number of New York decisions concerning this species is great, discussing and settling many questions of detail. The following are the most important: *Lorillard's Case*, 14 Wend. 265; *Hawley v. James*, 16 Wend. 61; *Kane v. Gott*, 24 Wend. 641; 35 Am. Dec. 641; *Hone's Ex'rs v. Van Schaick*, 20 Wend. 564; *Moore v. Moore*, 47 Barb. 257; *Burke v. Valentine*, 52 Barb. 412; *Killam v. Allen*, 52 Barb. 605; *Leggett v. Perkins*, 2 N. Y. 297; *Amory v. Lord*, 9 N. Y. 403; *Savage v. Burnham*, 17 N. Y. 561; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290; *Gilman v. Reddington*, 24 N. Y. 9; *Everitt v. Everitt*, 29 N. Y. 39; *Post v. Hover*, 33 N. Y. 593; *Harrison v. Harrison*, 36 N. Y. 543; *Schettler v. Smith*, 41 N. Y. 328; *Manice v. Manice*, 43 N. Y. 303; *Vernon v. Vernon*,

Minn. 165, 14 N. W. 805; *Townshend v. Frommer*, 125 N. Y. 446, 26 N. E. 805 (a trust to convey on the happening of a specified event is active, and will be validated as a power).

(c) See, also, *Cook v. Platt*, 98 N. Y. 35 (it is essential to the validity of trusts of this class that the power conferred shall be absolute and imperative).

See the following cases, as examples of what may be allowed under the Cal. Code: *In re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; *Nellis v. Rickard*, 132 Cal. 617, 85 Am. St. Rep. 227, 66 Pac. 32; *In re Sanford's Estate*, 136 Cal. 97, 68 Pac. 494; *Carpenter v. Cook*, 132

Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997; *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 453, 64 Pac. 1000 (by this case it was held that under the Cal. Code a direction to "transfer and convey" was not the equivalent of to "sell and convey"). A trust to convey is not valid in California: *Hofsas v. Cummings*, 141 Cal. 525, 75 Pac. 110; *In re Pichoir's Estate*, 139 Cal. 682, 73 Pac. 606; *In re Dixon's Estate*, (Cal.) 77 Pac. 412.

(d) To the effect that there are no powers in trust in California, see *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 453, 64 Pac. 1000; *McCurdy v. Otto*, 140 Cal. 48,

trust is authorized to accumulate income for the benefit of minors in being, and not longer than during their minority; every other form of accumulation is prohibited. By the other form the accumulation is permitted for the benefit of married women as well as minors.⁵

§ 1005. Interest, Rights, and Liabilities of the Beneficiary.—Although the beneficiary in all these classes of express trusts takes no estate, this does not prevent him from taking or holding the estate, or being vested with the ultimate estate, after the trust is ended.¹ He also has a right,—a thing in action; and how far this is assignable, or may be reached by his creditors, depends upon the nature and particular provisions of the trust.² The entire estate is vested in the trustee, but his power to make a valid sale

53 N. Y. 351; *Kiah v. Grenier*, 56 N. Y. 220; *Heermans v. Robertson*, 64 N. Y. 332; *Provost v. Provost*, 70 N. Y. 141; *Stevenson v. Lesley*, 70 N. Y. 512; *Verdin v. Slocum*, 71 N. Y. 345; *Garvey v. McDevitt*, 72 N. Y. 556; *Low v. Harmony*, 72 N. Y. 408; *Moore v. Hegeman*, 72 N. Y. 376; *Heermans v. Burt*, 78 N. Y. 259; *Donovan v. Van de Mark*, 78 N. Y. 244; *Ireland v. Ireland*, 84 N. Y. 321; *Delaney v. Van Aulen*, 84 N. Y. 16; *Toms v. Williams*, 41 Mich. 552; *Meth. Church etc. v. Clark*, 41 Mich. 730; *Lyle v. Burke*, 40 Mich. 499; *Smith v. Ford*, 48 Wis. 115; *White v. Fitzgerald*, 19 Wis. 480; *Goodrich v. City of Milwaukee*, 24 Wis. 422; overruling *Marvin v. Titsworth*, 10 Wis. 320; *Cutter v. Hardy*, 48 Cal. 568; *Estate of Delaney*, 49 Cal. 76.e

⁵ For construction, see *Hawley v. James*, 16 Wend. 61; *Vail v. Vail*, 4 Paige, 317, 328; *Morgan v. Masterton*, 4 Sand. 442; *Harris v. Clark*, 7 N. Y. 242; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Dodge v. Pond*, 23 N. Y. 69; *Gilman v. Reddington*, 24 N. Y. 9; *Toms v. Williams*, 41 Mich. 552.f

¹ *Stevenson v. Lesley*, 70 N. Y. 512.

² In all trusts of the first and second classes, where a fixed sum is to be paid to the beneficiary, as to the creditor, a legatee, etc., he may clearly assign his right, so that the assignee would become entitled to the payment. The interest of the beneficiary in these kinds is also plainly subject to be reached by his creditors. In trusts of the third and fourth classes, even without any statutory prohibition, it seems inconsistent with the whole scheme that the rights of the beneficiary should be assignable. In several of the states following the New York type, his power to assign is

73 Pac. 748. For an elaborate discussion of the validity of trusts to lease lands for the purpose of discharging incumbrances, and a review of the New York cases, see *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 302, 56 N. E. 515, by Parker, C. J.

(e) *Woodward v. James*, 115 N. Y. 346, 22 N. E. 150; *Cooke v. Platt*, 98 N. Y. 35.

(f) *Pray v. Hegeman*, 92 N. Y. 508; *Barbour v. De Forest*, 95 N. Y. 13.

and conveyance will depend upon the nature of the trust and the form of the instrument by which it is declared.³

expressly taken away; in California he may be restrained from assigning by the terms of the trust: Civ. Code, sec. 867.^a

In trusts of the third class, to receive rents and profits for the beneficiary, if there is no valid provision for their accumulation, the surplus of the income over what is reasonably necessary, under all the circumstances, for his support, education, etc., may be reached by the creditors of the beneficiary, by means of a proper equitable action. The trust may authorize the application of the income for the support of the beneficiary's family as well as of himself; in such a case only the surplus over what was needed for both could be reached. It is also settled by the decisions that a provision to the effect that the rights of the beneficiary should cease, and the trust should shift on behalf of another person—e. g., the beneficiary's wife—in case a judgment was recovered against him, or in case his interest became liable to the claims of creditors, is valid and operative:^b See *Noyes v. Blakeman*, 3 Sand. 531; 6 N. Y. 567; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Graff v. Bonnett*, 31 N. Y. 9; 88 Am. Dec. 236; *Campbell v. Foster*, 35 N. Y. 361; *Williams v. Thorn*, 70 N. Y. 270; 81 N. Y. 381; *Cruger v. Jones*, 18 Barb. 467; *Genet v. Beekman*, 45 Barb. 382; *Kennedy v. Nunan*, 52 Cal. 326. In trusts of the fourth class, to accumulate for the benefit of minors, the interest of the beneficiaries is clearly beyond the reach of their creditors during the existence of the trust.

³ In trusts of the first class, being expressly created for the purpose of a sale, the trustee may, of course, sell and convey a good title: See *Learned v. Welton*, 40 Cal. 349; *Thompson v. McKay*, 41 Cal. 221, 230; *Sprague v. Edwards*, 48 Cal. 239; *Saunders v. Schmælzle*, 49 Cal. 59. In trusts of the other kinds, the trustee had no authority to sell or convey. Still, if the trust is not declared in the same instrument by which the land is conveyed to the trustee, a purchaser from him without notice of the trust, and for a valuable consideration, takes a good title freed from the trust; a purchaser with notice, or without a valuable consideration, takes the land subject to the trust, and becomes himself a trustee: *Holden v. New York and Erie Bank*, 72 N. Y. 286; *New v. Nicoll*, 73 N. Y. 127; 29 Am. Rep. 111; *Griffin v. Blanchard*, 17 Cal. 70; *Thompson v. Toland*, 48 Cal. 99; *Sharp v. Goodwin*, 51 Cal. 219; *Scott v. Umbarger*, 41 Cal. 410; *Price v. Reeves*, 38 Cal. 457; *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141. When the trust is declared in the same instrument by which the land is conveyed to the trustee, every sale or other act by him in contravention of the trust is absolutely void; a purchaser or grantee would obtain no title whatever: *Powers v. Bergen*, 6 N. Y. 358; *Belmont v. O'Brien*, 12 N. Y. 394; *Smith v. Bowen*, 35 N. Y. 83; *Briggs v. Palmer*, 20 Barb. 392; *Cruger v. Jones*, 18 Barb. 467; *Leitch v. Wells*, 48 Barb. 637.

(^a) See, generally, *In re Foster's Estate*, 37 Misc. Rep. 581, 75 N. Y. Supp. 1067; *Cheyney v. Geary*, 194 Pa. St. 427, 45 Atl. 369. And see, *ante*, § 989, and notes.

(^b) Cited to this effect in *Jourleman v. Massengill*, 86 Tenn. 81, 5 S. W. 719.

SECTION III.

HOW EXPRESS TRUSTS ARE CREATED.

ANALYSIS.

§ 1006. Trusts of real property; statute of frauds; writing necessary.

§ 1007. Written declaration by the grantor; ditto, by the trustee; examples.

§ 1008. Trusts of personal property may be created verbally; what trusts are not within the statute.

§ 1009. Words and dispositions sufficient to create a trust; examples.

§§ 1010–1017. Express trusts inferred by construction, sometimes improperly called “implied trusts.”

§ 1011. 1. From the powers given to the trustee.

§ 1012. 2. Provisions for maintenance; examples.

§ 1013. 3. To carry out purposes of the will.

§ 1014. 4. From “precatory” words; *Knight v. Knight*; examples.

§ 1015. Modern tendency to restrict this doctrine; in the United States.

§ 1016. What intention necessary to create the trust; the general criterion; examples.

§ 1017. Objections to the doctrine.

§ 1006. Trusts of Real Property — Statute of Frauds.— Before the statute of frauds, trusts of real as well as personal property could be created or declared — technically *averred* — verbally.¹ The original statute of frauds provides that “all declarations or creations of trusts, or confidences in any lands, tenements, or hereditaments, shall be *manifested* and *proved* by some writing signed by the party who is by law enabled to declare the trust, or by his last will in writing, or else they shall be utterly void”; also, that “all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting

¹ It seems, however, that this power of declaring a trust of land verbally did not exist when the land was conveyed by a deed absolute on its face; only applying to conveyances by feoffment without a deed: See *Fordyce v. Willis*, 3 Brown Ch. 577, 587; *Adlington v. Cann*, 3 Atk. 141, 149, 151; *Osterman v. Baldwin*, 6 Wall. 116; *Murphy v. Hubert*, 7 Pa. St. 420; *Shelton v. Shelton*, 5 Jones Eq. 292; *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658; but see *Dean v. Dean*, 6 Conn. 285.

or assigning the same, or by such last will or devise [as mentioned in § 5], or else shall likewise be utterly void." This last clause refers to assignments by the *cestui que trust*. Analogous statutes have been enacted in the American states.² It is the settled doctrine, in interpreting this

229 Car. II., c. 3, secs. 7-9. The § 5 referred to in the clause above quoted, prescribed the mode of executing a will of land. The American statutes differ considerably from the English, and among themselves, in their language. Still, unless the terms of a particular statute are *radically* a departure from the original type, and are mandatory in form, requiring the trust to be *created* by the conveyance itself, the interpretation adopted by the English courts prevails through the American states. The various statutes are regarded as substantially the same: Perry on Trusts, sec. 81.^a

(a) The statutes of frauds in a number of the states have omitted the paragraph relating to the creation or declaration of trusts. Mr. Perry enumerates Connecticut, Delaware, Virginia, North Carolina, Texas, Tennessee, Kentucky, Ohio, and Indiana. To these should be added West Virginia: See Perry on Trusts, sec. 78, note; see, also, Pierson v. Pierson, 5 Del. Ch. 11; Harvey v. Gardner, 41 Ohio St. 642; Clark v. Haney, 62 Tex. 511, 50 Am. Rep. 536; Hamilton v. McKinney, 52 W. Va. 317, 43 S. E. 83; Sykes v. Boone, 132 N. C. 199, 95 Am. St. Rep. 619, 43 S. E. 645; Boughman v. Boughman, 69 Ohio St. 273, 69 N. E. 430 (proof must be clear and convincing).

In North Carolina, if the title is passed to a third party a trust may be declared by parol: Shelton v. Shelton, 5 Jones Eq. (58 N. C.) 292; see, also, Leggett v. Leggett, 88 N. C. 108. But when the legal title does not pass out of the grantor, as in a covenant to stand seised, a parol declaration has been held insufficient: Frey v. Ramsour, 66 N. C. 466 (approving Shelton v. Shelton, *supra*); see, also, Owens v. Williams, 130 N. C. 165, 41 S. E. 93; Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61, 11

L. R. A. 456 (containing a discussion of the creation of a trust on a declaration, or covenant to stand seised). In West Virginia a distinction seems to be made between cases where the oral trust is for the benefit of the grantor and where it is for a third party: Hardman v. Orr, 5 W. Va. 71 (the object of the trust was proved by parol evidence); see Nease v. Capehart, 8 W. Va. 95, discussing the difference between cases where the title is retained by the grantor and where it is passed to a third party; Troll v. Carter, 15 W. Va. 567 (the statement of the court, that where one voluntarily obtains land to be held in trust for a third party, and the trust is declared by parol only, the party so holding should be considered a trustee by reason of his inequitable position, seems a just and equitable deduction); approved in Zane v. Fink, 18 W. Va. 693; Cain v. Cox, 23 W. Va. 594 (where the oral agreement was to hold the land for the grantor instead of a third party, the parol agreement did not create a trust); Titchenell v. Jackson, 26 W. Va. 460 (gift of realty).

Some courts have held that, in the absence of statute, a parol declaration of trust relating to realty is in-

legislation, that a trust of land need not be created nor declared by a writing; it need only be manifested and proved by some writing duly signed or subscribed by the proper party; and, as a consequence, this written evidence

sufficient: *Dean v. Dean*, 6 Conn. 285 (in trust for the grantor); *Vail's App.*, 37 Conn. 185 (*semble*); *Todd v. Munson*, 53 Conn. 579, 4 Atl. 99 (approving the cases cited); see *Church v. Sterling*, 16 Conn. 388, as to a resulting trust in such cases. The rule seems to be the same in Kentucky: *Chiles v. Woodson*, 2 Bibb 71; *Parker v. Bodley*, 4 Bibb 102. In other jurisdictions it has been properly held that in the absence of statute no writing is required; this would seem to be the general rule; *Hall v. Livingston*, 3 Del. Ch. 348 (parol evidence was admitted to establish the trust where a deed was absolute on its face); *Soggins v. Heard*, 31 Miss. 426 (the rule is now changed by statute); *Miller v. Stokely*, 5 Ohio St. 197 (but it is said, "To establish an express trust in the case of a conveyance by deed absolute on its face, it is requisite that the evidence should be *clear*, *certain*, and *conclusive*, in proof not only of the existence of the trust, and that, too, at the time of the conveyance, but also as to its terms and conditions"); *Mathews v. Leaman*, 24 Ohio St. 615; *Harvey v. Gardner*, *supra*; *Lingenfelter v. Ritchey*, 58 Pa. St. 485, 98 Am. Dec. 308 (the case arose before the passage of the statute in that state); *Murphy v. Hubert*, 7 Pa. St. 420; *Meason v. Kaine*, 63 Pa. St. 335. The rule is now different and a parol declaration of trust is nugatory: *Longdon v. Crouse*, (Pa.) 1 Atl. 600. An agreement concerning a trust of realty need not be in writing in Texas: *James v. Fulcro*d, 5 Tex. 512, 55 Am.

Dec. 743; *Williams v. Emberson*, 22 Tex. Civ. App. 522, 55 S. W. 595; *Branch v. De Blanc*, (Tex. Civ. App.) 62 S. W. 134; *Mead v. Randolph*, 8 Tex. 191 (the court recognized the principle that the contract or conveyance should be enforced or upheld according to the intention of the parties at the time they executed the conveyance in order to prevent the accomplishment of fraud; for the consideration of which see, *post*, § 1053); the court of West Virginia was not influenced by such reason in the case of *Sprinkle v. Hayworth*, 26 Gratt. 384; but see *Borst v. Nalle*, 28 Gratt. 423; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329. For the rule in Tennessee see *Renshaw v. First Nat. Bank*, (Tenn. Ch. App.) 63 S. W. 194.

To the effect that an express trust in lands cannot be created by parol, see *Oden v. Lockwood*, 136 Ala. 514, 33 South. 895; *Marie M. E. Church v. Trinity M. E. Church*, (Ill.) 69 N. E. 73; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. 81, 96 Am. St. Rep. 322 (an express agreement by a husband to hold property conveyed by his wife to him in trust for her is within the statute of frauds); *Byers v. McEniry*, 117 Iowa 499, 91 N. W. 797; *Luckhart v. Luckhart*, 120 Iowa 248, 94 N. W. 461; *Willis v. Robertson*, 121 Iowa 380, 96 N. W. 900; *McClenahan v. Stevenson*, 118 Iowa 106, 91 N. W. 925; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Pol-lard v. McKenney*, (Nebr.) 96 N. W. 679; *Marvel v. Marvel*, (Nebr.) 97 N. W. 640.

may be a separate instrument, either simultaneous with or subsequent to the deed of conveyance, and may be very informal.³

§ 1007. Written Declaration by the Grantor, or by the Trustee.—The written evidence of the trust which will satisfy the statute *may* come from the grantor,—the one who intends that a trust shall be created for a certain beneficiary,—or from the trustee,—the grantee to whom the land is conveyed for the purposes of the trust, but not from the *cestui que trust*. The grantor may declare the trust in the will or the deed by which the land is conveyed or devised, or in an instrument separate and distinct from the conveyance; or he may declare himself a trustee, and that he holds the land in trust, without conveying the legal title.¹

³ Forster v. Hale, 3 Ves. 696; Denton v. Davies, 18 Ves. 499, 503; Ambrose v. Ambrose, 1 P. Wms. 322; Davies v. Otty, 33 Beav. 540; Gardner v. Rowe, 2 Sim. & St. 346; 5 Russ. 258; Smith v. Matthews, 3 De Gex, F. & J. 139; Movan v. Hays, 1 Johns. Ch. 339, 342; Pinney v. Fellows, 15 Vt. 525; Sime v. Howard, 4 Nev. 473, 483; Flagg v. Mann, 2 Sum. 486; Cornelius v. Smith, 55 Mo. 528.^b

¹ Patton v. Beecher, 62 Ala. 579 (an express trust cannot be created by parol on a deed absolute on its face); Wallace v. Wainwright, 87 Pa. St. 263; Hearst v. Pujol, 44 Cal. 230, 235; Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384; Taylor v. Sayles, 57 N. H. 465; Barnes v. Taylor, 27 N. J. Eq. 259; Tanner v. Skinner, 11 Bush, 120 (a party declaring himself a trustee); Urann v. Coates, 109 Mass. 581 (a memorandum signed by a decedent, not addressed to any person, found among his papers, a sufficient declaration of trust with respect to certain land, constituting him a trustee); Lynch v. Clements, 24 N. J. Eq. 431 (while a grantor may declare a trust in a separate instrument accompanying the deed, a testator who devises land cannot declare a trust in a valid manner by means of a separate writing which is not duly executed with the formalities required for the execution of a will, even though the writing is referred to in the will); Homer v. Homer, 107 Mass. 82 (a mere memorandum in a ledger is not sufficient); Bragg v. Paulk, 42 Me. 502; Bates v. Hurd, 65 Me. 180; McClellan v. McClellan, 65 Me. 500; Packard v. Putnam, 57 N. H. 43; Faxon v. Folvey, 110 Mass. 392; Movan v. Hays, 1 Johns. Ch. 339; Gomez v. Tradesmen's Bank, 4 Sand. 102, 106;

(b) Wiser v. Allen, 92 Pa. St. 317; Gordon v. McCulloh, 66 Md. 245, 7 Atl. 457; Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886; Phillips v. South Park Com., 119 Ill. 626, 10

N. E. 230 (the trust was not established); Hall v. Farmers & Merchants' Bank, 145 Mo. 418, 46 S. W. 1000.

When the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and evidenced by the trustee to whom the land is conveyed, or who becomes holder of the legal title; and this may be done by a

Harrison v. McMenomy, 2 Edw. Ch. 251; Wright v. Douglass, 7 N. Y. 564; Cook v. Barr, 44 N. Y. 156; Duffy v. Masterson, 44 N. Y. 557; Berrien v. Berrien, 4 N. J. Eq. 37; Ivory v. Burns, 56 Pa. St. 300; Raybold v. Raybold, 20 Pa. St. 308; Macubbin v. Cromwell, 7 Gill & J. 164; Johnson v. Ronald, 4 Munf. 77; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; 31 Am. Dec. 642 (the *cestui que trust* need not join in executing the writing); Reid v. Reid, 12 Rich. Eq. 213; Gibson v. Foote, 40 Miss. 788; Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67; Sime v. Howard, 4 Nev. 473, 482. The grantor may declare the trust by an instrument separate from the conveyance to the trustee: Wood v. Cox, 2 Mylne & C. 684 (a separate testamentary paper); Smith v. Attersoll, 1 Russ. 266 (a paper accompanying a will although not duly executed as a will; see, *per contra*, Lynch v. Clements, *supra*); Inchiquin v. French, 1 Cox, 1; but the separate instrument must be contemporaneous with the conveyance, or a part of the same single transaction; where the title has been vested in a grantee, his rights cannot be defeated by a subsequent and wholly independent act of the grantor: Adlington v. Cann, 3 Atk. 141, 145; Crabb v. Crabb, 1 Mylne & K. 511; Kilpin v. Kilpin, 1 Mylne & K. 520, 532; De Laurencel v. De Boom, 48 Cal. 581; Chapman v. Wilbur, 3 Or. 326; Bennett v. Fulmer, 49 Pa. St. 155; Brown v. Brown, 12 Md. 87.^a

(a) "The declaration must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing": Renz v. Stoll, 94 Mich. 377, 34 Am. St. Rep. 358, 54 N. W. 276; Heidenheimer v. Bauman, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382 (the residue of property was, by will, left to X. in trust "to be disposed of by him as I have heretofore or may hereafter direct him to do"; it was held that the trust could not be established by parol evidence). The mere fact that the grantor remained in possession and expended money in improvements will not ingraft a trust on land absolutely conveyed: Pillsbury-Washburne Flour-Mills Co. v. Kistler, 53 Minn. 123, 54 N. W. 1063; see First Nat. Bank of Salisbury v. Fries, 121 N. C. 241, 61 Am. St. Rep. 663, 28 N. E.

350 (stating that a parol declaration of trust, accompanying the transmission of the legal title, is not subject to the statute); Phillips v. South Park Com., 119 Ill. 626, 10 N. E. 230 (a declaration, made by the grantor eighteen years after he had parted with the title, is insufficient); Bragg v. Paulk, 42 Me. 502 (the trust declared in a subsequent bond, or contract to convey); see Albert v. Winn, 5 Md. 66; Aynesworth v. Haldeman, 2 Duval, 565; Blodgett v. Hildreth, 103 Mass. 484 (the statement "I intend to settle up our affairs and give up your deeds that you intrusted me with," does not sufficiently contain the terms of the trust to satisfy the statute); Yerkes v. Perrin's Estate, 71 Mich. 567, 39 N. W. 758 (series of letters held insufficient); Tenny v. Simpson, 37 Kan. 579, 15 Pac. 512;

writing executed simultaneously with or subsequent to the conveyance, and such writing may be of a most informal nature.² The trustee's acceptance of the trust may be ex-

² Letters, recitals, memoranda, etc., have been held sufficient evidence of a trust: *Smith v. Matthews*, 3 De Gex, F. & J. 139; *Gardner v. Rowe*, 2 Sim. & St. 346; 5 Russ. 258; *Dale v. Hamilton*, 2 Phill. Ch. 266; *Forster v. Hale*, 3 Ves. 696; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; 35 Am. Rep. 166 (notice in writing given by the grantee stating that the property in fact belonged to certain named beneficiaries, a sufficient declaration of trust); *Rogers Locomotive etc. Works v. Kelly*, 19 Hun, 399 (receipt by a bank that money deposited was in trust for specified purposes); *Bates v. Hurd*, 65 Me. 180 (a distinct written statement specifying the terms of the trust, and the parties to it, subscribed by the trustee, whether addressed to or delivered to the *cestui que trust* or not, or whether intended to be evidence of the trust or not when made, is a sufficient declaration); *McClellan v. McClellan*, 65 Me. 500 (it is sufficient that a trust is declared by a writing subscribed by the trustee subsequent to the conveyance); *De Laurencel v. De Boom*, 48 Cal. 581 (testator devised land to A on the face of the will absolutely; on the same day the will was executed, testator wrote a letter to A, stating that the devise was on trust for certain purposes which were sufficiently specified; afterwards, and during testator's lifetime, A, in writing, acknowledged the letter, accepted the trusts, and promised to carry them out. Held, that the express trust was declared, and A took the land as a trustee); *Tanner v. Skinner*, 11 Bush, 120 (explicit statement by a party declaring himself a trustee); *Moore v. Pickett*, 62 Ill. 158 (letter written by the trustee; and the lands mentioned in the letter as affected by the trust may be identified by evidence of the surrounding circumstances); *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67 (by letter of trustee); *Johnson v. Deloney*, 35 Tex. 42 (the same); *Phelps v. Seely*, 22 Gratt. 573 (the same); *Baldwin v. Humphrey*, 44 N. Y. 609 (grantees declaring themselves trustees by a written agreement); *Packard v. Putnam*, 57 N. H. 43; *Ivory v. Burns*, 56 Pa. St. 300; ^b Even where there has been no other writing, the

Oliver v. Hunting, 44 Ch. Div. 205 (allowing parol evidence to connect the writings to prove the trust); see *Tierney v. Wood*, 19 Beav. 330, *Ames Cas. on Trusts*, for a declaration of trust by a *cestui*, of his interest; see *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753 (citing the text, §§ 1006 and 1007). See, also, *Becker v. Stroeber*, 167 Mo. 306, 66 S. W. 1083; *Davis v. Stanbaugh*, 163 Ill. 557, 45 N. E. 170; *Cornelison v. Roberts*, 107 Iowa 220, 77 N. W.

1028; *Pendleton v. Patrick*, 22 Ky. Law Rep. 378, 57 S. W. 464.

(^b) *Loring v. Palmer*, 118 U. S. 321, 6 Sup. Ct. Rep. 1073, 24 L. ed. 165 (trust contained in a series of letters and agreements); *Cain v. Cox*, 23 W. Va. 594 (title bonds); *Newkirk v. Place*, 47 N. J. Eq. 477, 21 Atl. 124 (letters); *McCandless v. Warner*, 26 W. Va. 754; *Gaylord v. City of Lafayette*, 115 Ind. 423, 17 N. E. 899; *Barrell v. Joy*, 16 Mass. 221 (trust proved by a pamphlet is-

press by his executing the conveyance or other instrument, or by assenting to the will; or it may be inferred from his dealing with the property; and *prima facie* he is presumed to accept.³ An acceptance by the trustee is necessary, in order to bind him, but not in order to validate the trust. A refusal to accept or disclaimer frees the trustee named from any duty to act under the trust, but the rights of the beneficiary do not depend upon his acceptance. A court of equity never suffers an express trust to fail from want of a trustee.⁴

admissions by a party defendant in an answer in chancery may be a sufficient declaration of trust: *Patton v. Chamberlain*, 44 Mich. 5; *Broadrup v. Woodman*, 27 Ohio St. 553; *McLaurie v. Partlow*, 53 Ill. 340; *Cozine v. Graham*, 2 Paige, 177; *Maccubbin v. Cromwell*, 7 Gill & J. 157, 164.^c As to the defendant's denial of the alleged parol agreement, or his express pleading of the statute, in his answer, see *Ontario Bank v. Root*, 3 Paige, 478; *Dean v. Dean*, 9 N. J. Eq. 425; *Wolf v. Corby*, 30 Md. 356, 360; *Billingslea v. Ward*, 33 Md. 48, 51; *Allen v. Chambers*, 4 Ired. Eq. 125.

³ *Montford v. Cadogan*, 17 Ves. 485, 489; 19 Ves. 635, 638; *Urch v. Walker*, 3 Mylne & C. 702; *Kirwan v. Daniel*, 5 Hare, 493; *Eyrick v. Hetrick*, 13 Pa. St. 488, 493; *Flint v. Clinton Co.*, 12 N. H. 430, 432; *Lyle v. Burke*, 40 Mich. 499; *Hearst v. Pujol*, 44 Cal. 230, 235.^d

⁴ Whether the want arises from the fact that no trustee was named, or from the trustee's refusal to act, or from other cause, the court will appoint a trustee, or will treat the person in whom the legal title is vested as a trustee: *King v. Donnelly*, 5 Paige, 46; *Cushney v. Henry*, 4 Paige, 345; *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561; *Crocheron v.*

sued by the grantee); *Safford v. Rantoul*, 12 Pick. 233 (that grantee subsequently acknowledged in writing that he received the property as security for a debt proved him a trustee); *Montague v. Hays*, 10 Gray 609 (the grantee acknowledged the relation by a writing addressed to a third party); *Nesbitt v. Stevens*, 161 Ind. 519, 69 N. E. 256 (letters); *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55 (letters); *Wallace v. Pruitt*, 1 Tex. Civ. App. 231, 20 S. W. 728 (quoting the text).

(c) *McVay v. McVay*, 43 N. J. Eq. 47, 10 Atl. 178; *Garnsey v. Gothard*, 90 Cal. 603, 27 Pac. 516; *Whiting v.*

Gould, 2 Wis. 552 (it seems an admission of the parol trust, but an express reliance on the statute would protect the defendant); *Dean v. Dean*, 9 N. J. Eq. 425 (same); *Kellogg v. Peddicord*, 181 Ill. 22, 54 N. E. 623.

(d) *Harvey v. Gardner*, 41 Ohio St. 462. See, also, § 1060, note. As to notice to, or acceptance by, the *cestui*, see *Fearey v. O'Neill*, 149 Mo. 467, 73 Am. St. Rep. 440, 50 S. W. 918; *Norway Sav. Bk. v. Merriam*, 88 Me. 146, 33 Atl. 840; *Merigan v. McGonigle*, 205 Pa. St. 321, 54 Atl. 994; *Libby v. Frost*, (Me.) 56 Atl. 906.

§ 1008. Trusts of Personal Property may be Created Verbally.^a—The provisions of the statute of frauds apply to chattels real,¹ but not to money secured by mortgages and other charges upon land.² Nor does the statute extend to trusts of pure personalty; and such trusts may therefore be created, declared, or admitted verbally, and proved by parol evidence, although the consensus of authorities demands clear and unequivocal evidence.^{3 c} Trusts which arise

Jaques, 3 Edw. Ch. 207; *De Barante v. Gott*, 6 Barb. 492; *Griffith's Adm'r v. Griffith*, 5 B. Mon. 113; *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 210; *Peter v. Beverly*, 10 Pet. 532; 9 L. ed. 422; *Druid Park etc. Co. v. Oettinger*, 53 Md. 46; *Adams v. Adams*, 21 Wall. 185 (the trustee's refusal to accept does not impair the beneficiary's rights).^e

¹ *Forster v. Hale*, 3 Ves. 696; *Riddle v. Emerson*, 1 Vern. 108.

² *Benbow v. Townsend*, 1 Mylne & K. 506; *Bellasis v. Compton*, 2 Vern. 294.^b

³ *McFadden v. Jenkyns*, 1 Phill. Ch. 153, 157; *Hawkins v. Gardiner*, 2 Smale & G. 441, 451; *Clapp v. Emery*, 98 Ill. 523 (a son collected and invested in his own name money of his mother. Held, his parol statement showed a trust, and not a mere loan); *Hon v. Hon*, 70 Ind. 135 (trust in personal property created verbally); *Reiff v. Horst*, 52 Md. 255 (a son-in-law receiving money from his father-in-law verbally agreed to hold it, and also another sum previously received, in trust for his own children. Held, a trust was impressed on both sums); *Davis v. Coburn*, 128 Mass. 377 (a trust in personal property may be shown by parol evidence); *Chace v. Chapin*, 130 Mass. 128 (the same); *Gadsden v. Whaley*, 14 S. C. 210 (a person may create a trust in personal property by verbally declaring himself a trustee for the donee; no particular form of words is necessary, and

(e) *Minot v. Tilton*, 64 N. H. 371, 10 Atl. 682 (the trustee's refusal to accept does not impair the beneficiary's rights); *Sonley v. Clock Makers' Co.*, 1 Br. Ch. Cas. 81, Ames Cas. on Trusts 225 (a devise to a corporation in trust being void, the heir at law took subject to the trust); *Dodkin v. Brunt*, L. R. 6 Eq. 580, Ames Cas. on Trusts 226 (trustees were appointed); *Nason v. First Church*, 66 Me. 100 (same); see *In re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, for disclaimer by trustee; but see *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep.

724, 26 S. E. 717; *Taft v. Stow*, 167 Mass. 363, 45 N. E. 752; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652, 40 L. R. A. 127 (the trust was not enforced as it could not be carried out in the manner intended by the settlor).

(a) Sections 1008-1010 are cited in *McMonagle v. McGlinn*, 85 Fed. 88.

(b) *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; but see *Cameron v. Nelson*, 57 Nebr. 381, 77 N. W. 771.

(c) Quoted in *Harris v. Bratton*, 34 S. C. 259, 13 S. E. 447.

by operation of law — resulting and constructive trusts — are, in express terms, excepted from the statute.^c

the trust *may* be proved by circumstances as well as by direct evidence of the declarations); *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447 (an owner of personalty may verbally declare that he holds it in trust for another; e. g., A, depositing money in a bank in his own name, may orally declare that he holds it as trustee for B); *Silvey v. Hodgdon*, 52 Cal. 363 (A took out a policy of insurance on his own life in name of his daughter, B, and on the face of it in her favor; a verbal agreement was made that she should hold it in trust for all A's children. Held, that a valid trust was created, — a very instructive case); *Eaton v. Cook*, 25 N. J. Eq. 55 (an oral direction by a creditor to his debtor to hold the money due in trust for A creates a valid trust in favor of the donee, A); *Hooper v. Holmes*, 11 N. J. Eq. 122; *Kimball v. Morton*, 5 N. J. Eq. 26, 31; 43 Am. Dec. 621; *Barkley v. Lane's Ex'r*, 6 Bush, 587; *Higgenbottom v. Peyton*, 3 Rich. Eq. 398; *Maffitt's Adm'r v. Rynd*, 69 Pa. St. 380 (although upon a conveyance of land a verbal declaration of trust in favor of the grantor or other person is void under the statute, yet such a verbal declaration by the grantee after a conversion of the land into money creates a valid trust with respect to the proceeds). See *Lister v. Hodgson*, L. R. 4 Eq. 30.^d

(d) That the statute does not apply to personalty, see *Moore v. Campbell*, 113 Ala. 587, 21 South. 353 (citing Alabama cases); *Eipper v. Bennet*, 113 Mich. 75, 71 N. W. 511 (citing Michigan cases); *Woods v. Matlock*, 19 Ind. App. 364, 48 N. E. 384 (citing many Indiana cases); *Skein v. Marriot*, 22 Utah 73, 61 Pac. 296 (citing the text); *Crew v. Crew's Adm'r*, 113 Ky. 152, 67 S. W. 276; *Neresheimer v. Smyth*, 167 N. Y. 202, 60 N. E. 449; *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 389, 53 N. E. 823; *Wolf v. Haslach*, 65 Nebr. 303, 91 N. W. 283; *Maher v. Aldrich*, 205 Ill. 242, 68 N. E. 811; *Peck v. Scofield*, (Mass.) 71 N. E. 109; *Devries' Estate v. Hawkins*, (Nebr.) 97 N. W. 792; *Martin v. Martin*, 43 Oreg. 119, 72 Pac. 639. That there may be a valid parol trust as to the proceeds of realty, see *Hess's Appeal*, 112 Pa. St. 168, 4 Atl. 340; *Calder v. Moran*, 49 Mich. 14, 12

N. W. 892; *Edinger v. Heiser*, 62 Mich. 598, 29 N. W. 367; *Mohn v. Mohn*, 112 Ind. 285, 13 N. E. 859; *Thomas v. Merry*, 113 Ind. 88, 15 N. E. 244; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570, 30 N. E. 584; but see *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295 (a parol agreement by grantee to hold land for grantor until sold, and when sold, pay him the proceeds, void). See, also, on the general subject, *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677; *Cobb v. Knight*, 74 Me. 253; *Chace v. Chapin*, 130 Mass. 128 (subsequent declarations of transferee assented to and acted upon by the transferee, admissible to establish trust); *Chase v. Perley*, 148 Mass. 289, 19 N. E. 398; *Danser v. Warwick*, 33 N. J. Eq. 133; *Roach v. Carraffa*, 85 Cal. 437, 25 Pac. 22.

(e) See *Wallace v. Bowen*, 28 Vt. 638; *Bickford v. Bickford's Estate*, 68 Vt. 525, 35 Atl. 471; but where

§ 1009. Words or Dispositions Sufficient to Create a Trust. — What words or dispositions, either in the written or the verbal declaration, do or do not operate to create a trust? It is assumed in the present discussion that the property is directly conveyed to or is held by the person alleged to be a trustee. In the first place, as has already been shown, a mere voluntary promise to give property in trust does not create a trust, nor any right which a court of equity will enforce.¹ In the second place, no precise form of words is necessary to create a trust, but the intention must be clear. The fact that a trust of lands *is created* must not only be manifested and proved by a writing properly executed, but it must also be manifested and proved by such a writing what the trust is. The declaration of trust, whether

¹ *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Estate of Webb*, 49 Cal. 541; and see *ante*, §§ 997, 998, under head of voluntary trusts. On the same principle, a mere unfinished, inchoate purpose expressed does not create a trust: *Bayley v. Boulcott*, 4 Russ. 345; *Donohoe v. Conrahy*, 2 Jones & L. 688, 694; *Dellinger's Appeal*, 71 Pa. St. 425; nor the mere expression that the property was "intended" for a certain person: *Hays v. Quay*, 68 Pa. St. 263.

trusts resulting from the payment of consideration have been abolished a parol agreement showing a trust is prohibited by the statute: *Jeremiah v. Pitcher*, 20 Misc. 513, 45 N. Y. Supp. 758. Cases relating to the difference between an express, and a resulting trust: *Smith v. Mason*, 122 Cal. 426, 55 Pac. 145; *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651; *Monson v. Hutchin*, 194 Ill. 431, 62 N. E. 788; *Smith v. Peacock*, 114 Ga. 691, 88 Am. St. Rep. 53, 40 S. E. 757; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509. It has been held that where there was an express trust declared, a resulting or a constructive trust cannot be shown: *Mayfield v. Forsyth*, 164 Ill. 32, 45 N. E. 403; *Godschalk v. Fulmer*, 45 N. E. 809 (Ill.); *Myers v. Myers*, 167 Ill. 52, 47 N. E. 309; *Monson v. Hutchin*,

194 Ill. 431, 62 N. E. 788; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; *Hawkins v. Willard*, 35 S. W. 365 (Tex.). See, generally, *Galbraith v. Galbraith*, 190 Pa. St. 225, 42 Atl. 683; *Lamb v. Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219; *Rayl v. Rayl*, 58 Kan. 585, 50 Pac. 501; *Halsell v. Wise Co. Coal Co.*, 19 Tex. Civ. App. 564, 47 S. W. 1017; *Tillman v. Murrell*, 120 Ala. 239, 24 South. 712; *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85; *Houser v. Jordan*, 26 Tex. Civ. App. 398, 63 S. W. 1049; *Butler v. Carpenter*, 163 Mo. 597, 63 S. W. 823; *Grayson v. Bowlin*, 70 Ark. 145, 66 S. W. 658; *Whitney v. Hay*, 181 U. S. 77, 21 Sup. Ct. Rep. 537, 45 L. ed. 758; but see *Bullenkamp v. Bullenkamp*, 54 N. Y. Supp. 482.

written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail.² No particular technical words

² It does not follow that the grantee, devisee, or legatee takes the property absolutely free from the trust in such case; if the trust attempted to be created fails for reason of uncertainty, and the instrument shows an intention that the immediate donee was not to take and hold the beneficial interest, then a trust results to the donor: See *post*, § 1032; *Knight v. Boughton*, 11 Clark & F. 513; *Smith v. Matthews*, 3 De Gex, F. & J. 139; *Briggs v. Penny*, 3 Macn. & G. 546; *Williams v. Williams*, 1 Sim., N. S., 358; *Reeves v. Baker*, 18 Beav. 372; *Stubbs v. Sargon*, 2 Keen, 255; *Cruwys v. Colman*, 9 Ves. 319, 323, per Sir William Grant; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Porter v. Bank of Rutland*, 19 Vt. 410; *Carpenter v. Cushman*, 105 Mass. 417, 419; *Inhabs. of Freeport v. Bartol*, 3 Greenl. 340; *Brown v. Combs*, 29 N. J. L. 36; *Harris's Ex'rs v. Barnett*, 3 Gratt. 339; *Rutledge v. Smith*, 1 McCord Eq. 119; *Norman v. Burnett*, 25 Miss. 183; *Mercer v. Stark*, 1 Smedes & M. Ch. 479; *Barkley v. Lane's Ex'r*, 6 Bush, 587; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Russell v. Switzer*, 63 Ga. 711 (certainty necessary); *Hill v. Den*, 54 Cal. 6 (a conveyance by A to himself and his brother jointly as trustees for A's children); *Smith v. Ford*, 48 Wis. 115 (trust created by express words on behalf of grantor's wife and children); *Chili First Presb. Soc. v. Bowen*, 21 Hun, 389 (no valid trust without a certain beneficiary); *Wallace v. Wainwright*, 87 Pa. St. 263 (a trust exists where the legal estate is in one person and the equitable in another); *Cockrell v. Armstrong*, 31 Ark. 580 (express words not necessary; the intention to be gathered from the whole instrument); *Smith v. Bowen*, 35 N. Y. 83 (the words "all my estate, both real and personal, I give to my wife, to be used and disposed of at her discretion for the benefit of herself and my daughters, M., L. and A.," held to create a trust in favor of the daughters with respect to three fourths of the property); *Zuver v. Lyons*, 40 Iowa, 510 (a trust to A for life, and after his death the title in fee to vest in his heirs, creates a trust estate in A during his life, and remainder in fee to his heirs, contrary to the rule in *Shelley's case*); *McElroy v. McElroy*, 113 Mass. 509 (where a deed to A expressly creates a trust in favor of B, the *habendum* clause and

(a) Quoted in *Burling v. Newlands*, 112 Cal. 476, 44 Pac. 810 (on rehearing); *McMonagle v. McGlinn*,

85 Fed. 88. § 1009 is cited to this effect in *Atwater v. Russell*, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26.

need be used; even the words "trust" or "trustee" are not essential; any other words which unequivocally show an intention that the legal estate was vested in one person, but to be held in some manner or for some purpose on behalf of another, if certain as to all other requisites, are

the covenants do not necessarily limit the interest of the *cestui que trust*, nor give any beneficial interest to the grantee, A).^b Under the peculiar law of Pennsylvania, an express trust cannot be effectively created in behalf of a woman unless she is married, or unless it is created in contemplation of her marriage: *Snyder's Appeal*, 92 Pa. St. 504; *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Phila. 96. No trust will be created where the property to be the subject-matter is left uncertain: *Bardswell v. Bardswell*, 9 Sim. 319; *Winch v. Brutton*, 14 Sim. 379; *Fox v. Fox*, 27 Beav. 301; *Lechmere v. Lavie*, 2 Mylne & K. 197; *Cowman v. Harrison*, 10 Hare, 234; *Palmer v. Simmonds*, 2 Drew. 221; nor where the objects are left uncertain: *Green v. Marsden*, 1 Drew. 646; *White v. Briggs*, 2 Phill. Ch. 583. "Trust" and "trustee" not essential, but their omission *might* be a strong evidence of the intention: *King v. Denison*, 1 Ves. & B. 260, 273; *Crockett v. Crockett*, 1 Hare, 451; *Raikes v. Ward*, 1 Hare, 445; *Jubber v. Jubber*, 9 Sim. 503; *Inderwick v. Inderwick*, 13 Sim. 652; *Bibby v. Thompson*, 32 Beav. 646; *Porter v. Bank of Rutland*, 19 Vt. 410; *Aynsworth v. Haldeman*, 2 Duvall, 565, 571; *Tobias v. Ketchum*, 32 N. Y. 319, 327, 328; *Smith v. Bowen*, 35 N. Y. 83; *Sheets's Estate*, 52 Pa. St. 257, 566;^c and "trust" or "trustee" do not always show a trust: *Brown v. Combs*, 29 N. J. L. 36; *Attorney-General v. Merrimack M. Co.*, 14 Gray, 586, 612; *Selden's Appeal*, 31 Conn. 548; *Freedley's Appeal*, 60 Pa. St. 344; *Richardson v.*

(b) See, also, in general, *Obermiller v. Wylie*, 36 Fed. 641; *Blouin v. Phaneuf*, 81 Me. 176, 16 Atl. 540; *McCamant v. Nuckolls*, 85 Va. 331, 12 S. E. 160 (discretionary power merely); *Hemphill v. Hemphill*, 99 N. C. 442, 6 S. E. 201; *Anderson v. Crist*, 113 Ind. 65, 15 N. E. 9; *Quinn v. Shields*, 62 Iowa 129, 49 Am. Rep. 141, 17 N. W. 437; *Tenney v. Simpson*, 37 Kan. 579, 15 Pac. 512; *Richardson v. Seever's Adm'r*, 84 Va. 259, 270, 4 S. E. 712 (gift to donor's son-in-law "for benefit of" latter's wife and children, no trust created; words merely show motive for the gift); but see *Cresswell's Adm'r v. Jones*, 68 Ala. 420 (conveyance to son-in-law "as an advancement" to the daugh-

ter, "in part of her distributive share," creates a trust for her); *Holt v. Wilson*, 75 Ala. 58 (antenuptial agreement that wife's property shall "inure and belong to" the husband is a declaration of trust); *Trunkey v. Van Sant*, 176 N. Y. 535, 68 N. E. 946 (trust void for indefiniteness); *Flanner v. Fellows*, 206 Ill. 136, 68 N. E. 1057 (not too indefinite). It has been held that a trust will not fail merely because of uncertainty in whom the fee will vest in case the first beneficiary dies without leaving issue: *Orr v. Yates*, 209 Ill. 222, 70 N. E. 731.

(c) "Trust" and "trustee" not essential: *Woodward v. James*, 115 N. Y. 356, 22 N. E. 150; *In re Soul-*

sufficient. On the other hand, if the words "trust" or "trustee" are employed, they do not necessarily show an intention to create or declare a trust. It sometimes happens that an express trust arises, not from any definite words,

Inglesby, 13 Rich. Eq. 59; Eldridge v. See Yup. Co., 17 Cal. 44.^d Sir William Grant said in *Cruwys v. Colman*, 9 Ves. 319, 323, that three things are indispensable to constitute a valid trust: 1. Sufficient words to raise it; 2. A definite subject; and 3. A certain or ascertained object. It is the well-settled rule that although the purpose to create a trust is evident, still, where the terms of its creation are so vague and indefinite that a court of equity cannot clearly ascertain either the objects or the persons who are to take, the trust will be held to fail, and the property will fall into the general fund of the author: *Power v. Cassidy*, 79 N. Y. 602, 609; 35 Am. Rep. 550, per Miller, J.; *Fowler v. Garlike*, 1 Russ. & M. 232; *Stubbs v. Sargon*, 2 Keen, 255; 3 Mylne & C. 507; *Wood v. Cox*, 2 Mylne & C. 684; *Wheeler v. Smith*, 9 How. 55, 79.^e This requisite applies with special force to private trusts; public or charitable trusts are governed by a much less stringent rule.^f

ard's Est., 141 Mo. 642, 43 S. W. 617; *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433.

(d) "Trust" and "trustee" do not always show a trust: *Matter of Hawley*, 104 N. Y. 250, 10 N. E. 352; *Rua v. Watson*, 13 S. D. 453, 83 N. W. 572; *Dicker v. Union Dime Sav. Inst.*, 15 App. Div. 553, 44 N. Y. Supp. 521; *Cleveland v. Springfield Inst. for Sav.*, 182 Mass. 110, 65 N. E. 27.

(e) *Dyer's Appeal*, 107 Pa. St. 446.

(f) The beneficiaries need not be named; it is sufficient if they can be ascertained, and parol evidence is, of course, admissible in case of a latent ambiguity: *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. Rep. 689; *First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681; *Sleeper v. Iselin*, 62 Iowa 583, 17 N. W. 922; *Boardman v. Willard*, 73 Iowa 22, 34 N. W. 487; *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 389, 53 N. E. 823.

See the following cases in which it was held the declaration or disposition was sufficient to create a trust:

Gildersleeve v. Stratton, 59 N. J. Eq. 1, 36 Atl. 477; *Tarbox v. Grant*, 56 N. J. Eq. 199, 39 Atl. 378; *In re McAuley's Estate*, 184 Pa. St. 124, 39 Atl. 31; *Cathcart v. Nelson's Adm'rs*, 70 Vt. 317, 40 Atl. 826; *In re Eshbach's Estate*, 197 Pa. St. 153, 46 Atl. 905; *Collins v. Steuart*, 58 N. J. Eq. 392, 44 Atl. 467; *Hodnett's Estate*, 154 Pa. St. 485, 26 Atl. 623, 35 Am. St. Rep. 851; *In re Fall's Estate*, 31 Misc. Rep. 658, 66 N. Y. Supp. 47; *Central Trust Co. v. Weeks*, 15 App. Div. 598, 44 N. Y. Supp. 828; *Moloney v. Tilton*, 22 Misc. Rep. 682, 51 N. Y. Supp. 19; *Starbuck v. Farmers' Loan & Trust Co.*, 28 App. Div. 272, 51 N. Y. Supp. 58; *Mosher v. Funk*, 194 Ill. 351, 62 N. E. 782; *A. P. Cook Co. v. Bell*, 114 Mich. 283, 72 N. W. 174; *Stranahan v. Richardson*, 75 Minn. 402, 78 N. W. 110; *Roger v. Johnson*, 113 Ala. 589, 21 South. 477; *Tennant v. Tennant*, 43 W. Va. 547, 27 S. E. 334; *First Nat. Bk. v. Fries*, 121 N. C. 241, 61 Am. St. Rep. 663, 28 S. E. 350; *Ramsey v. Ramsey*, 123 N. C. 685, 31 S. E. 835; *Commer-*

but from the entire dispositions contained in the will, deed, or other instrument, or from a construction of all its terms. Some examples of such trusts, both in real and in personal property, are given in the foot-note as illustrations.³

³ Examples of trusts of real property: *Janes v. Throckmorton*, 57 Cal. 368 (an encumbered estate being conveyed to A, in consideration thereof he gave a written agreement whereby he covenanted that he would pay off the indebtedness out of the estate, and if any money or land remained after payment of all the indebtedness, he would convey one fifth part thereof to B. Held, that a trust was created in favor of B; and A having freed the estate from the encumbrances, and obtained a clear title in himself, that he held the land subject to a trust in B's favor with respect to one fifth thereof); *Wormouth v. Johnson*, 58 Cal. 621; *Taft v. Taft*, 130 Mass. 461 (testator devised land to his daughter, with full power to dispose of the whole or any part or any of the proceeds, to devote the income, etc., to the maintenance and support of herself and her children, and if any portion of the estate was undisposed of during her life or by her last will, the same was to be held for her children until they became of age and then paid to them. Held, that no trust was created in favor of the children, but they took contingent remainders); *Toms v. Williams*, 41 Mich. 552; *Ferry v. Liable*, 31 N. J. Eq. 566 (a testator's direction to his executors to continue his business creates a trust estate); *Donovan v. Van de Mark*, 78 N. Y. 244; *Verdin v. Slocum*, 71 N. Y. 345; *Low v. Harmony*, 72 N. Y. 408; *Vernon v. Vernon*, 53 N. Y. 351 (trusts under

cial & Farmers' Bk. v. Vass, 130 N. C. 183, 41 S. E. 791; *Hawkins v. Willard*, (Tex. Civ. App.) 38 S. W. 365; *McCreary v. Gewinner*, 103 Ga. 528, 29 S. E. 960.

In the following cases it was held that the declaration or disposition was not sufficient to establish the trust: *In re Barker*, [1892] 2 Ch. 491; *In re Severn, etc., Bridge Co.*, [1896] 1 Ch. 559; *Levis v. Kengla*, 169 U. S. 234, 18 Sup. Ct. Rep. 309, 42 L. ed. 728; *Walston v. Smith*, 70 Vt. 19, 39 Atl. 252; *Fellows v. Fellows*, 69 N. H. 339, 46 Atl. 474; *In re Small's Will*, 27 App. Div. 438, 50 N. Y. Supp. 341; *Birdsall v. Grant*, 37 App. Div. 348, 57 N. Y. Supp. 705; *Hoffman House v. Stokes*, 50 App. Div. 163, 63 N. Y. Supp. 784; *Kyle v. Wills*, 166 Ill. 501, 46 N. E. 1121; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301, 49 N. E. 652, 40 L. R.

A. 127; *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. 659; *Com. Nat. Bk. v. Kirkwood*, 172 Ill. 563, 50 N. E. 219; *Moore v. Ransdel*, 156 Ind. 658, 59 N. E. 936, 60 N. E. 1068; *Hamilton v. Hall*, 111 Mich. 291, 67 N. W. 484; *Price v. Dawson*, 111 Mich. 279, 69 N. W. 650; *Stokes v. Sprague*, 110 Iowa 89, 81 N. W. 195; *Rotter v. Scott*, 111 Iowa 31, 82 N. W. 437; *Dillon v. Farley*, 114 Iowa 629, 87 N. W. 677; *Citizens' Bk. & Tr. Co. v. Bradt*, (Tenn. Ch. App.) 50 S. W. 778; *Mulock v. Mulock*, 156 Mo. 431, 57 S. W. 122; *Gillen v. City of Frost*, 25 Tex. Civ. App. 371, 61 S. W. 345; *Kuehne v. Union Trust Co.*, (Mich.) 95 N. W. 715; *In re Barefield*, 177 N. Y. 387, 101 Am. St. Rep. —, 69 N. E. 732; see, also, *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278.

§ 1010. **Express Trusts Inferred by Construction.**—There is another important class of express trusts, which are not directly and expressly declared by the terms of the instrument, but which are inferred by a construction of all the

New York statute); *Smith v. Bowen*, 35 N. Y. 83; *Whitcomb v. Cardell*, 45 Vt. 24. Examples of trusts of personal property: Trust created, or not, of money deposited in a bank: *Stone v. Bishop*, 4 Cliff. 593; *Weber v. Weber*, 58 How. Pr. 255; *Rogers etc. Works v. Kelly*, 19 Hun, 399; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 448; *Boykin v. Pace's Ex'r*, 64 Ala. 68 (a receipt, "Received of S. P. eight hundred dollars, in trust for S. P., minor, to be kept and used for his benefit, to the best of my ability," etc., creates a valid trust which cannot be varied by parol evidence); *Clapp v. Emery*, 98 Ill. 523 (trust created by receiving and investing money of another with verbal declarations); *Reiff v. Horst*, 52 Md. 255 (trust by receiving money with verbal directions); *Lyle v. Burke*, 40 Mich. 499 (a written declaration of trust); *Kershaw v. Snowden*, 36 Ohio St. 181 (money placed in the hands of a person to be repaid on his death, held to create simply the relation of debtor and creditor, and not a trust); *Gadsden v. Whaley*, 14 S. C. 210 (a person verbally declares himself a trustee); *Ferry v. Liable*, 31 N. J. Eq. 566; *Morrison v. Kinstra*, 55 Miss. 71; *Jones v. Kent*, 80 N. Y. 585 (A sold to B certain stocks for a sum paid down, "and one half of whatever price the same should be sold for, when sold, over and above that sum." Held, no trust created of the stocks in B's hands); *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *People v. Merchants' and Mechanics' Bank*, 78 N. Y. 269; 34 Am. Rep. 532; *Silvey v. Hodgdon*, 52 Cal. 363 (verbal trust in a policy of life insurance); *Craige v. Craige*, 9 Phila. 545; *Eaton v. Cook*, 25 N. J. Eq. 55 (a direction by a creditor to his debtor to hold the money in trust for a third person); *Kitchen v. Bedford*, 13 Wall. 413 (a receipt of a "sum" in railroad bonds, with a promise to expend "said sum" in the purchase of certain lands, held to constitute a trust of the securities).§

(§) *Miller v. Clark*, 40 Fed. 15; *Hamer v. Sidway*, 124 N. Y. 538, 550, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693, *Ames Cas. on Trusts* 33 (the settlor said: "You can consider this money on interest"; if this was intended as an indication that the settlor would pay interest it would throw some doubt on the case); *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 N. Y. 206; *People v. City Bk. of Rochester*, 96 N. Y. 35; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531 (trust not inferred from a mere deposit of money in a savings bank

by one person in the name of another); *Marcy v. Amazeen*, 61 N. H. 131, 60 Am. St. Rep. 320 (same); *Robinson v. Ring*, 72 Me. 140, 39 Am. St. Rep. 308, 7 L. R. A. 272; *Boyd v. Munro*, 32 S. C. 249, 10 S. E. 963 (no trust); *Continental Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; *Edson v. Angell*, 58 Mich. 336, 25 N. W. 307 (no trust); *Chadwick v. Chadwick*, 59 Mich. 87, 26 N. W. 288; *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629; *Ellicott v. Barnes*, 31 Kan. 170, 1 Pac. 767 (money delivered to cashier of bank to pay a note is a trust fund); com-

terms and dispositions. They are all cases where the court infers that it was the intention of the party to create an express trust for some purpose, although he has not expressed that intention in unequivocal and direct terms, and

pare *National Bank v. Ellicott*, 31 Kan. 173, 1 Pac. 593; *Whitehouse v. Whitehouse*, 90 Me. 468, 60 Am. St. Rep. 278, 38 Atl. 374 (check of donor); *Metropolitan Bk. v. Loyd*, 90 N. Y. 530 (deposit of a check); see *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. 766; *Marine Bank v. Fulton Bank*, 2 Wall. 252 (discussing a debtor and creditor relation, as distinguished from a bailment to a bank); *Ætna Nat. Bank v. Fourth Nat. Bk. of N. Y.*, 46 N. Y. 82, 7 Am. Rep. 314.

The general principle that no trust arises from a mere deposit in a bank is so well recognized by the authorities that it is not deemed necessary to cite additional, specific cases, but the reader is referred, generally, to the cases cited in this note, and to § 997, note (a), in regard to voluntary trusts of bank deposits; see also a collection of cases in *Ames Cas. on Trusts* 43, note 1.

Notwithstanding this well-established rule, a bank deposit may be made as a special deposit in such manner as to create a trust. A common instance is that of the deposit of a check, or draft, for collection: *Giles v. Perkins*, 9 East 12, *Ames Cas. on Trusts* 9; *Commercial Nat. Bk. v. Armstrong*, 39 Fed. 684 (holding the fiduciary relation exists until collection); *Fifth Nat. Bk. v. Armstrong*, 40 Fed. 46; *First Nat. Bk. v. Armstrong*, 42 Fed. 193; *People v. Bk. of Dansville*, 39 Hun 187; *McLeod v. Evans*, 66 Wis. 410, 28 N. W. 173, 214, 57 Am. Rep. 287; see *First Nat. Bk. v. Armstrong*, 39 Fed. 231 (the crediting by a bank on the receipt

of the draft, giving the depositor a right to draw immediately, created the relation of debtor and creditor). Where paper is thus indorsed for collection it carries notice of the trust on its face, and when transmitted to a second or third bank for collection, such bank is bound by it; many of the cases holding that the depositor may proceed directly against the collecting bank. In *Makesey v. Ramseys*, 9 Clark & Finelly 818, *Ames Cas. on Trusts* 13, M. employed R. to collect a bill payable in Calcutta; R. employed C. & Co.; C. & Co. employed A. & Co.; A. & Co. collected the amount, credited C. & Co. with it and failed; the court held the crediting C. & Co. at A. & Co.'s was equivalent to crediting M. at R.'s, and R. was entitled to the full amount. The reasoning proceeded on the ground that title did not pass to C. & Co., nor to A. & Co., but that they were sub-agents for collection. It would seem that title did pass but was subject to the trust; yet the sub-agent theory is generally resorted to by the courts in such cases. See *Commercial Nat. Bk. v. Hamilton Nat. Bk.*, 42 Fed. 880 (the collecting bank held liable where they remitted in a roundabout way after notice of insolvency of an intermediate bank); *Midland Nat. Bk. of K. C. v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S.W. 994; *Commercial Nat. Bank v. Armstrong*, 39 Fed. 684; *Fifth Nat. Bank v. Armstrong*, 40 Fed. 46; *First Nat. Bank of Wellston v. Armstrong*, 42 Fed. 193; *First Nat. Bank v. Reno Co. Bank*, 3 Fed. 257; *Balbach v. Frelinghuysen*, 15 Fed. 675; *White v. Bank*,

the court is forced to gather it from his general expressions, or from the objects and purposes of his gift. When such a trust is found by the court to have been intended by the party, it is in every respect *an express active trust*,—has

102 U. S. 661; First Nat. Bank of C. P. v. First Nat. Bank of R., 76 Ind. 561, 40 Am. Rep. 261; Blaine v. Bourne, 11 R. I. 119; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193, 2 L. R. A. 699; Freeman's Nat. Bank v. National Tube-Works, 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779, 8 L. R. A. 42. As the note or check in such case is in trust, the insolvency of the one holding it for collection, if occurring before collection, should not affect the depositor's right to the paper or its proceeds: Brockmeyer v. Washington Nat. Bk., 40 Kan. 376, 19 Pac. 855; Fifth Nat. Bk. v. Armstrong, 40 Fed. 46; see First Nat. Bk. of Wellston v. Armstrong, 42 Fed. 193, for a discussion of the effect of payment before and after the bankruptcy; see the dissenting opinion in Ditch v. Western Nat. Bk., 79 Md. 192, 47 Am. St. Rep. 375, 29 Atl. 72, 138; City of Somerville v. Beal, 49 Fed. 790 (a bank having knowledge of its insolvency when collecting); People v. Bank of Dansville, 39 Hun 187; Continental Bank of N. Y. v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802. In Jockusch v. Towsey, 51 Tex. 129, the court states: "We are of opinion, both on principle and authority, that after a bank has suspended, it thereby ceases to have the general power and authority which it previously had to collect paper which, before its suspension, had been deposited with it for this purpose, so as to make it a general creditor of the depositor, but that this subsequent collection must be held by it as agent in trust for

the owner." The general rule would seem to be that by the collection, and mingling of the funds with those of the bank, the *res* would be destroyed, and the trust extinguished, and a subsequent insolvency would give the depositor the right of a creditor only: Freeman's Nat. Bank v. Nat. Tube-Works Co., 151 Mass. 413, 21 Am. St. Rep. 461, 24 N. E. 779, 8 L. R. A. 42. For a case where the collecting bank knew of its insolvency, see Sayles v. Cox, 95 Tenn. 579, 49 Am. St. Rep. 940, 32 S. W. 626, 32 L. R. A. 715; Howard v. Wacker, 92 Tenn. 452, 21 S. W. 897 (holding that though not actually paid in money it is binding on the depositor); Akin v. Jones, 93 Tenn. 353, 42 Am. St. Rep. 921, 27 S. W. 669, 25 L. R. A. 523; approved in Arbuckle v. Kirkpatrick, 98 Tenn. 221, 60 Am. St. Rep. 854, 39 S. W. 3, 36 L. R. A. 285; Midland Nat. Bk. v. Brightwell, 148 Mo. 356, 71 Am. St. Rep. 608, 49 S. W. 994 (the sending bank not preferred to the general creditors because the assets were not unduly swelled); Tinkham v. Heyworth, 31 Ill. 519 (when collected, and credited, the relation of debtor and creditor arose); but see Capital Nat. Bank v. Coldwater Nat. Bank, 49 Nebr. 786, 59 Am. St. Rep. 572, 69 N. W. 115; Monotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, overruling McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bowers v. Evans, 71 Wis. 133, 36 N. W. 629; Bowman v. First Nat. Bank, 9 Wash. 614, 43 Am. St. Rep. 870, 38 Pac. 211; Guignon v. First Nat. Bk., 22 Mont. 140,

no resemblance whatever to a resulting or a constructive trust. It is, in fact, an express trust which the donor did not unmistakably declare, but which the court has helped out by interpretation and inference. To call this class

55 Pac. 1051, 1097 (for a discussion of what payment or crediting will change the relation). Further discussion of the rights of the *cestui*, in case the bank has collected the amount, may be found in § 1048, note (f), in regard to the right to follow the trust property or its proceeds.

In cases of special deposit, where there is no collection intended, the trust may arise if such was the intention of the parties. In a leading English case, *Farley v. Turner*, 26 L. J. Ch. 710, the depositor gave a direction to have £500 of the deposit applied to paying R. & Co., with which they were to pay a certain bill; the receiving bank had £500 paid to R. & Co., and one of the firm died before it was applied to the payment of the depositor's account. It was held the depositor had a right to the £500. It would seem that the right which the forwarding bank had to compel R. & Co. to apply the money as directed, or to return it, was held in trust for the depositor. The case has been accepted as law, although the point as to what constituted the *res* is not always noticed. See *Montague v. Pacific Bank*, 81 Fed. 602 (money was deposited in N. Y. to the account of P. of San Francisco and P. ordered to pay to B. in Seattle; P. failed before transmitting to B. and it was held the depositor could recover in full as against the general creditors; it was further held that if P. should have kept the money separately the commingling with the bank's fund did not prevent recovery). The reason-

ing of the court, in regard to the commingling of the *res*, is criticised in 11 Har. Law. Rev. 202. See *Moreland v. Brown*, 86 Fed. 257 (a creditor refused payment in any way but by a draft to be payment if honored; the drawing bank failed before payment and the amount deposited for the payment of the draft was considered a special deposit; the case is criticised in 12 Har. Law Rev. 221, as not noticing the non-existence of a specific *res* unmixed with other funds); *Massey v. Fisher*, 62 Fed. 958 (money was paid on a note, and a receipt taken, to be given up when the note was returned; the bank failed and it was held a special deposit, though the particular money could not be identified); see, also, *Anderson v. Pacific Bk.*, 112 Cal. 598, 53 Am. St. Rep. 228, 44 Pac. 1063, 32 L. R. A. 479; *Kimmel v. Dickson*, 5 S. D. 221, 49 Am. St. Rep. 869, 58 N. W. 561, 25 L. R. A. 309; *Cutler v. Am. Ex. Nat. Bk.*, 113 N. Y. 593, 21 N. E. 710, 4 L. R. A. 328; *Drovers' Nat. Bk. v. O'Hare*, 119 Ill. 646, 10 N. E. 360; *City of St. Louis v. Johnston*, 5 Dill. 241, Fed. Cas. No. 12,235; *McHose v. Dutton*, 55 Iowa 728, 8 N. W. 667 (the deposit was to pay X. and X. was allowed to recover it); *Re Le Blanc*, 14 Hun 8 (deposit to pay certain dividends held a trust); *In re Barned Banking Co.*, 39 L. J. Ch. 635 (M. drew a note payable at P. & Co., and deposited an amount to meet it with B., to be transmitted to P. & Co.; B. failed without having transmitted the amount, and M. sued to recover the full amount on the authority of *Turner v. Farley*, *supra*;

“implied” trust, as is often done, is not only erroneous, but is productive of confusion and mistake.¹ These trusts ordinarily arise from a construction of the language of wills; but there is no reason, on principle, why they may

¹ See *Lane v. Lane*, 8 Allen, 350. These trusts are in no sense *implied* if that word is used, as it only can be properly, in opposition to *express*. They are a species of express trusts, and not a class distinct from express trust. They differ from all other express trusts only in degree, and not in kind. In every instance of express trust, the court must see an intention to convey or to hold the property in trust for some purpose, and this intention must be shown by the language used; in one instance the language is direct and technical, in another it is not so technical, but the meaning is equally plain; in the present instance there is no such direct language used to show that

but it was held the amount having been mixed with the funds of B. and no right existing against a third party, there was no *res*). Many of the cases, nominally following *Farley v. Turner*, are more like *In re Barnard* in their facts, but the point as to the identical *res* is evaded by considering that if a bank should have kept a deposit unmixed it will be presumed to have done so; also that the general creditors have no equitable right to have their amounts increased by the special depositor's money, and if the deposit can be traced to “the vault of the bank” it will be sufficient, especially if it was such a short time before the bank failure that it is obvious that the bank assets are “unduly swelled.” The Federal cases cited *supra* seem to follow such reasoning. For the proper consideration of this question see the notes to § 1048, where the right to follow the trust *res* is discussed; see, also, *Simonton v. First Nat. Bank of Minn.*, 24 Minn. 216 (the deposit for the payment of the depositors' obligation held not a trust); *First Nat. Bank of Scranton v. Higbee*, 109 Pa. St. 130; see, *ante*, § 997 and notes for cases of

bank deposit as creating voluntary trusts.

The deposit in bank of a sum of money does not, in the ordinary case, create a trust, but gives rise to the relation of debtor and creditor only; the leading case of *Foley v. Hill*, 2 H. L. C. 28, settled the question in England if any doubt had existed. See *In re Tidd*, [1893] 3 Ch. 154, distinguishing a case where the money was paid to a private party; *Carstairs v. Bates*, 3 Camp. 301, *Ames Cas. on Trusts* 12 (a bill discounted by a bank and the amount credited to the drawer was held to pass the entire property to the bank, and on its bankruptcy the drawer got nothing). A conclusive test in such cases (if one is required) is the payment of interest; when such is paid there can be no trust: *Ex parte Broad*, 13 Q. B. D. 740; the fact that there is no *res* set aside in such cases would also tend to prove that no trust was created: *Shoemaker v. Hinze*, 53 Wis. 116, 10 N. W. 86 (“the parties did not contemplate or understand that the same identical money was to be kept for and returned to the plaintiff on demand, but only that a like sum of money should be repaid by the defendant”).

not also arise from conveyances and agreements *inter vivos*.²

§ 1011. 1. From Powers Given to the Trustees.—Although no trust is declared in express terms, nor even mentioned, still the intention of the donor to create the trust, and the existence of the trust itself, may be necessarily inferred from the powers and authority given to the grantee, and in case of wills, even where no estate is directly devised to the executors, but the whole estate is *apparently* given to the beneficiaries, the trust may be necessarily inferred from the powers and authority conferred upon the executors, and thus from a construction of the entire will the intention may be shown that the executors are to take the legal title as trustees of an express active trust.¹ The peculiarity of

intention, and the intention is gathered from the whole instrument or from the nature of the dispositions. The term “implied” should be confined exclusively to those trusts which arise by operation of law, and are opposed to “express” trusts.

² See *Liddard v. Liddard*, 28 Beav. 266.

¹ The case of *Tobias v. Ketchum*, 32 N. Y. 319, 327–331, contains so full a discussion of this important doctrine that I shall quote from it at some length. The testator gave to his widow all the furniture and one third of the income of the land during her life, and to his children all the rest and residue of his property, real and personal, to be equally divided among them within six months after the widow's death. He then appointed executors, and gave them power to sell real estate, if necessary to make a fair division, and finally said that he clothed them “with full power and authority to carry out all the provisions of this will,” “to divide the proceeds,” etc., and “full power and authority to rent, lease, repair, and insure any portion of the said estate, during any period of time the same may remain unsold and undivided.” Here appears to be a direct gift of income to the widow during life, and a direct gift of the whole principal to the children, to be divided after the widow's death. There is no direct gift to the executors at all; and the words “trust,” or “trustee,” or other similar terms, are not used. The court said (p. 327): “The first question, then, is, Are the executors under this will made trustees of an express trust? The word ‘trust’ or ‘trustee’ is not used in the will, but that is only a circumstance to be noted in considering the question. ‘It is by no means necessary that the donee should be expressly directed to hold the property to certain uses, or in trust, or as a trustee. . . . It is one of the fixed rules of equitable construction that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust will have that effect. It was said by Lord Eldon that the word “trust” not being made use of is a circumstance to be alluded to, but nothing

this case is, that the trust arises, and the legal estate is vested in the trustees, although the will contains no disposition by which the legal estate is in terms devised to them. The doctrine is settled that, in dispositions of such a nature, although there is no devise in terms to them, the

more; and if the whole frame of the will creates a trust, the law is the same, though the word "trust" is not used': Hill on Trustees, orig. ed., 65, and cases cited. We are, in this case, to determine the question by the authority conferred and the duties imposed." The court then went into a full examination of the powers and duties given to the executors. If they had only authority to sell the land, and to make an equal division among the children, they might be satisfied by regarding it merely as a *power in trust*, while the legal estate remained vested in the devisees. But the authority to sell and to divide among the children, together with the authority to lease, rent, insure, pay taxes, interest, and the like, showed conclusively that the legal estate was intended to vest in the executors. These powers lasted during the life of the widow; they could not be exercised unless the executors were clothed with the legal estate; they necessarily required that the executors should have full possession of the *corpus* of the property, with full power to manage it and to receive all the *gross* income, to pay all charges, and to pay only the net income to the widow and children. In other words, the executors were trustees; the legal estate vested in them made them trustees. In support of these conclusions the court cited and commented upon Lewin on Trusts, 248; Barker v. Greenwood, 4 Mees. & W. 421; White v. Parker, 1 Bing. N. C. 573; Birmingham v. Kirwan, 2 Schoales & L. 444; Leggett v. Perkins, 2 N. Y. 297; Brewster v. Striker, 2 N. Y. 19. In conclusion, the court said: "These authorities are conceived to be abundant to establish the proposition that the authority to lease, rent, repair, insure, pay taxes, assessments, and interest, and pay net income to devisees, carried the legal title to the executors in this case, and created a trust in them, valid under the statute." In Brewster v. Striker, 2 N. Y. 19, the testator devised his real estate to his grandchildren, and then provided that the lands should not be sold, but the executors should lease or rent them, and pay the rents and profits to the grandchildren; the executors were held to be trustees and to take the legal estate. See also Garvey v. McDevitt, 72 N. Y. 556, 562; Smith v. Scholtz, 68 N. Y. 41; Knox v. Jones, 47 N. Y. 389, 396; Vernon v. Vernon, 53 N. Y. 351, 359; Van Nostrand v. Moore, 52 N. Y. 12, 18; Wagstaff v. Lowerre, 23 Barb. 209, 221; Ferry v. Liable, 31 N. J. Eq. 566 (a direction to the executors to carry on the testator's business creates a trust estate in them).^a

(a) See Meek v. Briggs, 87 Iowa 610, 43 Am. St. Rep. 410, 54 N. W. 456, quoting the text and citing Tobias v. Ketchum, *supra*; Arlington State Bank v. Paulsen, 57 Nebr. 717, 78 N. W. 303, citing the text; Johnson v. Lawrence, 95 N. Y. 154. See,

also, in general, Ward v. Ward, 105 N. Y. 73, 11 N. E. 373; Toronto General Trust Co. v. Chicago, etc., R. R. Co., 123 N. Y. 37, 25 N. E. 198; Matter of Denton, 102 N. Y. 200, 6 N. E. 299.

authority conferred by the will upon the executors to lease, rent, repair, insure, pay taxes, assessments, and interest, and otherwise manage the trust property, and to pay over the *net* income to the devisees or legatees, necessarily carries the legal title to the executors, and creates an express active trust in them. It is a familiar doctrine that where land is conveyed or devised to trustees, and they have active duties to perform, they take the legal estate; the converse is also generally true, that where active duties are prescribed for executors, which could not be performed unless the legal estate is vested in them, they are in fact made trustees, and necessarily take the legal estate for the purposes of the trust.^{2 b}

§ 1012. 2. Provisions for Maintenance.—A second species of trust by inference sometimes arises when property is given to a parent, or person *in loco parentis*, with no trust declared in terms, but with such directions for the maintenance of his family or children as enable the court to infer an intention on the part of the donor that the property should be held in trust for the purposes of the maintenance. No definite rule can be laid down; each case must stand upon its own circumstances. If the language is sufficient for the intention to be clearly inferred, the trust will be enforced; otherwise the donee will take an absolute estate, and the provisions concerning maintenance will be regarded as mere motives for the gift and recommendations addressed to his discretion.¹

² In general: *Wright v. Pearson*, 1 Eden, 119, 125; *Mott v. Buxton*, 7 Ves. 201. To receive and pay over rents: *Reynell v. Reynell*, 10 Beav. 21; *Collier v. McBean*, 34 Beav. 426; *Silvester v. Wilson*, 2 Term Rep. 444.

¹ *Woods v. Woods*, 1 Mylne & C. 401; *Raikes v. Ward*, 1 Hare, 445; *Carr v. Living*, 28 Beav. 644; *Bird v. Maybury*, 33 Beav. 351; *Byne v. Blackburn*, 26 Beav. 41; *Longmore v. Elcum*, 2 Younge & C. Ch. 363, 369; *Berry v. Briant*, 2 Drew. & S. 1; *Whiting v. Whiting*, 4 Gray, 236, 240; *Andrews v. Bank of Cape Ann*, 3 Allen, 313; *Smith v. Wildman*, 39 Conn. 387; *Paisley's Appeal*,

(b) Quoted in *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

§ 1013. 3. To Carry out the Purposes of the Will.—Trusts, or at least powers in trust, are sometimes inferred from the terms of a will, when an intention to create the same is necessary, in order to carry out the directions and purposes of the testator. For example, when a trustee is ordered to

70 Pa. St. 153, 158; *Whelan v. Reilly*, 3 W. Va. 597; *Bryan v. Howland*, 98 Ill. 625 (land conveyed to a trustee, in trust for A, and to permit A to “use, occupy, possess, enjoy, rent, etc., in any manner for the support, maintenance, and benefit of himself *and his children*,” held not to create a trust in favor of the children); *Taft v. Taft*, 130 Mass. 461 (devise to a daughter, with power to sell, and to devote the proceeds and income to the support and maintenance of herself *and her children*, no trust for the children); *Smith v. Bowen*, 35 N. Y. 83 (“all my estate I give to my wife, to be used and disposed of at her discretion for the benefit of herself and my daughters, A, B, and C,” created a trust for the daughters as to three fourths); *Lyon v. Lyon*, 65 N. Y. 339 (a testator devised all his real estate to his sons, provided that the house should be his daughter’s “home, free of expense, as to paying any rent or privilege in said house.” Held, the daughter was entitled to full support from the sons); *Biddle’s Appeal*, 80 Pa. St. 258 (devise to a trustee, in trust for testator’s widow, to pay the income to her, and that income to be applied by her to the maintenance of his children, without her being called upon to give any account of her manner of applying it; held to create no trust for the children); *Estate of Goodrich*, 38 Wis. 492 (testator devised his “home farm,” etc., to his son, and added, “my wife to have a home and good support as long as she lives on the home premises, board and clothing,” etc. Held, the maintenance of the widow was charged upon the “home farm”); *Young v. Young*, 68 N. C. 309 (testator gave all his property to his widow, “to be managed by her, and that she may be enabled the better to control and manage our children, to be disposed of by her to them in that manner she may think best.” Held, a trust created for the children); and see *Parsons v. Best*, 1 Thomp. & C. 211.^a It would be difficult to reconcile some of these American decisions with the current of English authorities. The following is a *résumé* of recent English cases:—

Where a bequest is made so that the legatee may use or dispose of the income for the benefit of *himself* and the maintenance or education of his children, a trust is, in general, created for the children in common with the

(a) See, also, *In re G.*—, [1899] 1 Ch. 719; *Blouin v. Phaneuf*, 81 Me. 176, 16 Atl. 540; *Bell v. Watkins*, 82 Ala. 512, 60 Am. Rep. 756, 1 South. 92; *Pilcher v. McHenry*, 14 Lea 77; *Seibel v. Rapp*, 85 Va. 28, 6 S. E. 478 (no trust for the children in the last case); *Spiers v. Roberts*, 73

Mich. 666, 41 N. W. 841 (absence of an obligation to account decisive against the trust character of the provision); *Zimmer v. Sennott*, 134 Ill. 505, 25 N. E. 774 (a devise to testator’s widow, “upon condition that” she shall raise, support, and educate his children, creates no trust).

pay certain moneys, but no property is given him with which to make the payments, or when executors are ordered to sell the real estate, or the real estate is charged with the payment of the testator's debts,—in these and similar cases a trust, or a power in trust, may be inferred, in order that the trustee or executor may carry the directions into effect.¹

interest of the parent: *Woods v. Woods*, 1 Mylne & C. 401; *Berry v. Briant*, 2 Drew. & S. 1; *Castle v. Castle*, 1 De Gex & J. 352; *Byne v. Blackburn*, 26 Beav. 41; *Carr v. Living*, 28 Beav. 644; *Bird v. Maybury*, 33 Beav. 351; *Hora v. Hora*, 33 Beav. 88; *Wilson v. Maddison*, 2 Younge & C. Ch. 372; *Longmore v. Elcum*, 2 Younge & C. Ch. 363, 370; *Staniland v. Staniland*, 34 Beav. 536. Sometimes the language shows that it was not the testator's intention for the parent to take *any interest* for himself; e. g., a gift to A to dispose of among his children: *Blakeney v. Blakeney*, 6 Sim. 52; or a gift to A to enable him to maintain his children until they become of age: *Wetherell v. Wilson*, 1 Keen, 80. A gift to A, to be disposed of for the benefit of *himself and his children*, has been construed so that the parent took a life estate with a *power* of disposition in favor of his children, which would be a power in trust: *Armstrong v. Armstrong*, L. R. 7 Eq. 518; *Crockett v. Crockett*, 2 Phill. Ch. 553; *Costabadie v. Costabadie*, 6 Hare, 410; *Gully v. Cregoe*, 24 Beav. 185; *Jeffery v. De Vitre*, 24 Beav. 276; *Shovelton v. Shovelton*, 32 Beav. 142; but see *Lambe v. Eames*, L. R. 6 Ch. 597. As to a bequest to A, with a direction that B should reside with and be maintained by A, see *Wilson v. Bell*, L. R. 4 Ch. 581. On the other hand, the language may show no intention to create a trust, and may simply state the motive for the gift. Thus the bequest was held to be absolute in the following cases: A bequest to A, to enable him the better to provide for his children: *Brown v. Cassamajor*, 4 Ves. 498; a bequest to A, to enable him to assist his children: *Benson v. Whittam*, 5 Sim. 22; a legacy to A, to maintain and bring up B: *Biddles v. Biddles*, 16 Sim. 1; *Jones v. Greatwood*, 16 Beav. 527; but see *Wheeler v. Smith*, 1 Giff. 300. It must be conceded that the cases upon the subject of maintenance are very confused, and even contradictory.^b

¹ *Pitt v. Pelham*, 2 Freem. 134; 1 Ch. Rep. 283; *Tenant v. Brown*, 1 Cas. Ch. 180; *Blatch v. Wilder*, 1 Atk. 420; *Cook v. Fountain*, 3 Swanst. 585; *Hoxie v. Hoxie*, 7 Paige, 187; *Walker v. Whiting*, 23 Pick. 313; *Fay v. Taft*, 12 Cush. 448; *Watson v. Mayrant*, 1 Rich. Eq. 449; *Withers v. Leadon*, 1 Rich. Eq. 324; *Baker v. Red*, 4 Dana, 158.^a

(b) See, also, *Henry v. Strong*, 39 Ch. Div. 443 (beneficiaries under a discretionary trust for maintenance have no assignable interest except such as the trustees, in their discretion, may allow them).

(a) These instances should be dis-

tinguished from the case of a power of sale not discretionary, implying no special confidence in the executor: such power belongs to the office of executor, and may be exercised by an administrator with the will annexed: See *Mott v. Ackerman*, 92 N. Y. 539.

§ 1014. 4. *Precatory Words*.^a—The most common and important species of trusts by inference are those which arise where a testator has given property to a devisee or legatee, and has accompanied his gift with *precatory* words or phrases, implying his desire or wish that the property should be used for the benefit of some designated person or persons, or should be applied to some designated purpose.¹ Words expressing direction, recommendation, en-

¹ In *Knight v. Knight*, 3 Beav. 148, 172-174, 11 Clark & F. 513, Lord Langdale explained this doctrine in the following manner: "As a general rule, it has been laid down that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, or entreaty, or wish shall be held to create a trust: 1. If the words are so used that, upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation or wish be certain; and 3. If the objects or persons intended to have the benefit of the recommendation or wish be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives one thousand pounds to A B, desiring, wishing, recommending, or hoping that A B will, at his death, give the same sum, or any certain part of it, to C D, it is considered that C D is an object of the testator's bounty, and A B is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish. So if a testator gives the residue of his estate, after certain purposes are answered, to A B, recommending A B, after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property—though a subject to be ascertained—and that the relations to be selected—though persons or objects to be ascertained—are nevertheless so clearly and certainly ascertainable—so capable of being made certain—that the rule is applicable to such cases. On the other hand, if the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty,—then it has been held that no trust has been created. Thus the words 'free and unfettered,' accompanying the strongest expressions of request, were held to prevent the words of request from being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object—that is, a de-

(a) Sections 1014-1017 are cited in *McDuffie v. Montgomery*, 128 Fed. 105.

treaty, confidence, hope, expectation, desire, wish, request, and the like, are included under the denomination "precatory." As a most general statement of the rule, if such words are strong enough to indicate the intention, and this intention is not defeated by other provisions of the will,

scription by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take — will prevent the objects from being certain within the meaning of the rule; and in such cases we are told that the question 'never turns upon the grammatical import of the words,—they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered:' *Meggison v. Moore*, 2 Ves. 632, 633. And 'wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended': *Morice v. Bishop of Durham*, 10 Ves. 535, 536; or, as Lord Eldon expresses it in another case, 'where a trust is to be raised characterized by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say it is not sufficiently clear what the testator intended': *Wright v. Atkyns*, Turn. & R. 157, 159." In this case a testator devised his estates to his heir at law,—a brother,—and added: "I trust to the liberality of my successors to reward any others of my old servants, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather." Held, that no trust was created; the devisee took the estate absolutely unfettered by any trust in favor of the male line. One of the most recent decisions in which the subject was carefully considered is *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572. Testator said: "I do give and bequeath all my property to my beloved wife, only requesting her at the close of her life to make such disposition of the same among my children and grandchildren as shall seem to her good." Danforth, J., said (p. 406): "The tendency of modern decisions is not to extend the rule or practice which from words of doubtful meaning deduces or implies a trust: *Lamb v. Eames*, L. R. 10 Eq. 267; *In re Hutchinson and Tenant*, L. R. 8 Ch. Div. 540. When this doctrine was applied, the object sought for was the intention of the testator, and for this the context of the will was looked at, first, to ascertain his wishes, if any were expressed, and next, to see whether he intended to impose an obligation on his legatee to carry them into effect, or having expressed his wishes, he intended to leave it to the legatee to act on them or not, in his discretion. Cases illustrating both divisions of this inquiry are collected by various text-writers. They are, however, subject to the rule stated by Lord Cranworth in

the court infers that the property was given on trust for the person or object indicated, and will enforce such trust, according to its nature, as a similar trust declared in express terms would be enforced.²

Williams v. Williams, 1 Sim., N. S., 358, 368, that 'the real question always is, whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.' Mr. Justice Danforth then cites *Bernard v. Minshull*, Johns. 276, *Howarth v. Dewell*, 6 Jur., N. S., 1360, and *In re Hutchinson and Tenant*, *supra*, and reaches the conclusion that the words used were not sufficient to show an intention on the part of the testator to create any trust.^b

² The following are some of the English cases showing what precatory words have or have not been held to create a trust: *Words which have been held sufficient*: "In full confidence": *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414; *Curnick v. Tucker*, L. R. 17 Eq. 320; "well knowing": *Briggs v. Penny*, 3 Macn. & G. 546; "directs": *White v. Briggs*, 2 Phill. Ch. 583; "confides," "trusts and confides": *Palmer v. Simmonds*, 2 Drew. 221, 225; *Griffiths v. Evan*, 5 Beav. 241; *Macnab v. Whitbread*, 17 Beav. 299; "hopes," "doubts not," "recommends": *Paul v. Compton*, 8 Ves. 375, 380; *Tibbits v. Tibbits*, 19 Ves. 656; *Malim v. Keighley*, 2 Ves. 333, 335; *Hart v. Tribe*, 18 Beav. 215; but see *Meggison v. Moore*, 2 Ves. 630; "entreats": *Prevost v. Clarke*, 2 Madd. 458; "desires," "wills and desires": *Stead v. Mellor*, L. R. 5 Ch. Div. 225; *Birch v. Wade*, 3 Ves. & B. 198; *Bonser v. Kinnear*, 2 Giff. 195; "requests," "wishes and requests": *Foley v. Parry*, 2 Mylne & K. 138;

(b) The case of *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138, illustrates the rule that a trust sought to be inferred from precatory words is not necessarily defeated by reason of uncertainty as to the form and extent of the provision intended, and because it involves the exercise of discretionary power on the part of the trustee. Mr. Justice Matthews says (pp. 319, 320); "We have seen that whatever discretion is given by the will to the testator's widow does not affect the existence of the trust. That discretion does not involve the right to choose whether a provision shall be made or not; nor is there anything personal or arbitrary implied in it.

It is to be the exercise of judgment directed to the care and protection of the beneficiaries by making such a provision as will best secure that end. There is nothing in this left so vague and indefinite that it cannot, by the usual processes of the law, be reduced to certainty. Courts of common law constantly determine the reasonable value of property sold, where there is no agreement as to price, and the judge and jury are frequently called upon to adjudge what are necessities for an infant, or reasonable maintenance for a deserted wife. The principles of equity and the machinery of its courts are still better adapted to its inquiries."

§ 1015. *Modern Tendency to Restrict the Doctrine.*— I shall not attempt any analysis and classification of the cases for the purpose of formulating more specific rules. This has been done, as far as practicable, in the various treatises

Bernard v. Minshull, Johns. 276; "requires and entreats": Taylor v. George, 2 Ves. & B. 378; "I direct" that A "shall reside with and be maintained by" B: Wilson v. Bell, L. R. 4 Ch. 581. Settlement made after marriage in pursuance of a declaration of wish sustained: Teasdale v. Braithwaite, L. R. 5 Ch. Div. 630; and see Irvine v. Sullivan, L. R. 8 Eq. 673. *Words held not sufficient*: "My wish": Parnall v. Parnall, L. R. 9 Ch. Div. 96; "to do justice" to testator's "relations": In re Bond, L. R. 4 Ch. Div. 238; "hoping," "fullest confidence": Eaton v. Watts, L. R. 4 Eq. 151; proceeds to be applied in maintaining children: Mackett v. Mackett, L. R. 14 Eq. 49; "may dispose of . . . for the good of their families": Alexander v. Alexander, 6 De Gex, M. & G. 593; and generally, where the intention appears from express terms or from the whole disposition that the devisee or legatee is to take *absolutely*, the addition of precatory words, even though standing alone they might create a trust, will not cut down the absolute gift; their fulfillment is left to the donee's own discretion: Meredith v. Heneage, 1 Sim. 542; Wood v. Cox, 2 Mylne & C. 684; a gift "absolutely," to dispose of, etc., testator having "full confidence," etc.: In re Hutchinson and Tenant, L. R. 8 Ch. Div. 546; "to be at her disposal," "for the benefit of herself and family": Lambe v. Eames, L. R. 10 Eq. 267; 6 Ch. 597; a gift to A, "for his own use, benefit, and disposal absolutely," nevertheless "conjuring," or "desiring," or "recommending" him to make some particular disposition: Winch v. Brutton, 14 Sim. 379; Johnston v. Rowlands, 2 De Gex & S. 356; Webb v. Wools, 2 Sim., N. S., 267; Abraham v. Alman, 1 Russ. 509; Reeves v. Baker, 18 Beav. 372.^c

The following are among the most important English cases not mentioned in the foregoing abstract: Harding v. Glyn, 1 Atk. 469; Pierson v. Garnet, 2 Brown Ch. 38, 226; Harland v. Trigg, 1 Brown Ch. 142; Cunliffe v. Cunliffe, Amb. 686; Bland v. Bland, 2 Cox, 349; Horwood v. West, 1 Sim. & St. 387; Cary v. Cary, 2 Schoales & L. 173, 189; Shaw v. Lawless, 1 Lloyd & G. 558; 5 Clark & F. 129; Wright v. Atkyns, Turn. & R. 143, 157; 17 Ves. 255; 19 Ves. 299; Cruwys v. Colman, 9 Ves. 319, 322; Morice v. Bishop of Durham, 10 Ves. 521, 535; Paul v. Compton, 8 Ves. 375, 380; Knott v. Cottee, 2 Phill. Ch. 192; Hinxman v. Poynder, 5 Sim. 546; Sale v. Moore, 1 Sim. 534; Eade v. Eade, 5 Madd. 118; Curtis v. Rippon, 5 Madd. 434; Wood v. Cox, 1 Keen, 317.

(c) The recent English decisions reject *Malim v. Keighley*, *supra*, and accept *Lambe v. Eames*, L. R. 10 Eq. 267, *supra*, and *In re Hutchinson and Tenant*, L. R. 8 Ch. Div. 540, *supra*, as illustrating the proper view: See *In re Hamilton*, [1895] 2 Ch. 373;

In re Williams, [1897] 2 Ch. 12; see, also, as examples: "Feeling confident that she will act justly by our children in dividing" the property, "when no longer required by her"—*Mussoorie Bank v. Raynor*, 7 App. Cas. (Priv. Coun.) 321; devise to

upon trusts. The decisions are numerous and conflicting. Judges have for some time past shown a decided leaning against the doctrine of precatory trusts, and a strong tendency to restrict its operation within reasonable and somewhat narrow bounds; many of the earlier decisions would certainly not be followed at the present day. The courts of this country have generally adopted the doctrine substantially as settled in England, although perhaps with some caution and reserve; and they all exhibit the modern tendency to limit rather than enlarge its scope; while in a few of the states the doctrine has been accepted with great reluctance, and only to a partial extent and in a modified form.¹

¹ *Dresser v. Dresser*, 46 Me. 48; *Cole v. Littlefield*, 35 Me. 439; *Erickson v. Willard*, 1 N. H. 217; *Van Amee v. Jackson*, 35 Vt. 173; *Warner v. Bates*, 98 Mass. 274, 277; *Spooner v. Lovejoy*, 108 Mass. 529, 533; *Chase v. Chase*, 2 Allen, 101; *Homer v. Shelton*, 2 Met. 194, 206; *Whipple v. Adams*, 1 Met. 444; *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572; *Smith v. Bowen*, 35 N. Y. 83; *Dominick v. Sayre*, 3 Sand. 555; *Parsons v. Best*, 1 Thomp. & C. 211; *Arcularius v. Geisenhainer*, 3 Bradf. 64, 75; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397; *Ward v. Peloubet*, 10 N. J. Eq. 304; *Williams v. Worthington*, 49 Md. 572; 33 Am. Rep. 286; *Tolson v. Tolson*, 10 Gill & J. 159; *Harrison v. Harrison's Adm'r*, 2 Gratt. 1; 44 Am. Dec. 365; *Crump v. Redd's Adm'r*, 6 Gratt. 372; *Reid's Adm'r v. Blackstone*, 14 Gratt. 363; *Rhett v. Mason's Ex'r*, 18 Gratt. 541; *Cook v. Ellington*, 6 Jones Eq. 371; *Carson v. Carson*, 1 Ired. Eq. 329; *Young v. Young*, 68 N. C. 309; *Lesesne v. Witte*, 5 S. C. 450; *Hunter v. Stembbridge*, 12 Ga. 192; *Ingram v. Fraley*, 29 Ga. 553; *Lines v. Darden*, 5 Fla. 51; *McRae's Adm'r v. Means*, 34 Ala. 349; *Ellis v. Ellis's Adm'r*, 15 Ala. 296; 50 Am. Dec. 132; *Lucas v. Lockhart*, 10 Smedes & M. 466; 48 Am. Dec. 766; *Cockrill v. Armstrong*, 31 Ark. 580; *Collins v. Carlisle*, 7 B. Mon. 13; *Hunt v. Hunt*, 11 Nev. 442.^a In Connecticut and Pennsylvania.

wife absolutely, "in full confidence that she will do what is right as to the disposal thereof between my children": *In re Adams Vestry*, 24 Ch. Div. 199; 27 Ch. Div. 394; "it is my desire that she allow": *Gregory v. Edmondson*, 39 Ch. Div. 253; *In re Hanbury*, [1904] 1 Ch. 415 ("in full confidence that"); *In re Oldfield*, [1904] 1 Ch. 549.

(^a) See, also, *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. 902; *Howze v.*

Barber, 29 S. C. 466, 7 S. E. 817; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 46; *Corby v. Corby*, 85 Mo. 371; *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. 780; *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298; *Seamonds v. Hodge*, 36 W. Va. 304, 32 Am. St. Rep. 854, 15 S. E. 156; *Foster v. Willson*, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003 (recognizing the trust); see

§ 1016. What Intention Necessary — The General Criterion.^a Whether or not a trust has been created in any particular case is entirely a question of interpretation and construction. The intention must be sought for not only in the precatory words themselves, but also in the terms and qualifications of the gift, the powers of disposition or enjoyment conferred upon the first taker, the nature of the property, the description of the supposed beneficiaries, and all the other context. Precatory words may be used which, standing alone, would, under the decisions, create a trust; but they may be qualified and controlled by other expressions showing that the gift is absolute, and that everything is left to the discretion of the devisee or legatee. Each case must therefore turn upon its own circumstances, and not a little upon the sentiments and prepossessions of individual judges. With respect to the essential elements which must exist in every precatory trust, it is impossible to add anything to the clear and accurate statement of Lord Langdale, in the case of *Knight v. Knight*, already quoted. Those essentials are the imperative nature and meaning of the precatory words, the certainty of the subject-matter or property embraced in the trust, and the certainty of the objects or intended bene-

the doctrine has been accepted with great reserve and caution, and under considerable limitations: See *Harper v. Phelps*, 21 Conn. 257; *Gilbert v. Chapin*, 19 Conn. 342; *Bull v. Bull*, 8 Conn. 47; 20 Am. Dec. 86; *Coates's Appeal*, 2 Pa. St. 129; *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718; *Walker v. Hall*, 34 Pa. St. 483; *Kinter v. Jenks*, 43 Pa. St. 445; *Jaureche v. Proctor*, 48 Pa. St. 466; *Second Church v. Disbrow*, 52 Pa. St. 219; *Burt v. Herron*, 66 Pa. St. 400; *Paisley's Appeal*, 70 Pa. St. 153; *Biddle's Appeal*, 80 Pa. St. 258.^b

Murphy v. Carlin, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786, which does not seem to be in full accord with the recent cases criticising the doctrine; see, also, citing the text, *Curd v. Field*, 19 Ky. Law Rep. 2016, 45 S. W. 92.

(b) See *Bowlby v. Thunder*, 105 Pa. St. 173; *Hopkins v. Glunt*, 111 Pa. St. 290, 2 Atl. 183; *Dexter v. Evans*,

63 Conn. 58, 38 Am. St. Rep. 336, 27 Atl. 308; but see the later Pennsylvania cases of *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630, 22 Atl. 1032; *Boyle v. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. 494.

(a) This section is cited generally in *McMonagle v. McGlinn*, 85 Fed. 88.

ficiaries. Upon the authority of the more modern decisions, the whole doctrine may be summed up in a single proposition: In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, *that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner.* Unless a gift to A, with precatory words in favor of B, is in fact *equivalent in its meaning, intention, and effect* to a gift to A, "in trust for B," then certainly no trust should be inferred. The early decisions proceeded perhaps upon a more artificial rule, and saw an intention in the use of words of wish, desire, and the like, where no such intention really existed. The modern decisions have adopted a more just and reasonable rule, and require the intention to exist as a fact, and to be expressed in unequivocal language. No other conclusion can be reconciled with the general principles of construction which are based upon reason and universal experience.¹ It has sometimes been stated as a general rule that a *prima facie* presumption of an intention to create a trust arises from the use of precatory words. Whatever may have been true of the earlier cases, the modern authorities do not, in my opinion, sustain any such rule; it is contrary to their whole scope and tenor.

¹ The following cases are given more as examples of the essential requisites, and as illustrations of the conclusion reached in the text: *Imperative nature of the words*: *Stead v. Mellor*, L. R. 5 Ch. Div. 225. The opinion of Jessel, M. R., in this case shows very clearly the positions occupied by modern authorities, and fully sustains the correctness of the criterion laid down above in the text. The will gave the residue to A and B, "my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." Held, that A and B took the residue absolutely. Sir George Jessel said, among other things (p. 228): "Unless I find in the will something *equivalent to a declaration that the residuary legatees take as trustees*, I must hold that they take a beneficial interest": *Briggs v. Penny*, 3 Macn. & G. 546, 554, 556, per Lord Truro; *Williams v. Williams*, 1 Sim., N. S., 358,

§ 1017. **Objections to the Doctrine.**—The doctrine of precatory trusts has never met with unanimous approval. Able judges have dissented from it on principle, have pronounced it artificial, and have described it as violating instead of carrying out the intent of parties; and undoubtedly most of the earlier decisions were open to this criticism. It does seem strange that a testator, *having a full and settled*

368; *Meredith v. Heneage*, 1 Sim. 542, 550, 553; *Bardswell v. Bardswell*, 9 Sim. 319; *Knott v. Cottee*, 2 Phill. Ch. 192; *Lechmere v. Lavie*, 2 Mylne & K. 197; *Hood v. Oglander*, 34 Beav. 513; *Scott v. Key*, 35 Beav. 291; *Shovelton v. Shovelton*, 32 Beav. 143; *Liddard v. Liddard*, 28 Beav. 266; *Eaton v. Watts*, L. R. 4 Eq. 151; *Foose v. Whitmore*, 82 N. Y. 405; 37 Am. Rep. 572; *Cockrill v. Armstrong*, 31 Ark. 580; *Hunt v. Hunt*, 11 Nev. 442; *Biddle's Appeal*, 80 Pa. St. 258; *Van Amee v. Jackson*, 35 Vt. 173, 177.^b *Certainty of subject-matter or property*: *Buggins v. Yates*, 9 Mod. 122; *Curtis v. Rippon*, 5 Madd. 434; *Pope v. Pope*, 10 Sim. 1; *Bardswell v. Bardswell*, 9 Sim. 319; *Winch v. Brutton*, 14 Sim. 379; *Cowman v. Harrison*, 10 Hare, 234; *Russell v. Jackson*, 10 Hare, 204, 213; *Lechmere v. Lavie*, 2 Mylne & K. 197; *Palmer v. Simmonds*, 2 Drew. 221; *Fox v. Fox*, 27 Beav. 301; *Constable v. Bull*, 3 De Gex & S. 411; *Williams v. Worthington*, 49 Md. 572; 33 Am. Rep. 286; *Tolson v. Tolson*, 10 Gill & J. 159; *Ingram v. Fraley*, 29 Ga. 553.^c *Certainty of object, the persons, and the way in which the property is to go*: *Green v. Marsden*, 1 Drew. 646; *White v. Briggs*, 2 Phill. Ch. 583; *Sale v. Moore*, 1 Sim. 534; *Malim v. Keighley*, 2 Ves. 333, 335; *Briggs v. Penny*, 3 Macn. & G.

(^b) This note is cited in *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33. *Words held not sufficient*: “Enjoin”: *Lawrence v. Cooke*, 104 N. Y. 632, 41 N. E. 144. See, also, *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473; *Rose v. Porter*, 141 Mass. 309, 5 N. E. 641; *Sturgis v. Paine*, 146 Mass. 354, 16 N. E. 21; *Bowlby v. Thunder*, 105 Pa. St. 173; *Hopkins v. Glunt*, 111 Pa. St. 290, 2 Atl. 183; *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225; *In re Whitecomb*, 86 Cal. 265, 24 Pac. 1028; *McDuffie v. Montgomery*, 128 Fed. 105; *Kaufman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Clark v. Clark*, (Md.) 58 Atl. 24. *Words held sufficient*: “Recommend,” “request”: *Colton v. Colton*, 127 U. S. 300, 8

Sup. Ct. Rep. 1164, 28 L. ed. 420; “If she find it convenient, . . . I wish it to be done”: *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411; “desire”: *Riker v. Leo*, 115 N. Y. 98, 21 N. E. 719; “request”: *Eddy v. Hartshorne*, 34 N. J. Eq. 420. See, also, *Low v. Low*, 77 Me. 171; *Maught v. Getzendanner*, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471; *Russell v. U. S. Trust Co.*, 127 Fed. 445.

(^c) *Mussoorie Bank v. Raynor*, 7 App. Cas. (Priv. Coun.) 321; *Colton v. Colton*, 127 U. S. 300, 319, 320, 8 Sup. Ct. Rep. 1164, 28 L. ed. 420; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155; *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239.

intention to create a trust, should adopt a mode which at best seems to be a mere suggestion or possible inference, and should not employ the familiar method of creating a trust by express declaration.¹ On the other hand, to abrogate the doctrine altogether would be introducing a rule wholly arbitrary and technical, since it would be saying, in

546. With respect to the doctrine in all of its phases, see *Harding v. Glyn*, 1 Atk. 469; 2 Lead. Cas. Eq., 4th Am. ed., 1833, 1834-1848, 1857-1866.^d

Notwithstanding the imposing line of authorities, there has always been a strong dissent from the doctrine from judges of the highest ability, who have described it as artificial, and its effect as violating the intention of parties. The following are a few examples: In *Sale v. Moore*, 1 Sim. 534, 540, Sir Anthony Hart, V. C., said: "The first case that construed words of recommendation into a command made a will for the testator; for every one knows the distinction between them." In *Wright v. Atkyns*, 1 Ves. & B. 313, 315, Lord Eldon said: "This sort of trust is generally a surprise on the intention, but it is too late to correct that." In the important case of *Meredith v. Heneage*, 1 Sim. 542, 551, before the house of lords, Chief Baron Richards said, speaking of prior decisions: "I entertain a strong doubt whether, in many or perhaps in most of the cases, the construction was not adverse to the real intention of the testator. It seems to me very singular that a person who really meant to impose the obligation established by the cases should use a course so circuitous, and a language so inappropriate and obscure, to express what might have been conveyed in the clearest and most usual terms,—terms the most familiar to the testator himself, and to the professional or other person who might prepare his will. In considering these cases, it has always occurred to me that if I had myself made such a will as has generally been considered imperative, I should never have intended it to be imperative; but on the contrary, a mere intimation of my wish that the person to whom I had given my property should, if he pleased, prefer those whom I proposed to him, and who, next to him, were at the time the principal objects of my regard." He also says that the question in such cases "is purely a matter of intention, to be collected from the words of the instrument, as in all other cases of wills." The foregoing language of this learned judge should, as it seems to me, be present to the minds of all courts, when passing upon cases of precatory trusts, as a proper and reasonable guide in rendering a decision.

¹ See quotations in the latter portion of the last preceding note.

(^d) *Handley v. Wrightson*, 60 Md. 198; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155; *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239. The case of *Colton v. Colton*, 127 U. S. 300, 317, 8 Sup. Ct. Rep. 1164, 28 L. ed. 420, well

illustrates the manner in which the intention of the testator may be inferred from the situation of the testator at the time he framed the provisions of the will, from his relation to the beneficiaries, and the like.

fact, that trusts shall not be created except by means of a certain, fixed, and technical formula or manner of expression. Justice will be done, therefore, if the doctrine is placed upon reasonable grounds, its operation confined within narrow limits, and regulated by the criterion stated in the preceding paragraph.

SECTION IV.

PUBLIC OR CHARITABLE TRUSTS.

ANALYSIS.

- § 1018. General description.
- § 1019. A public, not a private, benefaction requisite.
- § 1020. What are charitable uses and purposes: "Statute of charitable uses."
- §§ 1021-1024. Classes of charitable uses.
 - § 1021. 1. Religious purposes.
 - § 1022. 2. Benevolent purposes.
 - § 1023. 3. Educational purposes.
 - § 1024. 4. Other public purposes.
- § 1025. Creation of the trust: Certainty or uncertainty of the object and of the beneficiaries.
- § 1026. Certainty or uncertainty of the trustees.
- § 1027. The doctrine of *cy-pres*.
- § 1028. Origin and extent of the equitable jurisdiction.
- § 1029. Charitable trusts in the United States.

§ 1018. General Description.^a—In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified *cestui que trust* clearly identified or made capable of identification by the terms of the instrument creating the trust. It is an essential feature

(a) The text, §§ 1018-1023, is cited in *Field v. Drew Theological Seminary*, 41 Fed. 371; §§ 1018-1029, cited in *Lane v. Eaton*, 69 Minn. 141, 65 Am. St. Rep. 559, 71 N. W. 1031, 38 L. R. A. 669; §§ 1018-1020, cited

in *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723. This section is cited in *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Pennoyer v. Wadhams*, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 211.

of public or charitable trusts that the beneficiaries are uncertain,— a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a *quasi* public character. The most patent examples are “ the poor ” of a certain district, in a trust of a benevolent nature, or “ the children ” of a certain town, in a trust for educational purposes. In such a case it is evident that *all* the beneficiaries can never unite to enforce the trust; for even if all those in existence at any given time could unite, they could not include nor bind their successors. It is a settled doctrine in England and in many of the American states that personal property and real property, except when prohibited by statutes, may be conveyed or bequeathed in trust, upon charitable uses and purposes, for the benefit of such uncertain classes or portions of the public, and that if the purposes are charitable, within the meaning given to that term, a court of equity will enforce the trust. Furthermore, it is one of the most important and distinctive features of charitable trusts that however long the period may be during which they are to last, even though it be absolutely unlimited in its duration, they are not subject to nor controlled by the established doctrines, nor even the statutes which prohibit perpetuities. Indeed, it may be said that the full conception of a charitable trust includes the notion that it is or may be perpetual.¹

§ 1019. A Public, and not Private, Benefaction Requisite.— In order that a trust may be charitable, the gift must be for the benefit of such an indefinite *class* of persons that the charity is really a public, and not a mere private, benefaction. On the other hand, in a public trust the designation of the charitable use and of the beneficiaries must be suffi-

¹ The subject of charitable trusts in particular is so broad, and involves so many special rules and applications, that I shall attempt no more than to give an outline of its more general doctrines, and must refer the reader to treatises upon trusts for a detailed exposition; a proper treatment would require a volume by itself.

ciently certain and descriptive to indicate the intention of the donor; the language must not be so general and vague as to leave *both the beneficiaries and the purposes and objects* completely to the judgment and choice of the trustee or of the court.¹

¹ *Morice v. Bishop of Durham*, 9 Ves. 399, 405; 10 Ves. 522, 541; *Mitford v. Reynolds*, 1 Phill. Ch. 185; *Att'y-Gen. v. Aspinall*, 2 Mylne & C. 613, 622, 623; *British Museum v. White*, 2 Sim. & St. 594, 596; *Nash v. Morley*, 5 Beav. 177; *Kendall v. Granger*, 5 Beav. 300; *Townsend v. Carus*, 3 Hare, 257; *Nightingale v. Goulburn*, 5 Hare, 484; *Whicker v. Hume*, 14 Beav. 509; 1 De Gex, M. & G. 506; 7 H. L. Cas. 124; *Miller v. Rowan*, 5 Clarke & F. 99; *Williams v. Kershaw*, 5 Clarke & F. 111, note; *Cocks v. Manners*, L. R. 12 Eq. 574; *Beaumont v. Oliveira*, L. R. 6 Eq. 534; 4 Ch. 309, 314 (scientific purposes); *President of the United States v. Drummond*, cited 7 H. L. Cas. 155; *Dolan v. Macdermot*, L. R. 5 Eq. 60; 3 Ch. 676 (for "such charities and other public purposes as lawfully might be in the parish of T."—a good charitable trust); *James v. Allen*, 3 Mer. 17; *Fowler v. Garlike*, 1 Russ. & M. 232; *Vezey v. Jamson*, 1 Sim. & St. 69; *Ellis v. Selby*, 7 Sim. 352; 1 Mylne & C. 286; *Loscombe v. Wintringham*, 13 Beav. 87, 89, and cases in note; *Baker v. Sutton*, 1 Keen, 224; *Wilkinson v. Lindgreen*, L. R. 5 Ch. 570 ("to any other religious institution or purposes as A and B may think proper,"—a valid charity); *Chamberlayne v. Brockett*, L. R. 8 Ch. 806; *Aston v. Wood*, L. R. 6 Eq. 419 (court will not presume a public charitable use where none was declared, although the bequest was to the trustees of a religious society); *Corporation of Gloucester v. Wood*, 3 Hare, 131, 136–148; *Lewis v. Allenby*, L. R. 10 Eq. 668; *Wilkinson v. Barber*, L. R. 14 Eq. 96; *Gillam v. Taylor*, L. R. 16 Eq. 581; *Att'y-Gen. v. Eastlake*, 11 Hare, 205, 215; *Pocock v. Att'y-Gen.*, L. R. 3 Ch. Div. 342; *In re Jarman's Estate*, L. R. 8 Ch. Div. 584; *In re Williams*, L. R. 5 Ch. Div. 735; *In re Birkett*, L. R. 9 Ch. Div. 576; *In re Hedgman*, L. R. 8 Ch. Div. 156; *Mills v. Farmer*, 1 Mer. 55; *Moggridge v. Thackwell*, 7 Ves. 36; *Coggeshall v. Pelton*, 7 Johns. Ch. 292; 11 Am. Dec. 471; *Salstontall v. Sanders*, 11 Allen, 446; *Jackson v. Phillips*, 14 Allen, 539; *American Academy v. Harvard College*, 12 Gray, 582; *Vidal v. Girard*, 2 How. 127; 11 L. ed. 205; *Cresson's Appeal*, 30 Pa. St. 437; *Price v. Maxwell*, 28 Pa. St. 23, 35; *Franklin v. Armfield*, 2 Sneed, 305; *Russell v. Allen*, 5 Dill. 235; *Fed. Cas. No. 12,149*; *Boxford Sec. Relig. Soc. v. Harriman*, 125 Mass. 321; *Ould v. Washington Hospital*, 95 U. S. 303; 24 L. ed. 450; *Goodell v. Union Ass'n of Burlington Co.*, 29 N. J. Eq. 32; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Trustees of Cory Univ. Soc. v. Beatty*, 28 N. J. Eq. 570; *Stevens v. Shippen*, 28 N. J. Eq. 487; *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522; *Craig v. Secrist*, 54 Ind. 419; *Mason v. Meth. Epis. Ch.*, 27 N. J. Eq. 47; *Cruse v. Axtell*, 50 Ind. 49; *Old South Soc. v. Crocker*, 119 Mass. 1; 20 Am. Rep. 299; *Zeisweiss v. James*, 63 Pa. St. 465; 3 Am. Rep. 558 (a devise to "the Infidel Society in Philadelphia, for the purpose of building a hall for the free discussion of religion, politics, etc.," is not a valid charitable use); *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234;

§ 1020. What are Charitable Uses and Purposes — “Statute of Charitable Uses.”— It is the question of primary importance, upon which all others depend, to determine what uses and purposes are charitable, within the meaning of the doctrine, so that gifts for such purposes may be sustained

Needles v. Martin, 33 Md. 609; *Thompson's Ex'rs v. Norris*, 20 N. J. Eq. 489; *Norris v. Thompson's Ex'rs*, 19 N. J. Eq. 307; *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550.

In *Jackson v. Phillips*, 14 Allen, 539, 556, Gray, J., said: “A charity is a gift to be applied, consistently with existing laws, *for the benefit of an indefinite number of persons*, either by bringing their minds or hearts under the influence of education or religion; by relieving their bodies from disease, suffering, or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public works; or otherwise lessening the burdens of government.” This may not be an exhaustive description of charitable purposes, but it accurately states the essential element that the gift must be for an *indefinite class*, so that the benefit conferred upon them is in its nature public.

Trusts for private objects do not fall within the denomination of charitable trusts, nor under the jurisdiction over them, and are void if they create perpetuities; as those for the erection or repair of private tombs or monuments:^a In *re Rickard*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616; *Hoare*

(^a) In the following cases trusts for the care of private burial plots, tombs, monuments, etc., were held invalid: *Vaughan v. Thomas*, 33 Ch. Div. 187; *Prior v. Moore*, [1901] 1 Ch. 936 (trust void for uncertainty as to its duration); *Johnson v. Hollifield*, 79 Ala. 423, 58 Am. Rep. 596, and note; *Estate of Willey*, 128 Cal. 1, 60 Pac. 471 (*dictum*); *Estate of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70, 71 Pac. 707; *Piper v. Moulton*, 72 Me. 155; *Detwiller v. Hartman*, 37 N. J. Eq. 348; *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717; *Fite v. Beasley*, 12 Lea 328; *McIlvain v. Hockaday*, (Tex. Civ. App.) 81 S. W. 54. In some states, such trusts, while invalid as charities, are, though perpetual, protected by express terms of statutes: *Webster v. Sughrow*, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; *Green*

v. Hogan, 153 Mass. 462, 27 N. E. 413; In *re Bartlett*, 163 Mass. 509, 40 N. E. 899; *Morse v. Inhabitants of Natick*, 176 Mass. 510, 57 N. E. 996. In *Ford v. Ford*, 91 Ky. 572, 16 S. W. 451, under a statute validating any gift for any “charitable or humane purpose,” it was held that a provision for a monument for the testator and his wife was valid. The court said, however, that if the provision had been for a monument over the testator's grave alone it would have been invalid.

In general see *Spence v. Widney*, (Cal.) 46 Pac. 463; *Johnson v. De Pauw University*, 25 Ky. Law Rep. 950, 76 S. W. 851 (for the purposes of education of the descendants of G. H. & J. M.); *Bangor v. Masonic Lodge*, 73 Me. 428, 40 Am. Rep. 369 (Masonic lodge not a public charity); *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671 (same); *Bates v. Bates*,

as valid charitable trusts, although they may tend to create perpetuities. It has already been shown that the purpose, whatever be its particular object, must benefit some indefinite class or portion of the *public*; for mere private charities are governed by the rules which apply to ordinary

v. Osborne, L. R. 1 Eq. 585; or to found a private museum: *Thompson v. Shakespear*, 1 De Gex, F. & J. 399; or for the benefit of a private company: *Attorney-General v. Haberdashers' Co.*, 1 Mylne & K. 420; or for a private charity: *Ommaney v. Butcher*, Turn. & R. 260; a "friendly society": *In re Clark's Trust*, L. R. 1 Ch. Div. 497; *Dawson v. Small*, L. R. 18 Eq. 114 (to repair tomb); *Thomas v. Howell*, L. R. 18 Eq. 198 (a bequest to each of ten poor clergymen); *In re Williams*, L. R. 5 Ch. Div. 735 (to repair tombs); *Carne v. Long*, 2 De Gex, F. & J. 75 (to support a library society which was established for the benefit of its own subscribers only); *per contra*, *Cruse v. Axtell*, 50 Ind. 49 (a devise to a lodge of Freemasons, held to be for a good charitable use; a decision which seems opposed to the authorities); *Attorney-General v. Soule*, 28 Mich. 153 (a bequest to establish an ordinary private school is not for a public charitable use); *Swift v. Beneficial Soc.*, 73 Pa. St. 362 (bequest to a "friendly society," the benefits of which are confined to its own members, is not for a charitable use); *In re Clark's Trust*, L. R. 1 Ch. Div. 497 (same as last).

134 Mass. 110, 45 Am. Rep. 305; *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906, 18 R. I. 62, 25 Atl. 840 (for hospitality to traveling ministers and others of testator's religious belief). *In Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360, a trust for masses for the repose of the testator's own soul was held to be a private trust. See, also, *Moran v. Moran*, 104 Iowa 216, 73 N. W. 617, 65 Am. St. Rep. 443, 39 L. R. A. 204; but see *contra*, *Hoeffner v. Cloggan*, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730; *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11. A bequest for the relief of the most destitute of the testator's relatives held valid: *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706; but a provision for such of the testator's

children and their descendants as may be destitute, not a public charity: *Kent v. Dunham*, 142 Mass. 216, 56 Am. Rep. 667, 7 N. E. 730.

In Troutman v. De Boissiere Odd Fellows' Orphans H. & I. S. Ass'n, 66 Kan. 1, 71 Pac. 287, reversing (Kan.) 64 Pac. 33, it was held that a trust to provide a home for the children of deceased members of a secret society is not a valid charitable trust. The court said: "Public charities may be restricted to a class of the people of the state or of a municipal division. At the same time, they must be general for all of the class within the particular municipality." While a Masonic lodge is not ordinarily held to be a public charity (see cases cited above), it may still act as trustee for a charitable use. Thus, it has been held that a devise to a Masonic lodge "for the use of the widows' and orphans' fund of

private express trusts. The general objects which come within the description of "charitable uses," and which may therefore constitute a valid charitable trust, were enumerated in the statute of charitable uses, passed in the reign of Queen Elizabeth,¹ as follows: "The relief of aged, impotent, and poor people; the maintenance of maimed and sick soldiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; the relief, stock, and maintenance of houses of correction; marriage of poor maids; aid and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants

143 Eliz., c. 4. The "charitable trusts" now under consideration should be carefully distinguished from gifts to corporations which are authorized by their charters, or other statutes, to receive and hold property, and apply it to objects which fall within the general designation of charitable. Such gifts are permitted in the states where the peculiar doctrine of "charitable trusts" has been abrogated, and they are regulated by the general rules of law applicable to all corporations, or by the provisions of the individual charter: See *Levy v. Levy*, 33 N. Y. 97, 112-118, per Wright, J.; *Bascom v. Albertson*, 34 N. Y. 584, 587-621, per Porter, J.; *Wetmore v. Parker*, 52 N. Y. 450; *Dodge v. Williams*, 46 Wis. 70; 1 N. W. 92; 50 N. W. 1103; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; 50 N. W. 422.

said lodge" is valid: *Estate of Willey*, 128 Cal. 1, 60 Pac. 471. And gifts to the trustees of the permanent funds of three mutual benefit associations, the membership of which is open to all printers, all teachers, and all bank officers, respectively, of the city of Boston, the funds being devoted to the use of sick, needy, or disabled members, is charitable: *Minns v. Billings*, 183 Mass. 126, 66 N. E. 593, 94 Am. St. Rep. 420; and a proprietary library, the use of which is free to various classes of students, though the stockholders have larger privileges, is a charity: *Id.*

It is settled in England that a "friendly" or mutual benefit society may be a charity when, under its rules, distressed circumstances or poverty is necessary to entitle a member to the benefits: *Spiller v. Mande*, 32 Ch. Div. 158, note; *In re Bush*, [1896] 2 Ch. 727; *Pease v. Pattinson*, 32 Ch. Div. 154; *In re Lacy*, [1899] 2 Ch. 149; but where a wealthy member would be entitled to share in the benefits equally with a poor member, it is not a charity: *Cunnack v. Edwards*, [1896] 2 Ch. 679.

concerning payments of fifteenths, setting out of soldiers, and other taxes." It will be seen that this list omits some most important and familiar charitable objects,—as, for example, the support and propagation of religion. The English and American courts have never regarded this enumeration as exhaustive, but as designed to be merely illustrative. Numerous objects analogous to those mentioned in the statute are held to be charitable. The doctrine is settled that all particular objects embraced within the general spirit, intent, and scope of the statute are to be considered as charitable, unless they violate some rule of public policy or the provisions of some positive statute.^{2 a}

§ 1021. *Classes of Charitable Uses.*—1. *Religious Purposes.*—In addition to the objects specifically enumerated in the statute, other purposes of a like general nature are held by the courts to be charitable, and these may all be arranged in the following classes: *Religious purposes*: The support and propagation of religion is clearly a "charitable use."^{1 a}

² Many gifts for purposes confessedly charitable are defeated by the statutes of mortmain in England, and in the states where these or analogous statutes have been adopted.

¹ In England an exception is made of "superstitious" uses, contrary to the public policy, such as masses for the soul: *Attorney-General v. Fishmongers' Co.*, 5 Mylne & C. 11; *West v. Shuttleworth*, 2 Mylne & K. 684; *In re Blundell*, 30 Beav. 360; *Heath v. Chapman*, 2 Drew. 417; *Cary v. Abbot*, 7 Ves. 490, 495. In the United States no such purposes would probably be

§ 1020, (a) *In re Foveaux*, [1895] 2 Ch. 501, *per* Chitty, J.: "The method employed by the Court is to consider the enumeration of Charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and again, institutions which are analogous to those already admitted by reported decisions are held to be charities." In the important case of *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891]

A. C. 531, the meaning of the words "charitable purposes," as used in the Income Tax Act was exhaustively discussed. Lord Macnaghten (p. 583) makes a fourfold classification of charitable uses (often referred to in later cases), substantially identical with the author's classes, except that the words "relief of poverty" are employed as descriptive of the second class, instead of "benevolent."

§ 1021, (a) This section is cited in *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

This includes gifts for the erection, maintenance, and repair of church edifices, the maintenance of worship, the support

regarded as superstitious which were recognized by any religious belief and ritual: *Gass v. Wilhite*, 2 Dana, 170; 26 Am. Dec. 440; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61.^b In England, no charity for a religious purpose could be upheld as a valid public charity, unless the form of religion was one at least professing to acknowledge the divine revelation contained in the Bible, and to be founded thereon; indeed, the whole doctrine was regarded by the early judges as carrying out the precepts of Christianity. While the American courts do not discriminate between different phases of religious belief and doctrine, still the *essential element* of a charity for a religious purpose *must be in reality religious*. The supreme court of Pennsylvania therefore decided, in complete agreement with principle and authority, that a devise to "the Infidel Society in Philadelphia, for the purpose of

(b) Trusts for Masses, etc.—See *dictum* of Rapallo, J., in *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; also, *Hoeffer v. Clogan*, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241; *Seda v. Huble*, 75 Iowa 429, 39 N. W. 685, 9 Am. St. Rep. 495; *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068; *In re Schouler*, 134 Mass. 426; *Webster v. Sughrow*, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; *Kerrigan v. Tabb*, (N. J. Ch.) 39 Atl. 701; *Kerrigan v. Conelly*, (N. J. Ch.) 46 Atl. 227; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11; but it has been held that a trust to be used in solemn masses for the repose of the testator's soul is not valid because not for a public purpose: *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360. In discussing this case, the Supreme Court of Illinois, in *Hoeffer v. Clogan*, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730, say: "We are not able to agree with the conclusion that there is no benefit to the church or public in such case, and, as we have seen, the ceremonial of the mass is a public action, which can be seen and taken cognizance of, so

that there is no more difficulty in procuring a mass to be said than there is in securing the public delivery of a sermon or a lecture." See, also, *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068. In *Moran v. Moran*, 104 Iowa 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443, the court approved the ruling in *Festorazzi v. Church*, but the trust was sustained as an ordinary trust. A good classification of the cases on this subject is found in *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717, where the court says: "In this country, where all forms of religious belief stand upon equal legal rights, the doctrine of superstitious uses has never been recognized, and bequests for masses are now generally admitted to be legal, but there is a diversity of opinion as to their execution. One class of cases holds that they are good as charitable trusts, being for religious services. Another class holds that they are private trusts, which are void because there is no living beneficiary to enforce the trust. A third class holds that they are good as outright gifts for a specified legal object."

of clergymen, the promotion and propagation of religious doctrines and beliefs in any manner by the church or by

building a hall for the free discussion of religion, politics, etc.," was not a valid charitable gift: *Zeisweiss v. James*, 63 Pa. St. 465; 3 Am. Rep. 558.^e In England it is not necessary that the objects should conform to the doctrines and modes of the established church. Charitable gifts are valid for *dissenters*: *Attorney-General v. Cock*, 2 Ves. Sr. 273; *Shrewsbury v. Hornhy*, 5 Hare, 406; *Attorney-General v. Lawes*, 8 Hare, 32; *Attorney-General v. Bunce*, L. R. 6 Eq. 563. *Roman Catholics*: *Cary v. Abbot*, 7 Ves. 490; *Attorney-General v. Todd*, 1 Keen, 803; *Walsh v. Gladstone*, 1 Phill. Ch. 290; *Cocks v. Manners*, L. R. 12 Eq. 574. *Jews*: *Michel's Trust*, 28 Beav. 39. To promulgate doctrines of Joanna Southcott: *Thornton v. Howe*, 8 Jur., N. S., 663. But not to promote infidelity: *Zeisweiss v. James*, 63 Pa. St. 465; 3 Am. Rep. 558.^d

Among the particular objects which constitute valid religious purposes are the following:^e Building, repairing, ornamenting, etc., churches: *Hoare v. Osborne*, L. R. 1 Eq. 585; *Booth v. Carter*, L. R. 3 Ex. 757; *Cresswell v. Cresswell*, L. R. 6 Eq. 69 (to build a parsonage); providing things connected with church services: *Turner v. Ogden*, 1 Cox, 316; *Adnam v. Cole*, 6 Beav. 353; maintenance of divine worship: *Att'y-Gen. v. Pearson*, 3 Mer. 353, 409; *Att'y-Gen. v. Bunce*, L. R. 6 Eq. 563; *Att'y-Gen. v. Webster*, L. R. 20 Eq. 483; providing or supporting clergymen in the performance of their religious functions: *Att'y-Gen. v. Lawes*, 8 Hare, 32; *Thornber v. Wilson*, 3 Drew. 245; 4 Drew. 350; *In re Maguire*, L. R. 9 Eq. 632; *In re Clergy Soc.*, 2 Kay & J. 615; *In re Kilvert's Trusts*, L. R. 12 Eq. 183; 7 Ch. 170; but a bequest to each of ten poor clergymen is not a "charitable gift": *Thomas v. Howell*, L. R. 18 Eq. 198; and see *Russell v. Kellett*, 3 Smale & G. 264; promoting religious doctrines and beliefs by the distribution of Bibles or tracts, and by means of religious societies, etc.: *Att'y-Gen. v. Stepney*, 10 Ves. 22; *Wilkinson v. Lindgren*, L. R. 5 Ch. 570; a gift to "sisters of charity," but not to a convent: *Cocks v. Manners*, L. R. 12 Eq. 574.

American decisions are to the same effect: Building and supporting churches, maintaining divine worship: *Jones v. Habersham*, 3 Woods, 443; 107 U. S. 174, 182; *Laird v. Bass*, 50 Tex. 412; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Old South Soc. v. Crocker*, 119 Mass. 1; 20 Am. Rep. 299; *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234; promulgation of religious doctrines and beliefs and practices, missionary and other similar societies: *Goodell v. Union Ass'n etc.*, 29 N. J. Eq. 32 (*Young Men's Christian Association*); *De Camp v. Dobbins*, 29 N. J. Eq. 36 (*missionary*); *Trustees of Cory Univ. Soc. v. Beatty*, 28 N. J. Eq. 570 ("promotion of the Universalist denomination");

(c) See, also, *Manners v. Phila. Library Co.*, 93 Pa. St. 165, 39 Am. Rep. 741.

(d) *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165, 39 Am. Rep. 741.

(e) **Religious Purposes; Additional English Decisions.**—To repair a churchyard, valid: *Vaughan v. Thomas*, 33 Ch. Div. 187 (compare *supra*, note). "To the service of God," valid; though in a broad sense these

associations, the aid of missionary, Bible, and other religious societies, and all other objects and purposes which

but *Starkweather v. Am. Bible Soc.*, 72 Ill. 50, 22 Am. Rep. 133, holds that the American Bible Society is *not* a charity, within the statute of Elizabeth; *Fairbanks v. Lamson*, 99 Mass. 533; *Maine Baptist Miss. Con. v. Portland*, 65 Me. 92 (domestic missions, diffusion of Christian knowledge); for the benefit of the Sunday-school library of a specified church: *Fairbanks v. Lamson*, *supra*; but a bequest to a certain Sunday school, the income to be applied in procuring Christmas presents for the scholars, was held invalid: *Goodell v. Union Ass'n etc.*, 29 N. J. Eq. 32.

words include a great variety of purposes, not necessarily "charitable," in the ordinary meaning, as used by testators, they mean "religious purposes"; In *re Darling*, [1896] 1 Ch. 50; *Powerscourt v. Powerscourt*, 1 Molloy 616. "To the following religious societies, viz. —, to be divided in equal shares among them," valid; a "religious society" is not necessarily a charity (*Cocks v. Manners*, L. R. 12 Eq. 574, association solely for the spiritual edification of its own members, not a charity), so that independently of authority the gift would fail; "but the authorities show that a bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a charitable purpose": In *re White*, [1893] 2 Ch. 41, citing *Baker v. Sutton*, 1 Keen, 224, 233; *Townsend v. Carus*, 3 Hare 257, 261; *Wilkinson v. Lingren*, L. R. 5 Ch. App. 570. A gift to sisters of charity, valid: In *re Delany*, [1902] 2 Ch. 642, following *Cocks v. Manners*, L. R. 12 Eq. 574. The purchase of advowsons and presentations is not a religious purpose: *Hunter v. Attorney-General*, [1899] A. C. 309, reversing In *re Hunter*, [1897] 2 Ch. 105, and restoring In *re Hunter*, [1897] 1 Ch. 518; In *re Church Patronage Trusts*, [1904] 2 Ch. 643, affirming [1904] 1 Ch. 41.

Religious Purposes; Additional American Cases.—See *Field v. Drew*

Theological Seminary, 41 Fed. 371 (for education of two young men for Christian ministry); *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537 (Sunday school); *Parish of Christ Church v. Trustees of Donations, etc.*, 67 Conn. 554, 35 Atl. 552; Appeal of *Mack*, 71 Conn. 122, 41 Atl. 242 (for the erection and maintenance of a church); Appeal of *Eliot*, 74 Conn. 586, 51 Atl. 558 (for erection of chapel and maintenance of mission); *Trafton v. Black*, 187 Ill. 36, 58 N. E. 292 (erection of churches); *Andrews v. Andrews*, 110 Ill. 223; *Zion Church v. Parker*, 114 Iowa 1, 86 N. W. 60 (for the use and benefit of the ministry and membership of the Evangelical Association of North America); *Crawford's Heirs v. Thomas*, 21 Ky. Law Rep. 1100, 54 S. W. 197 (evangelist); *Chambers v. Higgins' Ex'r*, 20 Ky. Law Rep. 1425, 49 S. W. 436; *Kinney v. Kinney*, 86 Ky. 610, 6 S. W. 593 (foreign missions); *Simpson v. Welcome*, 72 Me. 496, 39 Am. Rep. 349 (purchase and distribution of religious books); *Morville v. Fowle*, 144 Mass. 109, 10 N. E. 766; In *re Bartlett*, 163 Mass. 509, 40 N. E. 899 (to erect a chapel); *Teele v. Bishop of Derry*, 168 Mass. 341, 60 Am. St. Rep. 401, 47 N. E. 422, 38 L. R. A. 629 (same); *McAllister v. Burgess*, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158 (for benefit of poor churches of a city and vicinity); *White v. Rice*, 112 Mich. 403, 70

are really religious.^f The English courts made an exception with reference to superstitious uses, but in the United States no such distinction is made. Our courts would recognize no difference among religious beliefs and opinions; but in this country, as well as in England, a gift could not be sustained as a charity for religious purposes when it was wholly irreligious, and its only object was to destroy all religion.

§ 1022. 2. Benevolent Purposes.—Numerous trusts for purposes of benevolence are upheld as charitable, although not mentioned in the statute, since they are within its spirit and intent.^{1 a} Among the particular instances embraced

¹ As examples, to support or aid widows or orphans, or the poor of a certain place or district: *Powell v. Att'y-Gen.*, 3 Mer. 48; *Att'y-Gen. v. Comber*, 2 Sim. & St. 93; *Att'y-Gen. v. Clarke*, Amb. 422; *Bishop of Hereford v. Adams*, 7 Ves. 324; *Russell v. Kellett*, 3 Smale & G. 264; *Thompson v. Corby*, 27 Beav. 649; *Fisk v. Att'y-Gen.*, L. R. 4 Eq. 521; *Dawson v. Small*, L. R. 18 Eq. 114; *In re Williams*, L. R. 5 Ch. Div. 735; *In re Birkett*, L. R. 9 Ch. Div. 576. It also seems to be settled that a gift or bequest in trust for the donor's or testator's "poor relations," or "poor descendants," or "poor kinsmen and

N. W. 1024; *Farmers & Merchants' Bank v. Robinson*, 96 Mo. App. 385, 70 S. W. 372 (support of pastor); *Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594 (church); *Jones v. Watford*, 64 N. J. Eq. 785, 53 Atl. 397, affirming 50 Atl. 180, 62 N. J. Eq. 339 (for the purchase of books on the philosophy of spiritualism); *Bruere v. Cook*, 63 N. J. Eq. 624, 52 Atl. 1001 (missions); *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809 (to build a church; to build home for minister); *In re Sellers Chapel Methodist Church*, 139 Pa. St. 61, 21 Atl. 145, 27 Wkly. Notes Cas. 383, 11 L. R. A. 282 (to build a church); *Board of Foreign Missions v. Culp*, 151 Pa. St. 467, 25 Atl. 117, 31 Wkly. Notes Cas. 135 (foreign missionary work); *Young v. St. Mark's Lutheran Church*, 200 Pa. St. 332, 49

Atl. 887 (to assist young men in obtaining an education for the ministry); *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642 (for church purposes); *Hood v. Dorer*, 107 Wis. 149, 82 N. W. 546 (for support and maintenance of superannuated preachers of the church denominated the United Brethren in Christ). But mere hospitality to traveling ministers and others of the testator's religious denomination is not charity: *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906.

(f) This portion of the text is quoted in *Pennoyer v. Wadhams*, 20 Ore. 274, 25 Pac. 720, 11 L. R. A. 211 (for the use of a church to be organized).

(a) It should be observed that, while the word "benevolent" describes the purposes of this class more accurately than "relief of poverty" the words "benevolent pur-

within this class are trusts for the "poor," the "deserving poor," widows and orphans of a specified town, district, or country; for hospitals, asylums, and similar public institutions; for any class of persons requiring aid, as "the

their offspring and issue," as an indefinite class, is a good charitable trust for benevolent purposes: *Gillam v. Taylor*, L. R. 16 Eq. 581, 584; *Att'y-Gen. v. Price*, 17 Ves. 371; *Isaac v. Defriez*, Amb. 595; 17 Ves. 373, note; *White v. White*, 7 Ves. 423; *Bernal v. Bernal*, 3 Mylne & C. 559; *Att'y-Gen. v. Duke of Northumberland*, L. R. 7 Ch. Div. 745; but a gift to particular individual poor relations would be an ordinary trust or legacy; *Liley v. Hey*, 1 Hare, 580; for erecting, endowing, or supporting hospitals: *Pelham v. Anderson*, 2 Eden, 296; *Magistrates of Dundee v. Morris*, 3 Macq. 134, 157; *Perring v. Trail*, L. R. 18 Eq. 88; *University of London v. Yarrow*, 1 De Gex & J. 72 (to found a hospital "for studying and curing maladies of any quadruped or bird useful to man"); for deserving unsuccessful literary men: *Thompson v. Thompson*, 1 Coll. C. C. 381, 395; for the encouragement of good servants: *Loscombe v. Wintringham*, 13 Beav. 87; for releasing debtors: *Att'y-Gen. v. Painters' Co.*, 2 Cox, 51; for the redemption of captives or prisoners: *Att'y-Gen. v. Ironmongers' Co.*, 2 Mylne & K. 576; *In re Prison*

poses," as used in a bequest, have been frequently condemned by the English courts as too broad to support a valid charitable use. The English cases to this point, however, have not been generally followed in this country: see *post*, notes to § 1025.

Relief of the poor: *Webster v. Southey*, 36 Ch. Div. 9; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. ed. 279 ("home for disabled or aged and infirm and deserving American mechanics"); *Wood v. Paine*, 66 Fed. 807 (for the support of the poor of a town); *Duggan v. Slocum*, 83 Fed. 244; affirmed in 92 Fed. 806, 34 C. C. A. 676 (for a protective for boys); *Estate of Willey*, 128 Cal. 1, 60 Pac. 471 (to certain Masonic lodges "for the use of the widows' and orphans' fund" of said lodges); *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423 ("in aid of deserving aged native born of S., needing such aid"); *In re Merchant's Estate*, (Cal.) 77 Pac. 475 (for the O. Red Cross Society); *In re Upham's Es-*

tate, 127 Cal. 90, 59 Pac. 315 (for an orphans' home); *Dailey v. City of New Haven*, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69 (deserving poor); *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152 ("for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the Town of B."); *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346 (home for destitute and friendless children); *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537 (poor of a certain church); *Hayden v. Connecticut Hospital for Insane*, 64 Conn. 320, 30 Atl. 50 (to establish free bed for female patients in Hospital for Insane); *In re Strong's Appeal*, 68 Conn. 527, 37 Atl. 395 (worthy poor people of the Town of P.); *Appeal of Eliot*, 74 Conn. 586, 51 Atl. 558 (aid of destitute seamen, and home for old and infirm ladies); *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009 (widows and or-

colored persons " of a certain state; and benevolent objects generally, without specifying the form. Even trusts established for the donor's own " poor relations," or " poor descendants," as a class, are held to be true charities. The

Charities, L. R. 16 Eq. 129; but see *Thrupp v. Collett*, 26 Beav. 125; for general benevolent purposes in a specified district or country at large, without mentioning any particular form or object: *Dolan v. Macdermot*, L. R. 5 Eq. 60; 3 Ch. 676; *Cresswell v. Cresswell*, L. R. 6 Eq. 69; *Lewis v. Allenby*, L. R. 10 Eq. 668; *Wilkinson v. Barber*, L. R. 14 Eq. 96; *Att'y-Gen. v. Webster*, L. R. 20 Eq. 483; *Pocock v. Att'y-Gen.*, 3 Ch. Div. 342; *Mills v. Farmer*, 1 Mer. 55; *Moggridge v. Thackwell*, 7 Ves. 36; but in *In re Jarman's Estate*, L. R. 8 Ch. Div. 584, a bequest to general benevolent purposes was held invalid from the uncertainty and indefiniteness of its object.

American decisions: Aid or support of the poor, widows, orphans, etc.: *Sohier v. Burr*, 127 Mass. 221; *Goodell v. Union Ass'n etc.*, 29 N. J. Eq. 32 ("in aid of the deserving poor of M."); *Mason v. Meth. Epis. Ch.*, 27 N. J. Eq. 47; *Fellows v. Miner*, 119 Mass. 541 (aged and infirm poor); *Gooch v. Ass'n for Relief etc.*, 109 Mass. 558 (a society "for the support of poor old women"); for building or sustaining a hospital: *Ould v. Washington Hospital*, 95 U. S. 303; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; 21 Am.

phans of deceased members of organization); *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491 ("worthy poor" of a certain city); *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434 (foundling hospital); *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310, 95 N. W. 411 (poor); *Tichenor v. Brewer*, 98 Ky. 349, 33 S. W. 86 (Roman Catholic charitable institutions); *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068 (home for poor Catholic men); *Thompson's Ex'r v. Brown*, 25 Ky. Law Rep. 371, 75 S. W. 210 (poor); *Dascomb v. Marston*, 80 Me. 223, 13 Atl. 888 (for the "worthy and unfortunate poor"); *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104 ("to poor and unfortunate"); *Suter v. Hilliard*, 132 Mass. 412, 42 Am. Rep. 444 (word "benevolent" sufficiently defined by accompanying words); *Holmes v. Coates*, 159 Mass. 226, 34 N. E. 190 ("disabled soldiers and seamen, their widows and orphans"); *Sherman v.*

Congregational Home Miss. Co., 176 Mass. 349, 57 N. E. 702 ("old ladies' home" and "rest home for worthy working girls"); *Attorney-General v. Goodell*, 180 Mass. 538, 62 N. E. 962 (to be divided among the poor colored people of a certain city); *Minns v. Billings*, 183 Mass. 126, 66 N. E. 593, 97 Am. St. Rep. 420 (for the sick, needy, or disabled members of certain mutual benefit associations); *Barkley v. Donnelly*, 112 Mo. 561, 19 S. W. 305 (orphans' home); *St. James' Orphan Asylum v. Shelby*, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553; *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638 (the poor and destitute); *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900 (for poor widows and children); *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334 ("benevolent" defined by whole purpose of will); *Hesketh v. Murphy*, 35 N. J. Eq. 23, and extensive collection of cases in reporter's note; affirmed, 36 N. J. Eq. 304 ("to the relief of the most deserving poor of

beneficiaries to be relieved, and the mode proposed for aiding them, must be *public*; a trust on behalf of a strictly private association, the benefits of which are confined to its own members, is not a "charitable trust."

§ 1023. 3. Educational Purposes.— Gifts, devises, and bequests in trust for educational purposes are valid, since they are all clearly within the spirit of the statute.^{1 a} This

Rep. 529; devise to a lodge of Freemasons: *Cruse v. Axtell*, 50 Ind. 49;^b but a "beneficial society," the benefits of which are confined to its own members, is not a public charity: *Swift v. Beneficial Soc.*, 73 Pa. St. 362; for general benevolent purposes not specified: *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Mayer v. Soc. for Visitation of the Sick*, 2 Brewst. 385; *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489 (a bequest to "benevolent, religious, or charitable institutions," held not a good charitable use; "benevolent" includes objects not charitable).

¹ Examples: To found, endow, or maintain schools and other institu-

P."); *Union Meth. Epis. Ch. v. Wilkinson*, 36 N. J. Eq. 141 (poor members of certain named churches); *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568 (for founding a home for aged people); *In re Sturgis*, 164 N. Y. 485, 58 N. E. 646 (to selectmen of a town in trust, to distribute so as to do the most possible good for the relief and benefit of respectable persons in reduced circumstances in a certain parish); *In re Lewis' Estate*, 152 Pa. St. 477, 25 Atl. 878, 31 Wkly. Notes Cas. 460 (to protect colored citizens in the enjoyment of their civil rights); *Trim v. Brightman*, 168 Pa. St. 395, 31 Atl. 1071 ("for the benefit of the poor of E. Township"); *In re Daly's Estate*, 208 Pa. St. 58, 57 Atl. 180. (home for industrious girls and women, either in or out of employment); *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510 (to build residences for laborers); *Pell v. Mercer*, 14 R. I. 412; *Dye v. Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724 ("for poor children, for their tuition"); *Cheatham v. Nashville Trust Co.*, (Tenn. Ch. App.) 57

S. W. 202 (for the Old Women's Home of Nashville); *Gidley v. Lovenberg*, (Tex. Civ. App.) 79 S. W. 831 (home for widows and orphans; support of indigent Israelites); *Sheldon v. Town of Stockbridge*, 67 Vt. 299, 31 Atl. 414 (for the poor of a certain kind); *Sawtelle v. Withrow*, 94 Wis. 412, 69 N. W. 72 (support and education of orphan children); *Hood v. Dorer*, 107 Wis. 149, 82 N. W. 546 (support and maintenance of superannuated preachers); *Kronshage v. Varrell*, (Wis.) 97 N. W. 928 (relief of distress caused by storms, floods, etc.); *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278 ("relief of the resident poor"). A trust for the relief of the most destitute of testator's poor relations was held valid in *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706; see, however, *Kent v. Dunham*, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667.

(b) See *contra*, *Bangor v. Masonic Lodge*, 73 Me. 428, 40 Am. Rep. 369; and *ante*, § 1019, note (a).

(a) This section is cited in *Spence v. Widney*, (Cal.) 46 Pac. 463; *Lackland v. Walker*, 151 Mo. 210, 52

class embraces all trusts for the founding, endowing, and supporting schools and other similar institutions which are not strictly private; for the establishment of professorships, and maintenance of teachers; for the education of designated classes of persons, as the poor children of a

tions of learning, which are not strictly private: *Magistrates of Dundee v. Morris*, 3 Macq. 134; *In re Latymer's Charity*, L. R. 7 Eq. 353; *In re Hedgman*, L. R. 8 Ch. Div. 156 ("for supporting or founding free or ragged schools"); and see *New v. Bonaker*, L. R. 4 Eq. 655; for the foundation or endowment of professorships, scholarships, lectureships, etc., and maintenance of teachers: *Rex v. Newman*, 1 Lev. 284; *Attorney-General v. Margaret Prof.*, 1 Vern. 55; *Attorney-General v. Tancred*, 1 Eden, 10; for the advancement of education, learning, and knowledge generally: *Whicker v. Hume*, 7 H. L. Cas. 124; 1 De Gex, M. & G. 506; also for the promotion of science and any strictly scientific purposes: *President of the United States v. Drummond*, cited 7 H. L. Cas. 155; as a gift to the Royal Society and to the Geographical Society: *Beaumont v. Oliveira*, L. R. 6 Eq. 534; 4 Ch. 309; and for a botanical garden: *Trustees of the British Museum v. White*, 2 Sim. & St. 594; *Townley v. Bedwell*, 6 Ves. 194. American cases: Founding or supporting schools, etc. (in several of those cases the gift is to a town or other municipal body, as the trustee): *Russell v. Allen*, 5 Dill. 235; *Boxford etc. Soc. v. Harriman*, 125 Mass. 321; *Stevens v. Shippen*, 28 N. J. Eq. 487; *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234; but the school must be public, or for the benefit of some portion of the public; a gift of ten thousand dollars to trustees "for the establishment of a school at M., for the education of children," was held not a valid charity, since the school might be merely private: *Attorney-General v. Soule*, 28 Mich. 153; the same is true of a gift for a merely private library association: *Carne v. Long*, 2 De Gex, F. & J. 75; gifts for the promotion of education generally, or for the education of any designated class of persons in a town, or district, or state: *Attorney-General v. Parker*, 126 Mass. 216; *Dodge v. Williams*, 46 Wis. 70 ("for the education and tuition of worthy indigent females"); *De Camp v. Dobbins*, 29 N. J. Eq. 36 ("educational enterprises"); *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522 (bequest "to the treasurer of the county of O. and his successors in office, the income to be expended in the education of scholars of the poor in the county of O."); *Craig v. Secrist*, 54 Ind. 419 (devise to a county for the education of a certain class of children); *Mason v. Meth. Epis. Ch.*, 27 N. J. Eq. 47 (bequest to two towns, the income for educating poor children); *Birchard v. Scott*, 39 Conn. 63 (to defray expenses of educating poor children in a certain district).

S. W. 414. In *In re Scowcroft*, [1898] 2 Ch. 638, the court declined to decide whether a gift for the "furtherance of Conservative principles" is charitable, but supported a gift of a building for a village club

and reading-room "to be maintained for the furtherance of Conservative principles and religious and mental improvement," on the ground that the "furtherance of Conservative principles" was not an alternative pur-

town; for the promotion of science and scientific studies; and generally for the advancement of knowledge, learning, and education.

§ 1024. 4. Other Public Purposes.—Other public purposes, not in the ordinary sense *benevolent*, may be valid charities,

pose, but that the words merely served to define the more general purposes of the gift. In *Smith v. Kerr*, [1902] 1 Ch. 774, affirming [1900] 2 Ch. 511, it was held that a certain Inn of Chancery was a "school of learning" and its property held for "charitable" purposes. See, also, *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401 (support of school); *Russell v. Allen*, 107 U. S. 172, 2 Sup. Ct. 327, 27 L. ed. 397 (to found a school); *Duggan v. Slocum*, 83 Fed. 244; affirmed in 92 Fed. 806, 34 C. C. A. 676 (for a public library); *John v. Smith*, 102 Fed. 218, 42 C. C. A. 275, affirming 91 Fed. 827 (for support of public schools); *Handley v. Palmer*, 103 Fed. 39, 43 C. C. A. 100, affirming 91 Fed. 948 (erection of school-houses); *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269 (to establish a polytechnic school); In re *Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364 (to establish a University professorship); *Clayton v. Hallett*, 30 Colo. 231, 59 L. R. A. 407, 70 Pac. 429, 97 Am. St. Rep. 117 (maintenance of college for orphan boys); *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346 (school); *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454 (public library); *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516; *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434 (public library); *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926 (permanent state school fund); *Dascomb v. Marston*, 80 Me. 223, 13 Atl. 888 (to found a

public library); *Piper v. Moulton*, 72 Me. 155 (to town for support of schools); *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502 (gift for "educational purposes"); In re *Bartlett*, 163 Mass. 509, 40 N. E. 899 (for public lyceum and free library); *Attorney-General v. Briggs*, 164 Mass. 561, 42 N. E. 118 (for support of a public school); *Dexter v. President, etc., of Harvard College*, 176 Mass. 192, 57 N. E. 371 (scholarship in a college is a valid charity, although a preference is given to donor's kindred); *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420, 66 N. E. 593 (proprietary library, the use of which is free to many classes of students, though the stockholders have larger privileges, is a charity); *City of Owatonna v. Rosebrock*, 88 Minn. 318, 92 N. W. 1122 (for a public kindergarten); *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414 (for a botanical garden with a museum and library connected); *Missouri Hist. Soc. v. Acad. of Science*, 94 Mo. 459, 8 S. W. 346 (promotion of science, etc.); *Taylor v. Trustees of Bryn Mawr College*, 34 N. J. Eq. 101 (to establish and maintain a college); *Brown v. Pancoast*, 34 N. J. Eq. 521 (library); *Green v. Blackwell*, (N. J. Ch.) 35 Atl. 375 (for the education of the poor children of a certain district); *Jones v. Watford*, 64 N. J. Eq. 785, 53 Atl. 397, affirming 62 N. J. Eq. 339, 50 Atl. 180 (purchase of books on the philosophy of spiritualism); In re *John's Will*, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A.

since they are either expressly mentioned by the statute, or are within its plain intent. All of these purposes tend to benefit the public, either of the entire country or of some particular district, or to lighten the public burdens for de-

242 (for maintenance of a public school — an excellent case); *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414 (for an art institute); *Palmer v. Union Bank*, 17 R. I. 627, 24 Atl. 109 (for giving premiums for treatises on subjects conducive to the advancement of medical science, and for printing and distributing such treatises); *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510 (to pay salaries of additional public school teachers); *Dye v. Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724 (“for poor children, for their tuition”); *In re Stewart’s Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723 (for a sectarian college); *Beurhaus v. City of Watertown*, 94 Wis. 617, 69 N. W. 986 (public library); *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278 (school “for the education of young persons in the domestic and useful arts”). *In George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511, a trust for the dissemination of the writings of Henry George was upheld. The test as laid down by this case is as follows: “The writings to be circulated must not be, when considered with respect to their purpose and general tendency, hostile to religion, to law, or to morals.” A school, which is a private pecuniary enterprise, is not a charity, even if it indirectly serves charitable ends: *Stratton v. Physio-Medical College*, 149 Mass. 508, 14 Am. St. Rep. 442, 21 N. E. 874, 5 L. R. A. 33, *per Holmes, J.*

Promotion of Ethical and Political Reforms.—A group of cases which does not readily admit of classification is that where the purpose is the prevention of cruelty to animals. Such gifts are supported as charitable in England on the ground that they tend to “the advancement of morals and education among men”: *In re Foveaux*, [1895] 2 Ch. 501, 507, *per Chitty, J.*; *Marsh v. Means*, 3 Jur. (N. S.) 790; *In re Douglas*, 35 Ch. Div. 472. See, also, *Minns v. Billings*, 183 Mass. 126, 92 Am. St. Rep. 420, 66 N. E. 593. Hence, a gift to an Anti-Vivisection society is a valid charity; the court, in passing upon educational or religious gifts, seldom concerns itself with the truth or falsity of the opinions sought to be propagated: *In re Foveaux*, [1895] 2 Ch. 501; *Armstrong v. Reeves*, 25 L. R. Ir. 325. The “promotion of temperance work” is a valid charitable purpose: *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; *Saltonstall v. Sanders*, 11 Allen 446; *Sherman v. Congregational Home Miss. Co.*, 176 Mass. 349, 57 N. E. 702. The opinions in these cases do not indicate to which of the recognized classes such purpose is most closely assimilated; but it may be surmised that the purpose is chiefly one of moral education. A bequest to trustees, “to be used by them, according to their best judgment, for the attainment of woman suffrage in the United States of America and its territories,” is valid, although an accomplishment of the purpose might involve constitutional amendment: *Garrison v. Little*, 75

fraying the necessary expenses of local administration which rest upon the inhabitants of a designated region.^{1 a}

§ 1025. Creation of the Trust — Certainty or Uncertainty of the Object and of the Beneficiaries.— One of the distinguishing elements of a “charitable” as compared with an ordinary trust consists in the generality, indefiniteness, and even uncertainty which is permitted in describing the ob-

¹ Examples: For the improvement or good of a town: *Jones v. Williams*, Amb. 651; *Howse v. Chapman*, 4 Ves. 542; *Att’y-Gen. v. Lonsdale*, 1 Sim. 105; *Mitford v. Reynolds*, 1 Phill. Ch. 185; *Att’y-Gen. v. Bushby*, 24 Beav. 299; for the benefit of the country generally: *Nightingale v. Goulbourn*, 2 Phill. Ch. 594; to aid in payment of the public debt: *Newland v. Att’y-Gen.*, 3 Mer. 684; for a parish or the parishioners: *Att’y-Gen. v. Webster*, L. R. 20 Eq. 483; public benefit of a town, improving streets, lighting, paving, protecting from the sea, etc.: *Att’y-Gen. v. Eastlake*, 11 Hare, 205, 215, 216; *Att’y-Gen. v. Brown*, 1 Swanst. 265, 301, 302; fire companies in Pennsylvania: *Humane Fire Co.’s Appeal*, 88 Pa. St. 389; *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445.

Ill. App. 402, disagreeing with *Jackson v. Phillips*, 14 Allen 539, on this point, and relying on *Haines v. Allen*, 78 Ind. 100, 41 Am. Rep. 555; In re *Foveaux*, [1895] 2 Ch. 501, and *George v. Braddock*, *supra*, 45 N. J. Eq. 757, 14 Am. St. Rep. 754, 6 L. R. A. 511, 18 Atl. 881.

(a) In re *Lord Stratheden and Campbell*, [1894] 3 Ch. 265 (for benefit of a volunteer corps of militia); *Attorney-General v. Day*, [1900] 1 Ch. 31 (for repair of roads); In re *Bartlett*, 163 Mass. 509, 40 N. E. 899 (for a public park); *Miller v. Rosenberger*, 144 Mo. 292, 46 S. W. 167 (for the use and benefit of the citizens of an unincorporated town); In re *John’s Estate*, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242 (for support of free public schools in a certain district); *Wehster v. Wiggins*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510 (to pay the salaries of additional school teachers); *Sheldon v. Town of Stockbridge*, 67 Vt. 299, 31 Atl. 414 (to a town to

keep burial grounds in repair; for support of schools; for poor of town); *Stuart v. City of Easton*, 74 Fed. 854, 21 C. C. A. 146, 39 U. S. App. 238 (for erection of courthouse); *Staines v. Burton*, 17 Utah 331, 70 Am. St. Rep. 788, 53 Pac. 1015 (gift to trustee for benefit of members of Mormon church, which included a majority of the inhabitants of the state, “whether it be for schools, parks, watering cities, planting forests, acclimatizing foreign plants, or anything else whereby the members may be benefited,” upheld). But to constitute a valid charity, benefit to the public must be the direct, and not a remote, object of the gift. Hence, a gift for the encouragement of a mere sport, such as yacht racing, cannot be supported as “charitable,” although the sport might be beneficial to the public, as in the particular case by tending to train sailors and encourage shipbuilding: In re *Nottage*, [1895] 2 Ch. 649.

jects and purposes or the beneficiaries. From the very definition of a "charitable trust" the beneficiaries are always an uncertain body or class; but the doctrine goes further than this. If the donor sufficiently shows his intention to create a charity, and indicates its general nature and purpose, and describes in general terms the class of beneficiaries, the trust will be sustained and enforced, although there may be indefiniteness in the declaration and description, and although much may be left to the discretion of the trustees.¹ This uncertainty, however, must not be carried

¹The decisions *appear* to be very conflicting, and it is certainly difficult to harmonize them all. The following are examples of trusts which were held *invalid* on account of too great uncertainty: A gift for "charitable or public purposes": *Vezey v. Jamson*, 1 Sim. & St. 69; see *Fowler v. Fowler*, 33 Beav. 616; for such "objects of liberality and benevolence" as a trustee shall approve of: *Morice v. Bishop of Durham*, 9 Ves. 399; *Williams v. Kershaw*, 5 Clark & F. 111; *Ellis v. Selby*, 1 Mylne & C. 286; *per contra*, *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 Mylne & K. 59; *Johnston v. Swann*, cited Amb. 585, note; but see comments on these cases in *Ellis v. Selby*, 1 Mylne & C. 286, 292, 293; also a bequest to a public body *for a purpose*, none being stated, is void: *Corporation of Gloucester v. Osborn*, 1 H. L. Cas. 272; *sub nom. Corporation of Gloucester v. Wood*, 3 Hare, 131, 136-148; a bequest "to the trustees of Mt. Zion chapel," etc., no purpose being stated; held that the court could not assume a charitable purpose to be intended, and the bequest was void: *Aston v. Wood*, L. R. 6 Eq. 419; a bequest which the executors "should apply to any charitable or benevolent purpose they might agree upon at any time," held too indefinite, and inoperative: *In re Jarman's Estate*, L. R. 8 Ch. Div. 584.^b

Examples of trusts held valid, although uncertain in their objects or purposes: Where the intention to create a charitable trust is evident, the court

(a) This section is cited in *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; *Trafton v. Black*, 187 Ill. 36, 58 N. E. 292; *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434; *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926.

(b) It is a well-established rule of the English courts that where there is a gift of a fund, part or all of which may, at the discretion of the trustees, be applied to an indefinite purpose which is not strictly "charitable," the whole gift fails: *Hunter*

v. Attorney-General, [1899] A. C. 309, reversing *In re Hunter*, [1897] 2 Ch. 105, and restoring [1897] 1 Ch. 518; *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 321, *supra*; *Vezey v. Jamson*, 1 S. & S. 69. This highly technical rule has frequently been deplored by judges who felt themselves bound by its authority; and is the more unfortunate in its results on account of the strictness with which the English courts condemn, as incapable of creating a charity, many expressions which, in popu-

too far. The intention of the donor to create some kind of charity, religious, benevolent, educational, or otherwise, must never be left uncertain. It must sufficiently appear that he designed to establish a charity, and the purpose must be indicated with sufficient clearness, to enable the court,

will, as a rule, sustain and enforce it, although its terms are very indefinite and uncertain: *Magistrates of Dundee v. Morris*, 3 Macq. 134, 157; a bequest for "such charities and other public purposes as lawfully may be in the parish of T.": *Dolan v. Macdermot*, L. R. 5 Eq. 60; 3 Ch. 676; for charitable purposes generally, no particular kind being mentioned: *Att'y-Gen. v. Herrick*, Amb. 712; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; for such charitable purposes as the trustee or some other designated person may determine, or where the selection and application are left to the discretion of the trustees: *Lewis v. Allenby*, L. R. 10 Eq. 668; *Wilkinson v. Barber*, L. R. 14 Eq. 96; *Wilkin-*

lar usage, are nearly synonymous with the word "charitable," because, when the meaning of such expressions is closely analyzed, they are found to be capable of embracing objects which cannot be the objects of a valid charitable use. The word "charity," in one at least of its popular meanings, is equivalent to "relief of poverty" (*Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A. C. 531), but the natural desire of testators to escape from this narrow meaning by the use of words more nearly synonymous with the broad significance of "charity" in its legal acceptation, has usually resulted in the defeat of their probable intention. Thus, a bequest to "objects of liberality and benevolence" was invalid: *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 321, *supra*; "for benevolent purposes," invalid: *James v. Allen*, 3 Mer. 17, 19; to "any charitable or benevolent purpose," invalid: *In re Jarman's Estate*, L. R. 8 Ch. Div. 584, *supra*; to "such charitable or public purposes as my trustee thinks proper," invalidated by the word "public:" *Blair v. Duncan*, [1902] A. C. 37; for "encouraging undertakings of

general utility," invalid: *Kendall v. Granger*, 5 Beav. 300, 303. This line of decisions reached its *reductio ad absurdum* in the recent case of *In re McDuff*, [1896] 2 Ch. 451, where a bequest for "charitable or philanthropic purposes" was held bad, on the ground that the word "philanthropic" had never been defined by the courts, and might possibly include objects not strictly "charitable." It must be said that the attempts of the Lords Justices of Appeal to suggest such possible objects are decidedly strained; the argument of Sir Richard Webster, Atty-Gen., to the general effect that "philanthropic" expresses the technical legal import of the word "charitable" more perfectly than any word in the language and should therefore be regarded as identical in meaning, will probably carry more of conviction to an American court. Moreover, the recent English cases are by no means free from inconsistency; thus, gifts "to the service of God" (*In re Darling*, [1896] 1 Ch. 50), and to "religious societies" (*In re White*, [1893] 2 Ch. 41), were upheld on the authority of previous cases, although each expression was admittedly broad

by means of its settled doctrines, to carry the design into effect. Such is the well-established English doctrine, and the court strives to carry out a charity if at all practicable. In this country, the doctrine has been adopted only to a partial extent. In a few of the states where the system of charitable trusts prevails, the English theory seems to have been accepted with little or no modification. In most of the states more certainty in defining the purposes of the charity and terms of the trust, or in designating the classes of persons who are intended to be the beneficiaries, is required, in order to sustain the gift, than is necessary under the methods of the English courts.²

son v. Lindgren, L. R. 5 Ch. 570; Pocock v. Att'y-Gen., L. R. 3 Ch. Div. 342. For further examples of uncertain objects and purposes, see *post*, § 1027, and cases cited as illustrations of the rule of *cy-pres*.

² It is impossible to formulate any more specific American rule, since there is a radical difference in the theories and fundamental views prevailing in various states. I shall make no attempt to analyze and classify the decisions upon this most important question, but shall simply give some examples, referring the reader to treatises upon trusts for a detailed discussion. Examples of trusts held invalid;^a Bequest to executors and their successors, "to be by them distributed to such persons, societies, or institutions as they

enough to cover objects not "charitable." A rule which finds "the service of God" definite, and "philanthropy" indefinite, certainly savors of extreme refinement.

The rule as stated at the beginning of this note is subject to two limitations (Hunter v. Attorney-General, [1899] A. C. 309, 324). The gift is valid where the trustees have a discretion to apportion between charitable objects and *definite and ascertainable* objects not charitable: Attorney-General v. Doyley, 4 Vin. Abr. 485, 7 Ves. 58, n.; Salusbury v. Denton, 3 K. & J. 529; and where there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in

law: Sinnett v. Herbert, L. R. 12 Eq. 201; In re Douglas, 35 Ch. Div. 472.

In a recent case, a gift to "charitable and benevolent institutions" was sustained, as meaning "charitable" institutions which were also benevolent: In re Best, [1904] 2 Ch. 354.

(c) Where there was a gift of a fund to the P. A. society "or some one or more kindred institutions" having certain specified objects, it was construed as a good charitable gift to one or more institutions of which the charity named was a type; the selection was not left to the discretion of the trustees, but a scheme was directed to be settled: In re Delmar Charitable Trust, [1897] 2 Ch. 163.

(d) Additional examples of trusts *invalid for uncertainty*: Fairfield v. Lawson, 50 Conn. 501, 47 Am. Rep.

§ 1026. Certainty or Uncertainty of the Trustee.—Charitable trusts also differ from private trusts in another very im-

may consider most deserving," held too indefinite, and invalid as a charitable trust: *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; compare *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550; bequest to A, "to distribute the same in such manner as, in his discretion, shall appear best calculated to carry out wishes which I have expressed to him," held invalid, and the trust cannot be established by proof of testator's oral directions: *Olliffe v. Wells*, 130 Mass. 221; bequest to a Sunday school, the income to be "applied to making Christmas presents to the scholars," void; no competent trustee and no certain beneficiaries: *Goodell v. Union Ass'n etc.*, 29 N. J. Eq. 32; devise and bequest "to the Roman Catholic orphans" of a certain diocese, the bishop, as executor, authorized to use the property for the benefit of said orphans, held invalid; uncertainty as to trustee and beneficiaries: *Heiss v. Murphy*, 40 Wis. 276; bequest to trustees, to be expended, at their discretion, "for the establishment of a school at M."; indefinite and invalid: *Att'y-Gen. v. Soule*, 28 Mich. 153; bequest to "benevolent, religious, or charitable purposes," invalid: *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489; a bequest to A., bishop of W., and his successors, in trust for the sisters of St. Joseph, an unincorporated society: *Kain v. Gibboney*, 101 U. S. 362; 3 Hughes, 397; a devise or bequest to trustees for the benefit of "the colored persons" of a city or state: *Needles v. Martin*, 33 Md. 609.

669 (trust for "freedmen," void when no power given to trustee to select beneficiaries); *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687 ("for such charitable purposes as A may deem proper"); *Mills v. Newberry*, 112 Ill. 123, 54 Am. Rep. 213; *Moran v. Moran*, 104 Iowa 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443 (trust "to be divided among the Sisters of Charity"); *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 54 S. W. 200 ("for charitable objects, to be expended for said objects in this diocese of Louisville, according to his discretion"); *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068 (to one "to be applied to any charitable uses, and so as to do most good, in his judgment," invalid; to Jesuit order, "for the purposes of education or religion," invalid); *Wheelock v. American Tract Soc.*, 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578 (for certain charities in such proportions

as trustees may think proper, and, in their discretion, to worthy poor girls); *Livesey v. Jones*, 55 N. J. Eq. 204, 35 Atl. 1064, affirmed *sub nom. Chadwick v. Livesey*, 56 N. J. Eq. 453, 41 Atl. 1115 ("to humanity's friend . . . B, to use and expend the same for the promotion of the religious, moral, and social welfare of the people in any locality, whenever and wherever he may think most needful and necessary"); *Hyde's Ex'rs v. Hyde*, 64 N. J. Eq. 6, 53 Atl. 593 ("for such religious, charitable, or educational or other purposes as they may deem advisable"); *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467 ("the property shall be devoted to the support and education of orphan children, in such way and manner as in his judgment may best conserve this object"); *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748 ("to such charitable institutions, and in such proportions, as my executors, by and with the advice of my friend, H, shall

portant feature. It is settled, as a part of the complete system prevailing in England, that not only may the benefi-

Examples of trusts held sufficiently certain and valid: Bequest to executors, "to be divided by them among such Roman Catholic charities, institutions, schools, or churches in the city of New York," as a majority of the executors should decide, there being many such institutions in New York authorized by law to take gifts by will: *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550; devise or bequest to a town, or towns, or a county, for purpose of building or maintaining a school, or educating poor children, or aiding the poor, etc.: *Boxford etc. Soc. v. Harriman*, 125 Mass. 321 (a school); *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522 (educating poor children); *Craig v. Secrist*, 54 Ind. 419 (same); *Mason v. Methodist Episcopal Church*,

determine"); *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33 (to "such charitable, educational, and scientific purpose as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind," also, to establish and maintain a free library); *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541 (trust to be divided among such "incorporated religious, benevolent, and charitable societies of the city of New York" as shall be appointed by the trustees); *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906 (where unascertainable portion is void, trust fails: *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671 (same); *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. 190 ("for the education of young men for the priesthood, or to educate individual orphan boys or orphan girls"); *Johnson v. Johnson*, 92 Tenn. (8 Pickle) 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179 (income "shall be used for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable as they may elect"); *Jones v. Green*, (Tenn. Ch. App.) 36 S. W. 729 (for support of

the ministry, repairs of the church, or other benevolent objects as may be designated from time to time by the said Union Church); *Nolte v. Meyer*, 79 Tex. 351, 15 S. W. 276 ("German citizens comprising the neighborhood six miles west of Brenham"); *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446 ("for the benefit of the New Jerusalem Church (Swedenborgian), as they shall deem best"). It should be observed that this note and the author's note above enumerate, among others, cases from several states of the author's "First class" (post, § 1029), where the doctrine as to charitable trusts has been abolished by statute, or adopted only with great restrictions.

A trust for the benefit of the testator's *next of kin* "who may be needy" was held to be void as to the clause "who may be needy" in *Fontaine's Adm'r v. Thompson's Adm'r*, 80 Va. 229, 56 Am. Rep. 588. See, also, *Kent v. Dunham*, 142 Mass. 516, 7 N. E. 730, 56 Am. Rep. 667. A similar bequest was upheld in *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278. And see *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706. For analogous English cases, see ante, § 1022, and note 1.

(e) Additional examples of trusts held *sufficiently certain*: *Russell v.*

ciaries be uncertain, but that, even where the gift is made to

27 N. J. Eq. 47 (same, and aiding poor widows); *Fellows v. Miner*, 119 Mass. 541 (aged and infirm poor); devise and bequest in trust "for the purpose of founding an institution for the education of youths in St. Louis Co.": *Russell v. Allen*, 5 Dill. 235; a gift to trustees to pay income to an almoner to be appointed by the probate court, and he to distribute the same among the poor widows of a certain district, held valid, and not defeated by a delay of several years: *Sohier v. Burr*, 127 Mass. 221; a conveyance to trustees for an unincorporated church: *Laird v. Bass*, 50 Tex. 412; a devise of lands to trustees "for the erection of a hospital for foundlings, and for any corporation which Congress may create": *Ould v. Washington Hospital*, 95 U. S. 303; a bequest, the income "to help form a Young Men's Christian Association"; also a bequest to A, "that the interest may be applied, at his discretion, in aid of the deserving poor of M.": *Goodell v. Union Ass'n etc.*, 29 N. J. Eq. 32; a bequest to a certain church, "in trust, to use the same to promote the religious interests of said church, and to aid the missionary, educational, and benevolent enterprises to which said church is in the habit of contributing": *De Camp v. Dobbins*, 29 N. J. Eq. 36; bequest to a church, to be paid as soon as it is incorporated, "to employ in the promotion of the Universalist denomination": *Trustees etc. v. Beatty*, 28 N. J. Eq. 570; a devise for the establishing a school for the benefit of youth residing in New Jersey, or furnishing education to such children of the city of H. as the authorities shall permit to attend: *Stevens v. Shippen*, 28 N. J. Eq. 487; a conveyance of land, in trust, for the purpose of erecting thereon a school-house and a meeting-house for divine worship: *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234; a bequest, the income to be applied for "the benefit of the sabbath-school library of the First Baptist Church in S., or the Baptist Home Missionary Society, whichever may be deemed most suitable": *Fairbanks v. Lamson*, 99 Mass. 533; see also *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99; *Vidal v. Girard's Ex'rs*, 2 How. 127; *Brown v. Concord*, 33 N. H. 285; *Burr's Ex'rs v. Smith*, 7 Vt. 241; 29 Am. Dec. 154; *Baker v. Smith*, 13 Met. 34, 41; *Jackson v. Phillips*, 14 Allen, 539, 557; *White v. Fisk*, 22 Conn. 31; *Shotwell's Ex'rs v. Mott*, 2 Sand. Ch. 46; *Williams v. Williams*, 8 N. Y. 525; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Bascom v. Albertson*, 34 N. Y. 584; *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; *Brendle v. German Ref. Cong.*, 33 Pa. St. 415, 418; *Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; 84 Am. Dec. 470; *Miller v. Porter*, 53 Pa. St. 292; *Gallego's Ex'rs v. Att'y-Gen.*, 3 Leigh, 450; 24 Am. Dec. 650; *Venable v. Coffman*, 2 W. Va. 310; *McAuley v. Wilson*, 1 Dev. Eq. 276; 18 Am. Dec. 587; *Att'y-Gen. v. Jolly*, 2 Strob. Eq. 379; *Carter v. Balfour*, 18 Ala. 814; *Dickson v. Montgomery*, 1 Swan, 348; *Att'y-Gen. v. Wallace*, 7 B. Mon. 611; *Urmey's Ex'r v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615; *Gilman v. Hamilton*, 16 Ill. 225.

Allen, 107 U. S. 167, 2 Sup. Ct. 327, 27 L. ed. 397; *John v. Smith*, 102 Fed. 218, 42 C. C. A. 275, affirming 91 Fed. 827; *Handley v. Palmer*, 103 Fed. 39, 43 C. C. A. 100, affirm-

ing 91 Fed. 948; *Field v. Drew Theol. Sem.*, 41 Fed. 371; *Wood v. Paine*, 66 Fed. 807 (to town council, in trust for the support of the poor of said town); *Duggan v. Slocum*, 83

no certain trustee, so that the trust, if private, would wholly

- Fed. 244, affirmed in 92 Fed. 806, 34 C. C. A. 676; *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269 ("the boys and girls of California"); *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315; *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423 (to trustee to be used "in aid of deserving aged native-born in the town of S. needing such aid, to be used as in his judgment he may think best"); *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. 429, 59 L. R. A. 407 (trust for college for poor, white, male orphans, born of reputable parents); *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557, 65 Am. Rep. 152 ("to be used at discretion, . . . for the special benefit of the worthy, deserving, poor, white, American, Protestant, democratic widows and orphans residing in B."; each adjective capable of sustaining a charitable bequest); *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346 ("the number of beneficiaries under a charitable bequest is immaterial where a power of selection is given"); *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Hayden v. Connecticut Hospital for Insane*, 64 Conn. 320, 30 Atl. 50; *Parish of Christ Church v. Trustees of Donations, etc.*, 67 Conn. 554, 35 Atl. 552; *In re Strong's Appeal*, 68 Conn. 527, 37 Atl. 395 (for "the worthy poor people of said town of P., as may be in needy and necessitous circumstances, and in any misfortune; always, however, excluding from assistance or aid the criminal class, or the habitually intemperate, indolent, and lazy"); *Appeal of Mack*, 71 Conn. 122, 41 Atl. 242 (to erect and maintain a church for use of the L. Church in S.); *Beckwith v. St. Philip's Parish*, 69 Ga. 564; *Guilfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009 (in trust for "widows and home and school for orphans of deceased members of the Brotherhood of Locomotive Engineers," "provided that the brotherhood may use the property or dispose of it for any charitable purpose, for the use of said widows and orphans"); *Crawford's Heirs v. Thomas*, 21 Ky. Law Rep. 1100, 54 S. W. 197; *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068 (home for poor Catholic men); *Thompson's Ex'r v. Brown*, 25 Ky. Law Rep. 371, 75 S. W. 210, reversing a prior construction of the same will in 24 Ky. Law Rep. 674, 70 S. W. 674 ("to the poor in his discretion"); *Barkley v. Donnelly*, 112 Mo. 561, 19 S. W. 305; *Miller v. Rosenberger*, 144 Mo. 292, 46 S. W. 167 (for the use and benefit of the citizens of an unincorporated town); *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491 (worthy poor of a certain city); *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516; *Trafton v. Black*, 187 Ill. 36, 58 N. E. 292 (erection of churches of certain denominations within certain specified limits, executor being vested with discretion as to location and cost); *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310, 95 N. W. 411 (to the poor, discretion being given to trustee); *Tichenor v. Brewer*, 98 Ky. 349, 33 S. W. 86 (to a bishop "to be by him used for the Roman Catholic charitable institutions in his diocese"); *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926 (to a state for a permanent school fund); *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940 ("benevolent and charitable"); *Eutaw Place Church v. Shively*, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412 (to a church "to

fail, a court of equity will carry the trust into effect, either by appointing a trustee or by acting itself in the place of a

be applied to the Sunday school belonging to or attached to said church"); *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713 (to trustee, "to be disposed of by him for such charitable purposes as he shall think proper"); *White v. Ditson*, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 273 (same); *Suter v. Hilliard*, 132 Mass. 412, 42 Am. Rep. 444; *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104 ("to poor and unfortunate"); *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; *McAlister v. Burgess*, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203 ("objects and purposes of benevolence and charity, public and private, including educational or charitable institutions and the relief of individual need"); *St. Paul's Church v. Attorney-General*, 164 Mass. 188, 41 N. E. 231; *St. James' Orphan Asylum v. Shelby*, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553 (to apply "to some charity according to his judgment; but I prefer that the same be applied to the establishment or maintenance of an orphanage"); *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900 (for poor widows and children under ten years of age); *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638 ("for the benefit of the poor and destitute in N. H., and for charitable and educational purposes therein"); *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334 (to be distributed by executors "for benevolent objects"); *Hesketh v. Murphy*, 36 N. J. Eq. 304 (the power to dispense the fund carries with it, by implication, the power to select the beneficiaries); *Union Meth. Epis. Ch. v. Wilkinson*, 36 N. J.

Eq. 141 (poor members of certain named churches); *Bruere v. Cook*, 63 N. J. Eq. 624, 52 Atl. 1001 (home and foreign missions); *People v. Powers*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502 ("charitable and benevolent institutions"); *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809 (to build a church and a home for a minister for a certain denomination in a certain place); *Pennoyer v. Wadhams*, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 211; *In re John's Will*, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; *Board of Foreign Missions v. Culp*, 151 Pa. St. 467, 25 Atl. 117, 31 Wkly. Notes Cas. 135; *In re Murphy's Estate*, 184 Pa. St. 310, 39 Atl. 70, 63 Am. St. Rep. 802 ("to be divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors"); *Young v. St. Mark's Lutheran Church*, 200 Pa. St. 332, 49 Atl. 887 (to aid young men in obtaining an education for the ministry, they to be selected according to the opinion of the pastor and church council); *In re Sleicher's Estate*, 201 Pa. St. 612, 51 Atl. 329 (to pay "to such German charitable institutions and German societies" as the trustees may select); *In re Daly's Estate*, 208 Pa. St. 58, 57 Atl. 180; *Dye v. Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724 (for poor children, for their tuition); *Chatham v. Nashville Trust Co.*, (Tenn. Ch. App.) 57 S. W. 202 (in trust for the Old Women's Home of Nashville); *Gidley v. Lovenberg*, (Tex. Civ. App.) 79 S. W. 831; *Staines v. Burton*, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788; *Sheldon v. Town of Stockbridge*, 67 Vt. 299, 31 Atl. 414 (for the poor of a

trustee,* — that is, by establishing a scheme for accomplishing the design of the donor, as though the legal title had vested in a certain trustee. This result may happen in various modes. In one class of instances the same rule is merely applied which would be invoked under like circumstances to regulate the administration of a private trust. Where a testator has expressly purported to give the prop-

certain town); *In re Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723 (for such other charitable purposes as they may see fit, in their discretion); *Sawtelle v. Withrow*, 94 Wis. 412, 69 N. W. 72 (to the "support, maintenance, and education of such indigent orphan children, under the age of fourteen years, in the county of R., as, in the judgment of my executors, may be most needy and deserving"); *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924 (bequest in trust for temperance work in the city of M.); *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353 (a bequest "to be given to any of my heirs who are in need, or not in very comfortable circumstances, as to my executors seems fit and proper"); *Hood v. Dorer*, 107 Wis. 149, 82 N. W. 546 ("to be invested in a fund provided for the purpose for the support and maintenance of superannuated preachers of the church denominated the United Brethren in Christ"); *Kronshage v. Varrel*, (Wis.) 97 N. W. 928 (relief of distress arising from storms, floods, etc.).

It is noticeable that the American courts which profess to follow the English cases in supporting gifts of extreme uncertainty, such as gifts to "charitable objects" generally, have either repudiated the distinction between "charitable" and "benevolent" or kindred words, or at least

have shown a strong inclination to infer from the context of the will that such words are used as synonyms with "charitable"; see, among other cases, *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940; *Saltonstall v. Sanders*, 11 Allen 446 (cf. *Chamberlain v. Stearns*, 111 Mass. 267); *Pell v. Mercer*, 14 R. I. 425; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334; *In re Murphy's Estate*, 184 Pa. St. 310, 39 Atl. 70, 63 Am. St. Rep. 802 ("benevolent, charitable, and religious institutions and associations"); *People v. Powers*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; *Rotch v. Emerson*, 105 Mass. 431 ("philosophical and philanthropic purposes"); *Staines v. Burton*, 17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788. Where the gift was for "objects and purposes of benevolence and charity, public and private, including educational or charitable institutions and the relief of individual need," it was held that the last words did not indicate private, non-charitable objects, but were "merely specifications within the limits of the dominant phrase": *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203. Where the trustees are given discretion to apply the fund to legal or illegal objects, the trust is valid for the legal object: *St. Paul's Church v. Attorney-General*, 164 Mass. 188, 41 N. E. 231, citing many cases.

(a) This portion of the text is quoted in *Hunt v. Fowler*, 121 Ill.

erty to a trustee, but for any cause the appointment fails, the charitable trust will still be enforced.^{1b} The doctrine, however, goes much farther than this simple rule, which does not permit a trust otherwise valid to fail for want of a designated trustee. It also applies where the property is given to a person or body incapable of *taking and holding in perpetuity*; or to a body uncertain, indefinite, and fluctuating in its members, such as an unincorporated society;

¹ As where a testator gives property, to be applied in charity to such person as he shall hereafter in his will appoint his executor, and he neglects to appoint any one, or, having appointed one, the person dies in the testator's lifetime, and none other is named; or the testator gives his property to such person as his executor shall name, and no executor at all is appointed, or, if appointed, he dies in the testator's lifetime; or if the property is given to certain trustees, and they all die in the testator's lifetime, or the trustee named refuses to act,—in all such cases the court carries out the intended charity as stated in the text: *Mills v. Farmer*, 1 Mer. 55, 96; *Moggridge v. Thackwell*, 3 Brown Ch. 517; 1 Ves. 464; 7 Ves. 36, 69; *Att'y-Gen. v. Jackson*, 11 Ves. 365, 367; *White v. White*, 1 Brown Ch. 12; *Att'y-Gen. v. Hickman*, 2 Eq. Cas. Abr. 193; *Brown v. Kelsey*, 2 Cush. 243; *Winslow v. Cummings*, 3 Cush. 358, 365; *McCord v. Ochiltree*, 8 Blackf. 15, 22; *Sohier v. Burr*, 127 Mass. 221.

269, 12 N. E. 33, 17 N. E. 491. This section is cited in *John v. Smith*, 102 Fed. 218, 42 C. C. A. 275.

(b) The text is cited to this effect in *Jones v. Watford*, 62 N. J. Eq. 339, 50 Atl. 180. See *Russell v. Allen*, 107 U. S. 167, 2 Sup. Ct. 327, 27 L. ed. 397 (*dictum*); *Dailey v. City of New Haven*, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69 (trustee refused to act); *Appeal of Mack*, 71 Conn. 122, 41 Atl. 242 (trustee refused to act); *Appeal of Eliot*, 74 Conn. 586, 51 Atl. 558 (trustee incapable of taking); *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516 (equity can appoint new trustee when duties of other cease); *Garrison v. Little*, 75 Ill. App. 402; *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434 (refusal of trustee to act); *In re Schouler*, 134 Mass. 426 (trustee died without

qualifying); *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502 (gift for specified purpose does not fail for want of a trustee); *Attorney-General v. Goodell*, 180 Mass. 538, 62 N. E. 962 (same); *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900 (refusal of trustee to act); *Campbell v. Clough*, 71 N. H. 181, 51 Atl. 668 (refusal of trustee to act); *Brown v. Pancoast*, 34 N. J. Eq. 521; *Brnere v. Cook*, 63 N. J. Eq. 624, 52 Atl. 1001 (trustee non-existent); *In re John's Estate*, 30 Ore. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242, reviewing many cases concerning certainty of the trustee (trust does not fail because of fact that persons who are authorized to appoint a board of trustees to succeed the executors in the management of the property fail to make such appointment).

or to a body not in legal being, as to a corporation not in existence; and even where there is no person or body indicated as the recipients of the legal title, but the property is merely directed to be applied to some designated charitable purpose, the performance of which direction might and often would necessarily create a perpetuity.² This is one

²The following are some of the many cases in which this doctrine is either applied or discussed: To a body not in existence: *Att'y-Gen. v. Bunce*, L. R. 6 Eq. 563; *In re Maguire*, L. R. 9 Eq. 632; to unincorporated fluctuating associations: *Cocks v. Manners*, L. R. 12 Eq. 574; and see *Gower v. Mainwaring*, 2 Ves. Sr. 87, 89, per Lord Hardwicke; *Att'y-Gen. v. Oglander*, 3 Brown Ch. 166; *Att'y-Gen. v. Green*, 2 Brown Ch. 490; *White v. White*, 1 Brown Ch. 12; *Att'y-Gen. v. Boulthbee*, 2 Ves. 380; *Att'y-Gen. v. Bowyer*, 3 Ves. 714; *Att'y-Gen. v. Comber*, 2 Sim. & St. 93; *Att'y-Gen. v. Downing*, Amb. 550, 571.^c

There is a fundamental divergence between two classes of American decisions upon this question. In some states the English doctrine as stated in the text is adopted, except so far as it is enlarged by the further and distinct doctrine of *cy-pres*; in others, charitable trusts are sustained and enforced only when the legal title to the property is given by the donor to a certain trustee competent to take and hold in perpetuity, if the trust creates one. The following cases are given simply as examples: Gifts to unincorporated societies held valid:^d *Laird v. Bass*, 50 Tex. 412; *Cruse v. Axtell*,

(c) As to "friendly societies" and the like, see *ante*, notes to § 1019. Where property is bequeathed to executors or trustees for charitable purposes, unexpressed, the proper mode of carrying out the intention is by a "scheme" under the direction of the court; but where there is a general charitable intention without a trust, the disposition of the gift is in the King by Sign Manual: *In re Pyne*, [1903] 1 Ch. 83 (citing *Moggridge v. Thackwell*, 7 Ves. 36b, 6 R. R. 76; *Paice v. Archbishop of Canterbury*, 14 Ves. 364); *Minot v. Baker*, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839, and cases cited by *Holmes, J.* In the case last mentioned it was held that the court would direct a scheme where the gift was to a trustee "to be disposed of by him for such charitable pur-

poses as he shall think proper," and the trustee died without making any disposition of the fund.

(d) Gifts to Unincorporated Societies held valid: *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315; *In re Winchester's Estate*, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 271 (direct gift to unincorporated association); *Chambers v. Higgins' Ex'r*, 20 Ky. Law Rep. 1425, 49 S. W. 436; *Byers v. McCartney*, 62 Iowa 339, 17 N. W. 571 (where there is a devise to a church or society that is unable to take the legal title because of not being incorporated, the devise is not void, but the heirs will hold in trust, or the court will appoint a trustee until the society is incorporated and acquires the capacity to take); *Missouri Hist. Soc. v. Acad. of Science*, 94 Mo. 459, 8 S. W. 346; *Hadden v. Dandy*, 51

of the most important points of distinction between charitable and private trusts; for it is certain that at law, and independently of the peculiar doctrine of equity on this

50 Ind. 49. Gift to an unincorporated society, or uncertain or fluctuating body held invalid: *e* Goodell v. Union Ass'n etc., 29 N. J. Eq. 32 (to a Sunday school); Heiss v. Murphey, 40 Wis. 276 ("to the Roman Catholic orphans" of a diocese). Gift to a corporation not yet created, but its incorporation expected, valid: *f* Ould v. Washington Hospital, 95 U. S. 303; Trustees etc.

N. J. Eq. 154, 32 L. R. A. 625, 28 Atl. 464 (direct bequest of personality to unincorporated charitable association valid: citing Wellbeloved v. Jones, 1 Sim. & St. 40; Evangelical Association's Appeal, 35 Pa. St. 316; Banks v. Phelan, 4 Barb. 80); American Bible Soc. v. American Tract Soc., 62 N. J. Eq. 219, 50 Atl. 67; St. Peter's Church v. Brown, 21 R. I. 367, 43 Atl. 642; Nance v. Bushy, 91 Tenn. (7 Pickle) 303, 18 S. W. 874, 15 L. R. A. 801. In Keith v. Scales, 124 N. C. 497, 32 S. E. 809, there was a gift to an unincorporated church as trustee for a charitable purpose. It was held that the court would hold the fund until incorporation was effected. Under similar circumstances it was held in Dye v. Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724, that the members took as individuals. In Conklin v. Davis, 63 Conn. 377, 28 Atl. 537, there was a gift to trustees of an incorporated church for a charitable purpose. The corporation could not take because not authorized by its charter. The court held that the trustees would take as individuals.

(*e*) Kerrigan v. Conelly, (N. J. Ch.) 46 Atl. 227 (direct gift to unincorporated association invalid); Rhodes v. Rhodes, 88 Tenn. (4 Pickle) 637, 13 S. W. 590 (direct gift).

(*f*) Gift to corporation not yet created, valid: Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401; Field v. Drew Theological Seminary, 41 Fed. 371; Coit v. Comstock, 51 Conn. 352, 50 Am. Rep. 29; Dascomb v. Marston, 80 Me. 223, 13 Atl. 888; Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796 (Massachusetts); Keith v. Scales, 124 N. C. 497, 32 S. E. 809; Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; Kahle v. Evangelical Lutheran Joint Synod, etc., 81 Minn. 7, 83 N. W. 460.

Gift to corporation not created, invalid: Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238. But see Loughheed v. Dykeman's Baptist Church, 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410, where it is held that if the corporation is incorporated before the time for the vesting of the gift it may take, although non-existent at the time of the death of the testator.

A gift increasing the property of a corporation beyond the amount it is allowed by statute or by its charter to hold can, according to the majority of decisions, be attacked only at the suit of the state: See the cases reviewed in the very instructive opinion of Peters, C. J., in Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339; Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796.

subject, gifts to charitable uses, without a certain and competent trustee to take and hold the legal title,—as to an unincorporated and fluctuating society,—would be wholly

v. Beatty, 28 N. J. Eq. 570. Gift to the treasurer of a county and his successors in office, the income for aiding poor, held valid: *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522. Where a bequest was made to two towns, in trust, to apply the income to the education of poor children and the relief of poor widows it was held that the town was not a proper trustee, but the charity would not fail on that account, for the court would appoint a trustee: *Mason v. Meth. Epis. Ch.*, 27 N. J. Eq. 47. Gift to a bishop and his successors, in trust, for an object which would be or might be a perpetuity, held void: *Kain v. Gibboney*, 101 U. S. 362; 3 Hughes, 397; *Heiss v. Murphey*, 40 Wis. 276. See also *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Tappan v. Deblois*, 45 Me. 122; *Swasey v. Am. Bible Soc.*, 57 Me. 523; *Tucker v. Seamen's Aid Soc.*, 7 Met. 188, 195; *Bliss v. Am. Bible Soc.*, 2 Allen, 334; *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234; *Birchard v. Scott*, 39 Conn. 63; *Goodell v. Union Ass'n etc.*, 29 N. J. Eq. 32; *Stevens v. Shippen*, 28 N. J. Eq. 487; *Philadelphia v. Fox*, 64 Pa. St. 169; *Zeisweiss v. James*, 63 Pa. St. 465; 3 Am. Rep. 558; *State v. Warren*, 28 Md. 338; *Needles v. Martin*, 33 Md. 609; *Miller v. Atkinson*, 63 N. C. 537; *McIntyre v. Zanesville*, 17 Ohio St. 352; *Board of Ed. v. Edson*, 18 Ohio St. 221; 98 Am. Dec. 114; *Ex parte Lindley*, 32 Ind. 367; *Att'y-Gen. v. Soule*, 28 Mich. 153; *Methodist Ch. v. Clark*, 41 Mich. 730; *Heuser v. Harris*, 42 Ill. 425; *Academy of Visitation v. Clemens*, 50 Mo. 167; *Estate of Hinckley*, 58 Cal. 457.^h

(g) Gift to the selectmen of a town, valid: *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152. In the case of *In re Sturgis*, 164 N. Y. 485, 58 N. E. 646, it was held that the selectmen took as individuals and not as officers; and that upon this construction the gift was valid. So, in *City of Boston v. Doyle*, 184 Mass. 373, 68 N. E. 851 (cf. *Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172), construing the will of Benjamin Franklin, it was held that where the office of selectman ceased to exist, the aldermen of the city did not become *ex officio* trustees, but the court should appoint trustees. Gift to a municipal corporation, valid: *Peynado v. Peynado*, 82 Ky. 5; *Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. 429, 59 L. R. A.

407; *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434; *Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172; *Barkley v. Donnelly*, 112 Mo. 561, 19 S. W. 305; *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900; *Sheldon v. Town of Stockbridge*, 67 Vt. 299, 31 Atl. 414. Gift to board of county commissioners, valid: *Rush Co. Com'rs v. Dinwiddie*, 139 Ind. 128, 37 N. E. 795. In *Dailey v. City of New Haven*, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69, it is held that in the absence of charter authority a municipal corporation cannot act as trustee of a charitable trust; and that where there is such authority, it cannot be compelled to accept such a trust. Gift to a state, valid: *Bedford v. Bedford*, 99 Ky. 273, 35 S. W. 926.

(h) See, also, *Hunt v. Fowler*, 127 Ill. 269, 12 N. E. 331, 17 N. E. 491.

void.³ The doctrine, however, is rejected by the courts of several American states, which admit the existence and validity of charitable trusts only in cases where the property is given to a certain and competent trustee.

§ 1027. *The Doctrine of Cy-Pres.*—In administering charitable gifts, the English courts have leaned so strongly in favor of sustaining the trusts, even when the donor's specified purpose becomes impracticable, that they invented at an early day, and have fully established, the so-called doctrine of *cy-pres*. The doctrine may be stated in general terms as follows: Where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust *cy-pres*, and will apply the fund to some charitable purposes, similar to those (if any) mentioned by the donor. "If the donor declare his intention in favor of charity indefinitely, without any specification of objects, or in favor of defined objects which happen to fail from whatever cause,—even though in such cases the particular mode of operation contemplated by the donor is uncertain or impracticable,—yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect."¹

³ *Att'y-Gen. v. Tancred*, Amb. 351; 1 W. Black. 90; *Widmore v. Woodroffe*, Amb. 636, 640; *Anonymous*, 2 Ch. Cas. 207; *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *McCord v. Ochiltree*, 8 Blackf. 15, 22; *Grimes's Ex'rs v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Levy v. Levy*, 33 N. Y. 97, 102, cases cited by Wright, J.

¹ In the following cases this doctrine is defined, discussed, applied, and illustrated: *Sinnett v. Herbert*, L. R. 7 Ch. 232; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Att'y-Gen. v. Baxter*, 1 Vern. 248; *Att'y-Gen. v. Andrew*, 3 Ves. 633; *Corbyn v. French*, 4 Ves. 418; *Att'y-Gen. v. Bishop of Oxford*, cited 4 Ves. 431; *Cary v. Abbot*, 7 Ves. 490; *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55; 19 Ves. 483, 485; *Pieschel v. Paris*, 2 Sim. & St. 384; *De Costa v. De Pas*, Amb. 228; 2 Swanst. 487; *Hayter v. Trego*, 5 Russ. 113; *Simon v. Barber*, 5 Russ. 112; *Att'y-Gen. v. Ironmongers' Co.*, Craig & P. 208; 10 Clark & F. 908; *Att'y-Gen. v. Glyn*, 12 Sim. 84; *Att'y-Gen. v. Bishop of Llandaff*, cited 2 Mylne & K. 586; *Incorporated Soc. v. Price*, 1 Jones & L. 498; *Loscombe v. Wintringham*, 13 Beav. 87; *Bennett v. Hayter*, 2 Beav. 81; *Marsh*

In the first kind of cases, where the donor has specified no object, the court will determine upon some scheme which shall carry out the general intention; in the second kind, where the donor's specified object fails, the court will determine upon another object similar to that mentioned by

v. Att'y-Gen., 2 Johns. & H. 61; Att'y-Gen. v. Marchant, L. R. 3 Eq. 424; Att'y-Gen. v. Bunce, L. R. 6 Eq. 563; In re Latymer's Charity, L. R. 7 Eq. 353; In re Maguire, L. R. 9 Eq. 632; Merchant Tailors' Co. v. Att'y-Gen., L. R. 11 Eq. 35; 6 Ch. 512; In re Prison Charities, L. R. 16 Eq. 129; Att'y-Gen. v. St. John's Hospital, L. R. 1 Ch. 92; 2 Ch. Div. 554; Manchester School Case, L. R. 2 Ch. 497; Att'y-Gen. v. Wax Chandlers' Co., L. R. 5 Ch. 503; Att'y-Gen. v. Duke of Northumberland, L. R. 7 Ch. Div. 745;^a and see also *Minot v. Baker*, 147 Mass. 348; 9 Am. St. Rep. 713.

(a) Where the specified purpose appears to be impracticable, but there is a general charitable intention: *Biscoe v. Jackson*, 35 Ch. Div. 460; *Attorney-General v. Boulton*, 2 Ves. 380, 387; *Amory v. Attorney-General*, 179 Mass. 89, 60 N. E. 391 (beneficiary refuses to accept the gift in the particular form); *Attorney-General v. Briggs*, 164 Mass. 561, 42 N. E. 118 (gift to a public school, but the school district abolished); *Wallis v. Solicitor-General for New Zealand*, [1903] App. Cas. 173. Where there is a gift to a charitable institution which never existed at all, the court "is more ready to infer a general charitable intention than to infer the contrary": In re *Davis*, [1902] 1 Ch. 876 (citing *Loscombe v. Winttringham*, 13 Beav. 87; *Hoare v. Hoare*, 56 L. T. 147, where there was no general charitable intent; In re *Clergy Society*, 2 K. & J. 615, 622; In re *Maguire*, L. R. 9 Eq. 632, 634). Where the institution comes to an end after the death of the testator, but before the legacy is paid, the property generally goes to the crown to be applied to charitable purposes: In re *Slevin*, [1891] 2 Ch. 236, 1 Ch. 373 (following *Hayter v. Targo*, 5

Russ, 113, and citing *Attorney-General v. Ironmongers' Co.*, 2 My. & K. 576, 2 Beav. 313, Cr. & P. 208, 10 Cl. & F. 908; *Wilson v. Barnes*, 38 Ch. Div. 507). See, also, In re *Buck*, [1896] 2 Ch. 727 (charitable fund not being needed for purposes of friendly society, a scheme directed); *Pease v. Pattinson*, 32 Ch. Div. 154; *Cunnack v. Edwards*, [1896] 2 Ch. 679 (extinct friendly society not having been a charity, its remaining funds are not applied *cy-pres*, but go to the crown as *bona vacantia*); *Stratton v. Physio-Medical College*, 149 Mass. 508, 14 Am. St. Rep. 442, 21 N. E. 874, 5 L. R. A. 33 (donee, a certain medical college, not having been a public charity, *cy-pres* rule not applicable). Where property is bequeathed to executors or trustees for charitable purposes, unexpressed, the proper mode of carrying out the intention is by a "scheme" under the direction of the court; but where there is a general charitable intention without a trust, the disposition of the gift is in the King by Sign Manual: In re *Pyne*, [1903] 1 Ch. 83 (citing *Moggridge v. Thackwell*, 7 Ves. 36b, 6 R. R. 76; *Paice v. Archbishop of Canterbury*, 14 Ves. 364).

the donor. A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object cannot be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust; it wholly fails.^{2 b} The true doctrine of *cy-pres* should not be confounded, as is sometimes done, with the more general principle which leads courts of equity to sustain and enforce charitable gifts, where the trustee, object, and beneficiaries are simply *uncertain*. There is a radical distinction between the two, although the doctrine of *cy-pres* may be to some extent an expansion or enlargement of the other principle.³ In the great majority of the American states the courts have utterly rejected the peculiar doctrine of *cy-pres* as inconsistent with our institutions and modes of public administration. A few of the states have accepted it in a modified and partial form.⁴

² Fisk v. Att'y-Gen., L. R. 4 Eq. 521; New v. Bonaker, L. R. 4 Eq. 655; In re Clerk's Trust, L. R. 1 Ch. Div. 497; Clephane v. Provost of Edinburgh, L. R. 1 H. L. S. 417; Cherry v. Mott, 1 Mylne & C. 123; Clark v. Taylor, 1 Drew. 642; Russell v. Kellett, 3 Smale & G. 264; Langford v. Gowland, 3 Giff. 617.

³ Some of the cases in which the court has professedly relied on the doctrine of *cy-pres*, and which are cited as illustrations of it, in a preceding note, seem to be nothing more than instances in which trusts with uncertain trustees or objects have been sustained. The suggestion of the text is not merely verbal; it has a practical importance in this country. It shows that the courts in the American states which have utterly rejected the doctrine of *cy-pres* may sustain and enforce charitable trusts which are simply uncertain in their objects or their trustees, and still be consistent with the general position which they have assumed.

⁴ It has generally been said that the doctrine of *cy-pres* and the power to enforce it belong to and result from the *executive* authority held by the

In Minot v. Baker, 147 Mass. 348, 9 Am. St. Rep. 713, 17 N. E. 839, the court, by Holmes, J., commenting on this distinction, directed a scheme in a case where the trustee died without

having made any disposition of the fund.

(b) The text is cited to this effect in Gladding v. St. Matthew's Church, (R. I.) 57 Atl. 860.

§ 1028. **Origin and Extent of the Equitable Jurisdiction.**—Such being the general nature of charitable trusts, the origin and extent of the jurisdiction over them remains to be examined. The question is one of little practical importance in England, since the jurisdiction is there exer-

English chancellor as a representative of the crown in its character as *parens patriæ*, and are not a part of the judicial functions possessed by the court of chancery; while in the United States the courts are clothed with judicial functions only, the prerogative belonging to the *parens patriæ* being held by the legislatures. It may well be doubted, I think, whether this view is entirely correct: See *Starkweather v. Am. Bible Soc.*, 72 Ill. 50; 22 Am. Rep. 133; *Heiss v. Murphey*, 40 Wis. 276; *Heuser v. Harris*, 42 Ill. 425; *Gilman v. Hamilton*, 16 Ill. 225.^c

Where the institution ceased to exist in the testator's lifetime: In *re Ovey*, 29 Ch. Div. 560; In *re Rymer*, [1895] 1 Ch. 19, 34, and cases reviewed by Herschell, Lord Ch.; In *re Davis*, [1902] 1 Ch. 876; *Stratton v. Physio-Medical College*, 149 Mass. 508, 14 Am. St. Rep. 442, 21 N. E. 874, 5 L. R. A. 33, and cases cited by Holmes, J. Where there is no general charitable intent, and the object of the gift proves to be impracticable: In *re White's Trusts*, 33 Ch. Div. 449; *Teele v. Bishop of Derry*, 168 Mass. 341, 47 N. E. 422, 60 Am. St. Rep. 401, 38 L. R. A. 629.

(c) In *Mormon Church v. United States*, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. ed. 478, the question was discussed, and it was held that the legislature may, at any rate, delegate such power to the court. This paragraph of the text is cited in *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310, 95 N. W. 411. In Connecticut, by statute (Gen. Stats., sec. 778, in the year 1880), the courts have been authorized to apply the *cy-pres* doctrine, to a limited extent, to trusts created by deed: *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346, 355, 26 Atl. 846; *Parish of Christ Church v. Trustees of Donations, etc.*,

67 Conn. 554, 35 Atl. 552, 554. In *Barnard v. Adams*, 58 Fed. 313, (C. C., Iowa) a fund was given to trustees to provide scholarships to educate young men for the ministry at a certain college; after the gift vested, that college suspended its functions, but no proceedings were taken to forfeit its charter; held, that the fund should be applied to provide scholarships at another college. The Iowa cases were entirely ignored by the court, and it seems doubtful whether, under the terms of the will, the case would have been held a proper one for the application of the *cy-pres* doctrine even in England. The doctrine has been recognized in Missouri in language somewhat broader than appears to be called for by the questions actually decided: *Missouri Historical Society v. Academy of Science*, 94 Mo. 459, 8 S. W. 346; *Academy v. Clements*, 50 Mo. 167; see *post*, last note to § 1029. In Massachusetts, where the *cy-pres* doctrine is more fully recognized than in other states, it has been intimated that the court would in some cases exercise the functions which were traditionally ascribed to the chancellor in his executive capacity: *Minot v. Baker*, 147 Mass. 348, 9 Am. St. Rep. 713, 17

cised as though it were entirely derived from the statute of charitable uses of Elizabeth.¹ The question, however, becomes of vital importance in this country,—is absolutely fundamental,—since the statute of Elizabeth has been held to be in force in but a very few of the states. The opinion at one time prevailed that the peculiar equitable jurisdiction over charities, except in cases where a trust valid by the ordinary rules of law and equity was created, was derived solely from the statute.² Other English judges have maintained the opinion that the jurisdiction in its full extent was possessed by the court of chancery by virtue of its general powers, and that the statute had only the effect to regulate that jurisdiction, and to define more distinctly the

1 43 Eliz., c. 4. This statute, in a particular and definite manner, declares the powers of chancery, regulates the proceedings for the enforcement of charitable trusts, and enumerates the purposes which are charitable as quoted *ante*, in § 1020.

² This view was sustained by *dicta* of some able English judges, and by some decisions of American courts: See a *dictum* of Lord Loughborough in *Att'y-Gen. v. Bowyer*, 3 Ves. 714, 726; and the decisions in *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Gallego's Ex'rs v. Att'y-Gen.*, 3 Leigh, 450; 24 Am. Dec. 650; *McCord v. Ochiltree*, 8 Blackf. 15, 22; *Common Council of Richmond v. State*, 5 Ind. 334. These two cases held that the jurisdiction was derived solely from the statute, and that the statute was in force in Indiana, but they were completely overruled as to both points by *Grimes's Ex'rs v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690. The early Massachusetts cases, *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645, and *Burbank v. Whitney*, 24 Pick. 146, 35 Am. Dec. 312, seem to intimate that the statute was in force in Massachusetts, and that the jurisdiction was based upon it; but this view was finally discarded in *Bartlett v. Nye*, 4 Met. 378. In Illinois, the statute seems to be regarded as the source of jurisdiction: *a Starkweather v. Am. Bible Soc.*, 72 Ill. 50; *Heuser v. Harris*, 42 Ill. 425; *Gilman v. Hamilton*, 16 Ill. 225.

N. E. 839. Other recent cases are *Bullard v. Town of Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110 (doctrine not applied); *Attorney-General v. Briggs*, 164 Mass. 561, 42 N. E. 118; *Teele v. Bishop of Derry*, 168 Mass. 341, 60 Am. St. Rep. 401, 47 N. E. 422, 38 L. R. A. 649 (doctrine not applied); *Amory v. Attorney-General*, 179 Mass. 89, 60 N. E.

391. The doctrine cannot be used to overturn the original intention of the donor: as, where land is given for a public park, it cannot be used for public buildings: *Rawzee v. Pierce*, 75 Miss. 846, 23 South. 307, 40 L. R. A. 402, citing the text.

(*a*) *Andrews v. Andrews*, 110 Ill. 223; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454.

classes of objects which are charitable. This conclusion has been sustained, and even demonstrated as correct, by the researches of the English record commissioners.³ The question has been repeatedly passed upon by the American courts. Wherever the system of charitable trusts has been accepted at all, it has generally been held that the jurisdiction belongs to equity as a part of its ordinary authority over express trusts, and is not referable for its origin to the statute of Elizabeth. This conclusion was necessary to support the jurisdiction in a great majority of the states, since that statute had not been adopted as a part of their local legislation.^{4 b}

³ *Burford v. Lenthall*, 2 Atk. 551, and *Att'y-Gen. v. Middleton*, 2 Ves. Sr. 327, per Lord Hardwicke; *Att'y-Gen. v. Tancred*, Amb. 351; 1 W. Black. 90; 1 Eden, 10, per Lord Northington; *Att'y-Gen. v. Skinners' Co.*, 2 Russ. 407, 420, per Lord Eldon; a very decided opinion of Lord Redesdale in *Att'y-Gen. v. Mayor etc. of Dublin*, 1 Bligh, N. S., 312, 347, 348; and equally clear opinion of Lord Chancellor Sugden in *Incorporated Soc. v. Richards*, 1 Dru. & War. 258; 1 Con. & L. 58. The examination of the ancient records of the court of chancery by the commissioners has disclosed a large number of cases brought in that court and decided prior to the statute, in which charities of the most indefinite and general character were sustained, thus proving that the court then exercised the same kind of jurisdiction which it has exercised since the statute: See *Coop. Pub. Rec.* 355.

⁴ The position above stated is affirmed in the same positive manner by repeated and most able decisions of the United States supreme court: *Ould v. Washington Hospital*, 95 U. S. 303; *Vidal v. Girard's Ex'rs*, 2 How. 127, 155, 194, 196; *Wheeler v. Smith*, 9 How. 55, 77; *Fontain v. Ravenel*, 17 How. 369; *Griffith v. State*, 2 Del. Ch. 421; *State v. Griffith*, 2 Del. Ch. 392; *Estate of Hinckley*, 58 Cal. 457; *Howard v. Am. Peace Soc.*, 49 Me. 288; *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522; *Ex'rs of Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154; *Bartlett v. Nye*, 4 Met. 378; *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645; *Burbank v. Whitney*, 24 Pick. 146; 35 Am. Dec. 312 (these two latter cases left the question in some doubt); *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437, 474-482, per Jones, C.; *Williams v. Williams*, 8 N. Y. 525; *Andrew v. New York Bible Soc.*, 4 Sand. 156; *Ayres v. Methodist Ch.*, 3 Sand. 351; *Bascom v. Albertson*, 34 N. Y. 584, 604; *Norris v. Thomson's Ex'rs*, 19 N. J. Eq. 307; *Comm'rs of Lagrange Co. v. Rogers*, 55 Ind. 297; *Grimes's Ex'rs v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; overruling *McCord v. Ochiltree*, 8 Blackf. 15; *Miller v. Chittenden*, 2 Iowa, 315; *Dickson v. Mont-*

(b) This section is cited in *Pen-
oyer v. Wadhams*, 20 Oreg. 274, 25

Pac. 720, 11 L. R. A. 211. See, also,
Missouri Hist. Soc. v. Academy of

§ 1029. **Charitable Trusts in the United States.**^a— With regard to the extent to which charitable trusts have been adopted and the jurisdiction over them exercised in the various states, there is the utmost conflict of judicial decision. It seems possible, however, without attempting any strict comparison of the cases or any minute classifications of the rules, to arrange the different states according to three general types, which shall represent with reasonable accuracy and certainty the existing condition of the law on the subject in this country. *First class.* This class includes those states in which charitable trusts have been abrogated or not adopted.¹ Either from a statutory abolition of all

gomery, 1 Swan, 348; *Carter v. Balfour's Adm'r*, 19 Ala. 814; *Beal v. Fox's Ex'rs*, 4 Ga. 404.

¹ The excepted instances authorized by statute are generally cases where corporations may receive and hold property, in trust, for some object which is charitable. The states constituting this class are the following:—

New York: *Bascom v. Albertson*, 34 N. Y. 584; *Levy v. Levy*, 33 N. Y. 97; *Holmes v. Mead*, 52 N. Y. 332; *Beekman v. Bonsor*, 23 N. Y. 298; 80 Am. Dec. 269; *Dodge v. Pond*, 23 N. Y. 69; *Burrill v. Boardman*, 43 N. Y. 254, 263; 3 Am. Rep. 694; *Adams v. Perry*, 43 N. Y. 487; *Rose v. Rose*, 4 Abb. App. 108; but see *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, where a will gave property to his executors, "to be divided by them among such Roman Catholic charities, institutions, schools, or churches in the city of New York" as a majority of his executors should decide, and in such proportions as they should think proper. There were in New York City many such Roman Catholic institutions incorporated and authorized by statute to take by devise or bequest; a majority of the executors designated certain of these institutions as the beneficiaries. Held, the testamentary disposition was not void from uncertainty, but was operative, and the acts of the executors were effectual. This result, of course, depended upon the fact that all the beneficiaries were corporations authorized to hold property, in trust, for

Science, 94 Mo. 459, 8 S. W. 346; *Howe v. Wilson*, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226; *St. James' Orphan Asylum v. Shelby*, 60 Nebr. 796, 83 Am. St. Rep. 553, 84 N. W. 273; *Hutchins v. George*, 44 N. J. Eq. 126, 14 Atl. 108 (the main result reached in this case on another point was overruled in *George v. Brad-dock*, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511);

Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; *Garrison v. Sittle*, 75 Ill. App. 402.

(a) This section is cited in *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, 13 N. E. 491; *Lane v. Eaton*, 69 Minn. 141, 71 N. W. 1031, 65 Am. St. Rep. 559, 38 L. R. A. 669; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

uses and trusts, with a few specified exceptions, or from the general provisions of the law against perpetuities, or from

charitable purposes. In *Williams v. Williams*, 8 N. Y. 525, a majority of the court of appeals admitted the doctrine under great restrictions; but this decision, and all the earlier ones which sustained the doctrine to a much fuller extent, have been overruled by the cases above cited.^b

Wisconsin:^c *Ruth v. Oberbrunner*, 40 Wis. 238; *Heiss v. Murphey*, 40 Wis. 276. See *Dodge v. Williams*, 46 Wis. 70, and *Gould v. Taylor Orphan Asylum*, 46 Wis. 106, for examples of gifts to corporations.

(^b) *New York*.—The New York rule was changed by statute in 1893, and that state now belongs to the second class. (See notes to second class.) The cases here cited follow the former rule. The opinion of *Rapallo, J.*, in *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, contains an exhaustive review of the earlier New York decisions. It was held that the doctrine of *Power v. Cassidy* could not be extended to a case where the number of beneficiaries among whom a selection was to be made was indefinitely large. So in *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715, it was held that a bequest to a town, in trust, for "the poor" of the town was invalid for uncertainty, not being restricted to those for whose support the town is under a statutory liability. See, also, *Prichard v. Thompson*, 95 N. Y. 76, 47 Am. Rep. 9. See further, in interpretation of statutes limiting testamentary gifts to charitable corporations, *Stephenson v. Short*, 92 N. Y. 433, per *Rapallo, J.*; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166. And see, in general, *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467; *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E.

238; *Lougheed v. Dykeman's Baptist Church*, 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410; *People v. Powers*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541. A convenient summary of the general course of the New York cases may be found in the opinion of *Marshall, J.*, in *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307. In *Bird v. Merkle*, 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423, a gift "to be divided and paid to the Methodist Episcopal churches of the Ninth ward of the City of New York, according to the number of members, to buy coal for the poor of said churches" was held not to create a trust and to be valid.

(^c) *Wisconsin*.—Wisconsin now clearly belongs in the second class, as respects trusts of personal property only. The following rules seem to be established: A devise of realty in trust for a charitable purpose will not be enforced if it violates the statutory rule against perpetuities: *Danforth v. City of Oshkosh*, 119 Wis. 262, 97 N. W. 258 (decision of a bare majority of the court: see vigorous dissenting opinion of *Marshall, J.*); *De Wolf v. Lawson*, 61 Wis. 469, 21 N. W. 615, 50 Am. Rep. 148; *Beurhaus v. Cole*, 94 Wis. 617, 69 N. W. 986. The statutory rule referred to prohibits the suspension

the general policy of the state legislation, "charitable trusts" do not exist at all, except where they are merely

Michigan.^d *Methodist Church v. Clark*, 41 Mich. 730 (there is no distinction between trusts for charitable purposes and any others, and the same requisites are necessary to their validity); see *Attorney-General v. Soule*, 28 Mich. 153.

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In all the foregoing states the same type of statute has been adopted, in terms abolishing all uses and trusts, except a few well-defined species of active express trusts which do not include any ordinary form of charitable use. The courts of these states have felt themselves compelled to hold that all charitable trusts were abolished, except such as would be valid forms, under the exceptions of the statute. No other conclusion seems to me possible, except by a judicial repeal of the legislation.

of the power of alienation for a longer period than during two lives in being. It provides further that "such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed." Consequently, where the beneficiaries are not so definite that they can join in a conveyance, the trust fails. This statute has been held not to apply to personal property. Hence it is held that a bequest in trust for charitable uses is valid. And if, upon the doctrine of equitable conversion, a devise can be interpreted to be in effect a bequest, it may be sustained, although the use be charitable: *Harrington v. Pier*, 105 Wis. 485, 76 Am. St. Rep. 924, 82 N. W. 345, 50 L. R. A. 307; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; *Sawtelle v. Witham*, 94 Wis. 412, 69 N. W. 72; *Hood v. Dorer*, 107 Wis. 149, 82 N. W. 546; *Kronshage v. Varrell*, (Wis.) 97 N. W. 928; *In re Fuller's Will*, 75 Wis. 431, 44 N. W. 304, is overruled, as are the *dicta* in *McHugh v. McCole*, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106. In general, see *Estate of Hoffen*, 70 Wis. 522, 36 N. W. 407 (direct gift to uncertain class invalid); *Fadness v.*

Braunborg, 73 Wis. 257, 41 N. W. 84 (gift to corporation). In the instructive opinion of Marshall, J., in *Harrington v. Pier*, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307, after a careful review of the Wisconsin cases, the law of charitable trusts of personalty in that state is thus summarized: "It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee if there be a trust in fact, or indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses."

(d) *Michigan*.—*Hathaway v. Village of New Baltimore*, 48 Mich. 251, 12 N. W. 186; *Wheelock v. American Tract Soc.*, 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; *White v. Rice*, 112 Mich. 403, 70 N. W. 1024; *Hopkins v. Crossley*, (Mich.) 96 N. W. 499.

(e) *Minnesota*.—*Little v. Willford*, 31 Minn. 173, 17 N. W. 282; *Atwater v. Russell*, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26; *Lane v. Eaton*, 69 Minn. 141, 71 N. W. 1031, 65 Am.

the express private trusts permitted by the law, or except in those particular instances authorized by statute. The equi-

Maryland:^f *Dashiell v. Attorney-General*, 5 Har. & J. 392, 400; 6 Har. & J. 1; 9 Am. Dec. 572; *Wilderman v. Baltimore*, 8 Md. 551; *Methodist Church v. Warren*, 28 Md. 388, 353; *Needles v. Martin*, 33 Md. 609; *Murphy v. Dallam*, 1 Bland, 529.

North Carolina:^g *McAuley v. Wilson*, 1 Dev. Eq. 276; 18 Am. Dec. 587; *Trustees v. Chambers's Ex'rs*, 3 Jones Eq. 253; *Holland v. Peck*, 2 Ired. Eq. 255; *White v. Attorney-General*, 4 Ired. Eq. 19; 44 Am. Dec. 92; *Miller v. Atkinson*, 63 N. C. 537.

Virginia:^h *Virginia v. Levy*, 23 Gratt. 21; *Carter v. Wolfe*, 13 Gratt. 301; *Seaburn's Ex'r v. Seaburn*, 15 Gratt. 423; *Gallego's Ex'rs v. Attorney-General*, 3 Leigh, 450; 24 Am. Dec. 650; *Kain v. Gibboney*, 101 U. S. 362; 3 Hughes C. C. 397.

St. Rep. 559, 38 L. R. A. 669; *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948; *Kahle v. Evangelical Lutheran Joint Synod*, 81 Minn. 7, 83 N. W. 460; *City of Owatonna v. Rosebrook*, 88 Minn. 318, 92 N. W. 1122.

(^f) *Maryland*.—*Rizer v. Perry*, 58 Md. 112; *Henry Watson, etc., Soc. v. Johnston*, 58 Md. 139; *Barnum v. Mayor, etc., of Baltimore*, 62 Md. 275, 50 Am. Rep. 219; *Isaac v. Emory*, 64 Md. 333, 1 Atl. 713; *Maught v. Getzendanner*, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 331; *Crisp v. Crisp*, 65 Md. 422, 5 Atl. 421; *Eutaw Place Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412, and note; *Halsey v. Convention of Protestant Episcopal Church*, 75 Md. 275, 23 Atl. 781 (limited jurisdiction in Maryland explained); *Gamble v. Trippe*, 75 Md. 252, 23 Atl. 461, 32 Am. St. Rep. 388, 15 L. R. A. 235; *Yingling v. Miller*, 77 Md. 104, 26 Atl. 491; *Hanson v. Little Sisters of the Poor of Baltimore*, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293 (gift to church for its parish school, valid); *Methodist Episcopal Church v. Jackson Square Evangelical Church*, 84 Md. 173, 35 Atl. 8; *Missionary Society v. Humphreys*, 91 Md. 131, 46

Atl. 320, 80 Am. St. Rep. 432; *Prettyman v. Baker*, 91 Md. 539, 46 Atl. 1020; *Erhardt v. Baltimore Monthly Meeting of Friends*, 93 Md. 669, 49 Atl. 561 ("a devise in trust for the benefit of an uncertain and undefined beneficiary is as invalid as if the devise had been directly to the beneficiary").

(^g) *North Carolina*.—Under the decision in *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809, it would seem that North Carolina now belongs to the second class.

(^h) *Virginia*.—The earlier Virginia decisions were disapproved by *Richardson, J.*, in *Protestant, etc., Society v. Churchman's Rep's*, 80 Va. 718. His conclusions, which were many of them mere *dicta*, would bring Virginia within the second class. In *Fifield v. Van Wyck's Ex'r*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446, the court refused to adopt those conclusions, saying: "We are unwilling to hold that this line of decisions, running back over a period of 50 years, was overturned by expressions of opinion in the *Churchman* and *Guthrie* Cases not necessary to their decision. If further changes are necessary or desirable on the sub-

table system of distinctively charitable trusts is abandoned. *Second class.* This class includes the larger portion of the states in which "charitable trusts" exist under a somewhat modified and restricted form.² There is not a little

*West Virginia:*¹ *Venable v. Coffman*, 2 W. Va. 310; *Carpenter v. Miller's Ex'r*, 3 W. Va. 174; 100 Am. Dec. 744.

In all these states a trust for charitable purposes would be upheld, provided it possessed all the elements of a valid ordinary private trust; that is, the trustee was a certain person competent to take and hold the property, the beneficiaries were certain or capable of being made so, and no perpetuity was created. In other words, an express trust, otherwise valid, would not become invalid because the ultimate purpose was charitable.

² The following states are placed in this class; but there is a great diversity in the particular rules prevailing in the different states, and only a general resemblance in their decisions:—

*Alabama:*³ *Johnson's Adm'r v. Longmire*, 39 Ala. 143; *Williams v. Pearson*, 38 Ala. 299; *Carter v. Balfour's Adm'r*, 19 Ala. 814; *Antonea v. Es-lava*, 9 Port. 527.

Arkansas: *Grissom v. Hill*, 17 Ark. 483.

*California:*⁴ *Hinckley's Estate*, 58 Cal. 457.

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*Connecticut:*⁵ *Bull v. Bull*, 8 Conn. 47; 20 Am. Dec. 86; *Chatham v. Brainerd*, 11 Conn. 60; *Brewster v. McCall*, 15 Conn. 274; *American Bible Soc. v. Wetmore*, 17 Conn. 181; *Hampden v. Rice*, 24 Conn. 350; *White v.*

ject, the legislature, the lawmaking power, and not the courts, should make them."

(i) *West Virginia.*—*Mong v. Roush*, 29 W. Va. 119, 11 S. E. 906; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. 302—following the earlier Virginia cases; *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389; *Morris' Ex'r v. Morris' Devisees*, 48 W. Va. 430, 37 S. E. 570 (valid); *Weaver v. Spurr*, (W. Va.) 48 S. E. 852 (invalid).

(j) *Alabama.*—*Johnson v. Holifield*, 79 Ala. 423, 58 Am. Rep. 596; *Burke v. Roper*, 79 Ala. 138; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 18 South. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360.

(k) *California.*—*People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; *In re Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A.

364; *In re Upham's Estate*, 127 Cal. 90, 59 Pac. 315; *In re Willey's Estate*, 128 Cal. 1, 60 Pac. 471; *In re Winchester's Estate*, 133 Cal. 271, 65 Pac. 475, 54 L. R. A. 281; *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423; *Estate of Gay*, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70; *Spencer v. Widney*, (Cal.) 46 Pac. 463.

(l) *Colorado.*—*Clayton v. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. 429, 59 L. R. A. 407.

(m) *Connecticut.*—*Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29; *Tappan's Appeal*, 52 Conn. 412; *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep. 152; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687; *Camp v. Crocker's Adm'r*, 54 Conn. 21, 5 Atl. 604; *Duggan v. Slocum*, 83 Fed. 244,

divergence in the views maintained by the courts of the various states composing this class. In a few of them the

Fisk, 22 Conn. 31; Treat's Appeal, 30 Conn. 113; Birchard v. Scott, 39 Conn. 63. A statute similar to that of Elizabeth is enacted.

Delaware:^m Griffith v. State, 2 Del. Ch. 421; State v. Griffith, 2 Del. Ch. 392.

Georgia:^o Walker v. Walker, 25 Ga. 420; Beall v. Fox, 4 Ga. 404; Jones v. Habersham, 3 Woods, 443.

Illinois:^p Starkweather v. Am. Bible Soc., 72 Ill. 50; 22 Am. Rep. 133; Heuser v. Harris, 42 Ill. 425; Gilman v. Hamilton, 16 Ill. 225.

affirmed in 92 Fed. 806, 34 C. C. A. 676; Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; Hayden v. Connecticut Hospital for Insane, 64 Conn. 320, 30 Atl. 50; In re President and Fellows of Yale College, 67 Conn. 257, 34 Atl. 1036; In re Strong's Appeal, 68 Conn. 527, 37 Atl. 395; Appeal of Mack, 71 Conn. 122, 41 Atl. 242; Appeal of Eliot, 74 Conn. 586, 51 Atl. 558. A modified form of the *cy-pres* doctrine has been adopted by statute. In Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346, the court says: "In 1876 the general assembly confided to the superior court power to order the sale of any lands devised in trust where, in its opinion, this would promote the interest of the beneficiaries: Gen. Stats., sec. 779. In 1880 it was given authority, in cases where the execution of a trust deed in accordance with its terms has become, by reason of a change of circumstances, impossible, or would frustrate the manifest intention of the grantor, to sell the land, and direct the application of the proceeds in such manner as it may deem most proper to secure the object for which the trust was originally created, as near as may be according to the intent of the conveyance: Gen. Stats., sec. 778. In 1886 the superior court was invested with exclusive jurisdiction of all matters

where the general assembly had theretofore exercised jurisdiction over the sale of lands, when, by reason of the condition of the parties in interest, or the limitations of any will or deed, no person could convey a legal title: Gen. Stats., sec. 776. Whether, in view of the gradual and, of late, rapid withdrawal of the general assembly from the consideration of matters proper for equitable relief, the equitable jurisdiction of the superior court, which has been thus expressly authorized to apply the *cy-pres* doctrine to trusts created by deed, ought not to be now deemed to include authority to deal in the same manner with charitable trusts created by will, it is unnecessary to determine in the present case." See, also, Parish of Christ Church v. Trustees of Donations, etc., 67 Conn. 554, 35 Atl. 552.

(^m) *Delaware*.—Field v. Drew Theol. Sem., 41 Fed. 371; Doughten v. Van-dever, 5 Del. Ch. 51.

(^o) *Georgia*.—Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401; Beckwith v. St. Philip's Parish, 69 Ga. 564.

(^p) *Illinois*.—Andrews v. Andrews, 110 Ill. 223; Mills v. Newberry, 112 Ill. 123, 54 Am. Rep. 213; Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009; Hoeffler v. Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St.

statute of Elizabeth is held to be in force, or one similar to it has been enacted. In the majority of them the doctrine

Indiana:^a *Comm'rs of Lagrange Co. v. Rogers*, 55 Ind. 297; *Craig v. Sechrist*, 54 Ind. 419; *Cruse v. Axtell*, 50 Ind. 49; *Grimes's Ex'rs v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Ex parte Lindley*, 32 Ind. 367; *Sweeney v. Sampson*, 5 Ind. 465; *Common Council of Richmond v. State*, 5 Ind. 334; *McCord v. Ochiltree*, 8 Blackf. 15.

Iowa:^r *Miller v. Chittenden*, 2 Iowa, 315, 352; *Johnson v. Mayne*, 4 Iowa, 180; *Lepage v. McNamara*, 5 Iowa, 124, 146.

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Louisiana: *Society of Orphan Boys v. New Orleans*, 12 La. Ann. 62; *New Orleans v. McDonogh*, 12 La. Ann. 240; *Fink v. Ex'r of Fink*, 12 La. Ann. 301.

Maine:^u *Maine Bapt. Miss. Con. v. Portland*, 65 Me. 92; *Swasey v. Am. Bible Soc.*, 57 Me. 523; *Howard v. Am. Peace Soc.*, 49 Me. 288; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Tappan v. Deblois*, 45 Me. 122; *Shapleigh v. Pilsbury*, 1 Me. 271.

Mississippi:^v *Wade v. Am. Colon. Soc.*, 7 Smedes & M. 663; 45 Am. Dec. 324.

Missouri:^w *State v. Prewett*, 20 Mo. 165; *Chambers v. St. Louis*, 29 Mo.

Rep. 241, 40 L. R. A. 730; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444, 49 N. E. 516; *Trafton v. Black*, 187 Ill. 36, 58 N. E. 292.

(a) *Indiana*.—*Rush Co. Com'rs v. Dinwiddie*, 139 Ind. 128, 37 N. E. 795.

(r) *Iowa*.—*Seda v. Huble*, 75 Iowa, 429, 39 N. W. 685, 9 Am. St. Rep. 495; *Byers v. McCartney*, 62 Iowa 339, 17 N. W. 571; *Phillips v. Harrow*, 93 Iowa 92, 61 N. W. 434; *Moran v. Moran*, 104 Iowa 216, 73 N. W. 617, 65 Am. St. Rep. 443, 39 L. R. A. 204; *Zion Church v. Parker*, 114 Iowa 1, 86 N. W. 60; *Grant v. Saunders*, 121 Iowa 80, 100 Am. St. Rep. 310, 95 N. W. 411.

(s) *Kansas*.—*Troutman v. De Boisiere Odd Fellows' Orphans H. & I. S. Ass'n*, 66 Kan. 1, 71 Pac. 287 (reversing (Kan.) 64 Pac. 33).

(t) *Kentucky*.—The decision in *Spalding v. St. Joseph's Industrial School*, 107 Ky. 382, 21 Ky. Law Rep. 1107, 54 S. W. 200, places Kentucky in the second class, as the trust in

that case would clearly be valid under the English decisions; moreover, it is there asserted that all previous recognitions of the *cy-pres* rule in Kentucky were *dicta*. For the other Kentucky cases, see *post*, under class third.

(u) *Maine*.—*Piper v. Moulton*, 72 Me. 155; *Simpson v. Welcome*, 72 Me. 496, 39 Am. Rep. 349; *Dascomb v. Marston*, 80 Me. 223, 13 Atl. 888; *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940; *Farrington v. Putnam*, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339.

(v) *Mississippi*.—Under Const. §§ 269, 270, it is now held that a trust of realty for charitable purposes is void; but a trust of personality for the same purposes is valid: *Blackburn v. Tucker*, 72 Miss. 735, 17 South. 737. See, in general, *Rowzee v. Pierce*, 75 Miss. 846, 65 Am. St. Rep. 625, 23 South. 307, 40 L. R. A. 402.

(w) *Missouri*.—*Howe v. Wilson*, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep.

of charitable trusts, as a part of the ordinary jurisdiction and functions of equity, has been accepted in a modified and

543; *Russell v. Allen*, 5 Dill. 235; *Academy of Visitation v. Clemens*, 50 Mo. 167.

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New Hampshire:^y *Dublin Case*, 38 N. H. 459; *Chapin v. School Dist.*, 35 N. H. 445; *Brown v. Concord*, 33 N. H. 285; *Second Cong. Soc. v. First Cong. Soc.*, 14 N. H. 315; *Duke v. Fuller*, 9 N. H. 536; 32 Am. Dec. 392.

New Jersey:^z *Goodell v. Union Ass'n*, 29 N. J. Eq. 32; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Trustees etc. v. Beatty*, 28 N. J. Eq. 570; *Stevens v. Shippen*, 28 N. J. Eq. 487; *Mason's Ex'rs v. Meth. Epis. Ch.*, 27 N. J. Eq. 47; *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489; *Norris v. Thomson's Ex'rs*, 19 N. J. Eq. 307; *Att'y-Gen. v. Moore's Ex'rs*, 19 N. J. Eq. 503.

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226; *Missouri Hist. Soc. v. Acad. of Science*, 94 Mo. 459, 8 S. W. 346; *Barkley v. Donnelly*, 112 Mo. 561, 19 S. W. 305; *Miller v. Rosenberger*, 144 Mo. 292, 46 S. W. 167; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Farmers & Merchants' Bank v. Robinson*, 96 Mo. App. 385, 70 S. W. 372. Under the decision in *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346, recognizing the *cy-pres* rule to a limited extent, Missouri may properly belong in the third class.

(x) *Nebraska*.—*St. James' Orphan Asylum v. Shelby*, 60 Nebr. 796, 84 N. W. 273, 83 Am. St. Rep. 553.

(y) *New Hampshire*.—*Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334; *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706; *Adams Female Academy v. Adams*, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785; *Towle v. Nesmith*, 69 N. H. 212, 42 Atl. 900; *Webster v. Sughrow*, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638; *Campbell v. Clough*, 71 N. H. 181, 51 Atl. 668.

(z) *New Jersey*.—*De Camp v. Dobbins*, 31 N. J. Eq. 671; *Taylor v. Trustees*, 34 N. J. Eq. 101; *Brown v. Pancoast*, 34 N. J. Eq. 324; *Hesketh v.*

Murphy, 35 N. J. Eq. 23, 36 N. J. Eq. 304; *Detwiller v. Hartman*, 37 N. J. Eq. 348; *Union Meth. Epis. Ch. v. Wilkinson*, 36 N. J. Eq. 141; *Hutchins v. George*, 44 N. J. Eq. 126, 14 Atl. 108; *George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881, 14 Am. St. Rep. 754, 6 L. R. A. 511; *Green v. Blackwell*, (N. J. Ch.) 35 Atl. 375; *Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113; *Livesey v. Jones*, 35 Atl. 1064, 55 N. J. Eq. 204 (affirmed, *Chadwick v. Livesey*, 56 N. J. Eq. 453, 41 Atl. 1115); *Kerrigan v. Tabb*, (N. J. Ch.) 39 Atl. 701; *Kerrigan v. Conelly*, (N. J. Ch.) 46 Atl. 227; *American Bible Soc. v. American Tract Soc.*, 62 N. J. Eq. 219, 50 Atl. 67; *Lanning v. Com. of Public Instruction*, 63 N. J. Eq. 1, 51 Atl. 787; *Bruere v. Cook*, 63 N. J. Eq. 624, 52 Atl. 1001; *Jones v. Watford*, 64 N. J. Eq. 785, 53 Atl. 397 (affirming 62 N. J. Eq. 339, 50 Atl. 180); *Hyde's Ex'r v. Hyde*, 64 N. J. Eq. 6, 53 Atl. 593.

(aa) *New York*.—New York now belongs to the second class. A statute passed in 1893 (Laws 1893, c. 701) provides: "Section 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent

limited form; such trusts are upheld when the property is given to a person sufficiently certain, and for an object

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Ohio:^{cc} *Am. Bible Soc. v. Marshall*, 15 Ohio St. 537; *Urmey's Ex'rs v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615; *Hullman v. Honcomp*, 5 Ohio St. 237; *McIntire's School v. Zanesville*, 9 Ohio, 203.

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Pennsylvania:^{cc} *Humane Fire Co.'s Appeal*, 88 Pa. St. 389; *Swift's Ex'rs v. Eaton Beneficial Soc.*, 73 Pa. St. 362; *Zeisweiss v. James*, 63 Pa. St. 465; 3 Am. Rep. 558; *Mayer v. Soc. for Visitation of the Sick*, 2 Brewst. 385; *Philadelphia v. Girard*, 45 Pa. St. 9; 84 Am. Dec. 470; *McLean v. Wade*, 41 Pa. St. 266; *Miller v. Porter*, 53 Pa. St. 292; *Henderson v. Hunter*, 59 Pa. St. 335; *Philadelphia v. Fox*, 64 Pa. St. 169; *Soohan v. Philadelphia*, 33 Pa. St. 9; *Price v. Maxwell*, 28 Pa. St. 23; *Griffitts v. Cope*, 17 Pa. St.

uses, which shall, in other respects, be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court. Section 2. The supreme court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court." Under this statute, a gift in trust for the purpose of founding a home for aged people was upheld in *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568. The court also held that upon the death of the trustees the supreme court would execute the trust. See, also, *In re Sturgis*, 164 N. Y. 485, 58 N. E. 646. The opinion of Parker,

C. J., in *Allen v. Stevens*, *supra*, is of much general interest because of the breadth of construction given to the statute, which was held to negative the effect not only of the cases invalidating charitable trusts because of uncertainty, but also of the long line of decisions applying to charitable trusts the rule against perpetuities. For a vigorous criticism of his reasoning, see *Danforth v. City of Oshkosh*, 119 Wis. 262, 97 N. W. 258, dissenting opinion of Marshall, J.

(**bb**) *North Carolina*.—*Keith v. Scales*, 124 N. C. 497, 32 S. E. 809.

(**cc**) *Ohio*.—*Mannix v. Purcell*, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

(**dd**) *Oregon*.—*Pennoyer v. Wadhams*, 20 Oreg. 274, 25 Pac. 720, 11 L. R. A. 211; *In re John's Will*, 30 Oreg. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; *John v. Smith*, 102 Fed. 218, 42 C. C. A. 275 (affirming 91 Fed. 827).

(**ee**) *Pennsylvania*.—*Handley v. Palmer*, 103 Fed. 39, 43 C. C. A. 100 (affirming 91 Fed. 948); *Manners v. Phila. Library Co.*, 93 Pa. St. 165, 39 Am. Rep. 741; *Jones v. Renshaw*, 130 Pa. St. 327, 18 Atl. 651; *Commonwealth v. Pauline Temporary Home*, 141 Pa. St. 537, 21 Atl. 661; *In re*

sufficiently definite. With regard to this element of certainty in the trustee, and the objects, there is much diversity

96; *McLain v. School Directors*, 51 Pa. St. 196; *Evangelical Association's Appeal*, 35 Pa. St. 316; *Mission. Society's Appeal*, 30 Pa. St. 425; *Cresson's Appeal*, 30 Pa. St. 437; *Barr v. Weld*, 24 Pa. St. 84; *Brendle v. German Ref. Cong.*, 33 Pa. St. 415; *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; *Gregg v. Irish*, 6 Pa. St. 211; *Wright v. Linn*, 9 Pa. St. 433; *Pickering v. Shotwell*, 10 Pa. St. 23; *Hillyard v. Miller*, 10 Pa. St. 326; *Methodist Ch. v. Remington*, 1 Watts, 218; 26 Am. Dec. 61; *Martin v. McCord*, 5 Watts, 493; 30 Am. Dec. 342; *Ex parte Cassel*, 3 Watts, 408, 440; *Morrison v. Beirer*, 2 Watts & S. 81; *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552; *Philadelphia v. Elliott*, 3 Rawle, 170; *Girard v. Philadelphia*, 7 Wall. 1; *Vidal v. Girard's Ex'rs*, 2 How. 127.

Rhode Island:^{ff} *Meeting St. Bap. Soc. v. Hail*, 8 R. I. 234; *Potter v. Thornton*, 7 R. I. 252; *Derby v. Derby*, 4 R. I. 414.

South Carolina:^{gg} *Attorney-General v. Jolly*, 1 Rich. Eq. 99; 2 Strob. Eq. 379; *Attorney-General v. Clergy Soc.*, 8 Rich. Eq. 190; *Gibson v. McCall*, 1 Rich. 174; *Combe v. Brazier*, 2 Desaus. Eq. 431.

Tennessee:^{hh} *Dickson v. Montgomery*, 1 Swan, 348; *White v. Hale*, 2 Cold. 77; *Gass v. Ross*, 3 Sneed, 211; *Franklin v. Armfield*, 2 Sneed, 305; *Green v. Allen*, 5 Humph. 170.

Texas:ⁱⁱ *Laird v. Bass*, 50 Tex. 412; *Paschal v. Acklin*, 27 Tex. 173; *Bell Co. v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268; *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375.

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Sellers Chapel Meth. Ch., 139 Pa. St. 61, 21 Atl. 145, 27 Wkly. Notes Cas. 383, 11 L. R. A. 282; *Presbyterian Board of Foreign Missions v. Culp*, 151 Pa. St. 467, 25 Atl. 117, 31 Wkly. Notes Cas. 135; *In re Lewis*, 152 Pa. St. 477, 25 Atl. 878, 31 Wkly. Notes Cas. 460; *Trim v. Brightman*, 168 Pa. St. 395, 31 Atl. 1071; *In re Murphy's Estate*, 184 Pa. St. 310, 33 Atl. 70, 63 Am. St. Rep. 802; *Young v. St. Mark's Lutheran Church*, 200 Pa. St. 332, 49 Atl. 887; *In re Sleicher's Estate*, 201 Pa. St. 612, 51 Atl. 329; *In re Daly's Estate*, 208 Pa. St. 58, 57 Atl. 180. The subject of charities is now regulated to a large extent by statute in Pennsylvania.

^(ff) *Rhode Island*.—*Pell v. Mercer*, 14 R. I. 412, declares that the *cy-pres* doctrine exists in Rhode Island. See notes to third class.

^(gg) *South Carolina*.—*Brennan v. Winkler*, 37 S. C. 457, 16 S. E. 190; *Dye v. Beaver Creek Church*, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724.

^(hh) *Tennessee*.—*Fite v. Beasley*, 12 Lea 328; *Rhodes v. Rhodes*, 88 Tenn. (4 Pickle) 637, 13 S. W. 590; *Nance v. Busby*, 91 Tenn. (7 Pickle) 303, 18 S. W. 874, 15 L. R. A. 801; *Johnson v. Johnson*, 92 Tenn. (8 Pickle) 559, 23 S. W. 114, 36 Am. St. Rep. 104, 22 L. R. A. 179; *Jones v. Green*, (Tenn. Ch. App.) 36 S. W. 729; *Cheatham v. Nashville Trust Co.*, (Tenn. Ch. App.) 57 S. W. 202.

⁽ⁱⁱ⁾ *Texas*.—*Ryan v. Porter*, 61 Tex. 106; *Pierce v. Weaver*, 65 Tex. 44; *Nolte v. Meyer*, 79 Tex. 351, 15 S. W. 276; *Peace v. First Christian Church*, 20 Tex. Civ. App. 85, 48 S. W. 534.

^(jj) *Utah*.—*In Staines v. Burton*,

of decision. The doctrine of *cy-pres* is generally rejected.^{oo} *Third class.* This class includes a very few states which have accepted the doctrine in its full extent.³ The states

Vermont:kk *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522; *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154; *Penfield v. Skinner*, 11 Vt. 296; *Stone v. Griffin*, 3 Vt. 400.

II

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United States Supreme Court:nn *Ould v. Washington Hospital*, 95 U. S. 303; *Kain v. Gibboney*, 101 U. S. 362; 3 Hughes C. C. 397; *Girard v. Philadelphia*, 7 Wall. 1; *Vidal v. Girard's Ex'rs*, 2 How. 127; *Wheeler v. Smith*, 9 How. 55; *Fontain v. Ravenel*, 17 How. 369; *Bap. Ass'n v. Hart's Ex'rs*, 4 Wheat. 1; *Mormon Church v. United States*, 136 U. S. 1.

A few of the states in this list—e. g., New Jersey—might perhaps be properly placed in the third class, since their courts uphold trusts very uncertain, both as to trustee and object; but none of them, I believe, profess to accept the English doctrine in all its fullness.

3 Massachusetts:pp—The doctrine is freely and fully accepted, and the rule of *cy-pres* is enforced: *Att'y-Gen. v. Parker*, 126 Mass. 216; *Sohier v. Burr*, 127 Mass. 221; *Boxford etc. Soc. v. Harriman*, 125 Mass. 321; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Old South Soc. v. Crocker*, 119 Mass. 1; 20 Am. Rep. 299; *Fellows v. Miner*, 119 Mass. 541; *Gooch v. Ass'n for Relief etc.*, 109 Mass. 558; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221; *Att'y-Gen. v. Garrison*, 101 Mass. 223; *Fairbanks v. Lamson*, 99 Mass. 533; *Hosea v. Jacobs*, 98 Mass. 65; *Jackson v. Phillips*, 14 Allen, 539; *Att'y-Gen. v. Old South Soc.*, 13 Allen, 474; *Saltonstall v. Sanders*, 11 Allen, 446; *Odell v. Odell*, 10 Allen, 1; *Drury v. Natick*, 10 Allen, 169; *Att'y-Gen. v. Trinity Church*, 9 Allen, 422; *Dexter v. Gardner*, 7 Allen, 243; *Tainter v. Clark*, 5 Allen, 66; *Bliss v. Am. Bible Soc.*, 2 Allen, 334; *Easterbrooks v. Tillinghast*, 5 Gray, 171;

17 Utah 331, 53 Pac. 1015, 70 Am. St. Rep. 788, a trust was upheld the terms of which were very broad, and which would have been rejected by the English courts on the ground that it gave the trustees discretion to apply the fund for indefinite purposes not charitable. The *cy-pres* rule was not passed upon.

(kk) Vermont.—*Sheldon v. Town of Stockbridge*, 67 Vt. 299, 31 Atl. 414.

(ll) Washington.—In re *Stewart's Estate*, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

(mm) Wisconsin now belongs in the

second class, as respects trust of personal property: see cases cited *ante*, under first class.

(nn) Jones v. Hahersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401; *Russell v. Allen*, 107 U. S. 172, 2 Sup. Ct. 327, 27 L. ed. 397.

(oo) This portion of the text is quoted in *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. 190.

(pp) Massachusetts.—*Suter v. Hilliard*, 132 Mass. 412, 42 Am. Rep. 444; *Bates v. Bates*, 134 Mass. 110, 45 Am. Rep. 305; In re *Schouler*, 134 Mass. 426; *White v. Ditson*, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep.

composing this group have not even totally rejected the doctrine of *cy-pres*, although they do not apply it so freely and under such extreme circumstances as would be done in England. The general system seems, at least, to be so

Am. Acad. v. Harvard College, 12 Gray, 582; *Wells v. Heath*, 10 Gray, 17; *North Adams etc. Soc. v. Fitch*, 8 Gray, 421; *Harvard College v. Soc. Prom. Theol. Educ.*, 3 Gray, 280; *Wells v. Doane*, 3 Gray, 201; *Earle v. Wood*, 8 Cush. 430; *Nourse v. Merriam*, 8 Cush. 11; *Parker v. May*, 5 Cush. 336; *Winslow v. Cummings*, 3 Cush. 358; *Brown v. Kelsey*, 2 Cush. 243; *Baker v. Smith*, 13 Met. 34; *Sohier v. St. Paul's Church*, 12 Met. 250; *Washburn v. Sewall*, 9 Met. 280; *Tucker v. Seaman's Aid Soc.*, 7 Met. 188; *Bartlett v. Nye*, 4 Met. 378; *Burbank v. Whitney*, 24 Pick. 146; 35 Am. Dec. 312; *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591; *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645; *Hadley v. Hopkins Acad.*, 14 Pick. 240; *Bartlett v. King*, 12 Mass. 537; 7 Am. Dec. 99; *Barker v. Wood*, 9 Mass. 419.

Kentucky.—The statute is adopted, and the court carries out the doctrine fully, in cases of uncertain trustees and objects, applying the rule of *cy-pres*: *Cromies v. Louisville etc. Soc.*, 3 Bush, 365; *Bap. Church v. Presb. Church*,

473; *Kent v. Dunham*, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667; *Morville v. Fowle*, 144 Mass. 109, 10 N. E. 766; *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713; *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; *Stratton v. Physio-Medical College*, 149 Mass. 508, 14 Am. St. Rep. 442, 21 N. E. 874, 5 L. R. A. 33; *Weeks v. Hobson*, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147; *Burbank v. Burbank*, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110; *Bullard v. Town of Shirley*, 153 Mass. 559, 27 N. E. 766, 12 L. R. A. 110; *Green v. Hogan*, 153 Mass. 462, 27 N. E. 413; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; *Holmes v. Coates*, 159 Mass. 226, 34 N. E. 190; *McAlister v. Burgess*, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203; *In re Bartlett*, 163 Mass. 509, 40 N. E. 899; *St. Paul's Church v. Attorney-General*, 164 Mass. 188, 41 N. E. 231; *Teele v. Bishop*

of Derry, 168 Mass. 341, 47 N. E. 422, 60 Am. St. Rep. 401, 38 L. R. A. 629; *Attorney-General v. Briggs*, 164 Mass. 561, 567, 42 N. E. 118; *Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172; *Dexter v. President, etc., of Harvard College*, 176 Mass. 192, 57 N. E. 371; *Sherman v. Congregational Home Miss. Society*, 176 Mass. 349, 57 N. E. 702; *Morse v. Inhabitants of Natick*, 176 Mass. 510, 57 N. E. 996; *Amory v. Attorney-General*, 179 Mass. 89, 60 N. E. 391; *Attorney-General v. Goodell*, 180 Mass. 538, 62 N. E. 962; *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420, 66 N. E. 593; *City of Boston v. Doyle*, 184 Mass. 373, 68 N. E. 851; *Codman v. Brigham*, (Mass.) 72 N. E. 1008; *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. 796.

(aa) *Kentucky*.—*Curling v. Curling*, 8 Dana, 38, 33 Am. Dec. 475; *Chambers v. Society*, 1 B. Mon. 215; *Leeds v. Shaw*, 82 Ky. 80; *Kinney v. Kinney*, 86 Ky. 610, 6 S. W. 593; *Givens v. Shouse*, 5 Ky. Law Rep. 419; *Peynado v. Peynado*, 82 Ky. 5;

far adopted that when an intention to give property to charitable uses is clearly manifested, but the disposition is uncertain and indefinite, either as to the trustee or as to the objects and beneficiaries, the trust is upheld or defeated, upon the same principles as those which would be followed by the English courts.

18 B. Mon. 635; Hadden v. Chorn, 8 B. Mon. 70; Att'y-Gen. v. Wallace, 7 B. Mon. 611; Moore v. Moore, 4 Dana, 354; 29 Am. Dec. 417; Gass v. Wilhite, 2 Dana, 170; 26 Am. Dec. 446.

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Penick v. Thorn, 90 Ky. 668, 14 S. W. 830; Ford v. Ford, 91 Ky. 572, 16 S. W. 451; Tichenor v. Brewer, 98 Ky. 349, 33 S. W. 86; Bedford v. Bedford, 99 Ky. 273, 35 S. W. 926; Chambers v. Higgins' Ex'r, 20 Ky. Law Rep. 1425, 49 S. W. 436; Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 21 Ky. Law Rep. 1107, 54 S. W. 200; Crawford's Heirs v. Thomas, 21 Ky. Law Rep. 1100, 54 S. W. 197; Coleman v. O'Leary's Ex'r, 24 Ky. Law Rep. 1248, 70 S. W. 1068; Thompson's Ex'r v. Brown, 25 Ky. Law Rep. 371, 75 S. W. 210; Johnson v. De Pauw University, 25 Ky. Law Rep. 950, 76 S. W. 851. In Spalding v. St. Joseph's Industrial School, 107 Ky. 382, 21 Ky. Law Rep. 1107, 54 S. W. 200, it was held that the apparent adoption of the *cy-pres* rule in the earlier Kentucky cases, which are reviewed at length, was only by way of *dicta*, and a devise of the testator's entire estate to his executor "for charitable objects," to be expended in a certain diocese, was void for uncertainty. The case is difficult to reconcile with other Kentucky cases where the language of the testator was equally indefinite. This decision clearly places Kentucky in the second class.

(rr) *Missouri*.—The *cy-pres* doctrine is recognized in Missouri, in

broad terms, the actual decisions, however, going merely to the extent of holding that when land is given in trust to a charitable institution to use for a particular purpose, and its further use for that purpose becomes impracticable, the court may order it to be sold and the proceeds applied to the purposes of the trust: *Missouri Historical Society v. Academy of Science*, 94 Mo. 459, 8 S. W. 346; *Academy of Visitation v. Clemens*, 50 Mo. 167; or that the courts may permit the land to be alienated in a different manner from that prescribed by the donor; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414.

(ss) *Rhode Island*.—Under the decision in *Pell v. Mercer*, 14 R. I. 412, the doctrine of *cy-pres* seems to be fully adopted. *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414; *Palmer v. Union Bank*, 17 R. I. 627, 24 Atl. 109; *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; *In re Van Horne*, 18 R. I. 389, 28 Atl. 341; *Webster v. Wiggin*, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510; *Sherman v. Baker*, 20 R. I. 446, 40 Atl. 11; *St. Peter's Church v. Brown*, 21 R. I. 367, 43 Atl. 642; *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671; *Wood v. Paine*, 66 Fed. 807.

SECTION V.

TRUSTS ARISING BY OPERATION OF LAW—RESULTING AND CONSTRUCTIVE TRUSTS.

ANALYSIS.

- § 1030. General nature and kinds.
- §§ 1031–1043. *First.* Resulting trusts.
- §§ 1032–1036. First form: trusts resulting to donor.
 - § 1032. 1. Property conveyed on some trust which fails.
 - § 1033. Same; essential elements.
 - § 1034. 2. A trust declared in part only of the estate conveyed.
 - § 1035. 3. In conveyances without consideration.
 - § 1036. Parol evidence.
- §§ 1037–1043. Second form: conveyance to A, price paid by B.
 - § 1038. Special rules.
 - § 1039. Purchase in name of wife or child.
 - § 1040. Admissibility of parol evidence.
 - § 1041. The same; between family relatives.
 - § 1042. Legislation of several states.
 - § 1043. Interest and rights of the beneficiary.
- §§ 1044–1058. *Second.* Constructive trusts.
 - § 1045. Kinds and classes.
 - § 1046. 1. Arising from contracts express or implied.
 - § 1047. 2. Money received equitably belonging to another.
 - § 1048. 3. Acquisition of trust property by a volunteer, or purchaser with notice.
 - § 1049. 4. Fiduciary persons purchasing property with trust funds.
 - § 1050. 5. Renewal of a lease by partners and other fiduciary persons.
 - § 1051. 6. Wrongful appropriation or conversion into a different form of another's property.
 - § 1052. 7. Wrongful acquisition of the trust property by a trustee or other fiduciary person.
 - § 1053. 8. Trusts *ex maleficio*.
 - § 1054. (1) A devise or bequest procured by fraud.
 - § 1055. (2) Purchase upon a fraudulent verbal promise.
 - § 1056. (3) No trust from a mere verbal promise.
 - § 1057. 9. Trust in favor of creditors.
 - § 1058. Rights and remedies of the beneficiaries.

§ 1030. **General Nature and Kinds.**—The second main division of trusts, and the one which, in this country especially, affords the widest field for the jurisdiction of equity in granting its special remedies so superior to the mere legal

recoveries of damages, embraces those which arise by operation of law, from the deeds, wills, contracts, acts, or conduct of parties, either with or without their intention, but without any express words of creation.¹ A broad distinction separates all express trusts from those which arise by operation of law. In the former class the trust relation is rightful and permanent. In the latter, there is no such element of right and permanency. Even if the trust relation is not wholly wrongful, resulting from fraud or other unconscionable act, still a certain antagonism between the *cestui que trust* and the trustee is involved in the very existence of the trust; and instead of the idea of permanence, the substantial right of the beneficiary is that the trust should be ended by a conveyance of the legal title to himself.² All trusts by operation of law consist, therefore, in a separation of the legal and the equitable estates, one person holding the legal title for the benefit of the equitable owner, who is regarded by equity as the *real* owner, and who is entitled to be clothed with the legal title by a conveyance.³ Certain in-

¹ The proposed Civil Code of New York (sec. 1169) and the Civil Code of California (sec. 2217) have invented the wholly unnecessary name of "involuntary trusts" to designate this class. Express trusts they call "voluntary," and define in such general and inaccurate terms that a voluntary trust is made to include *every* instance of fiduciary position,—an attorney, agent, and even a confidential employee. There is, of course, the common element of *confidence* in all these fiduciary relations and in trusts; but the essential conception of a "trust" is, that it always involves and relates to *property*; "trust," in its legal meaning, not only describes a confidential relation between two persons, but also includes the property which is the subject-matter of that relation, and which is stamped with the trust character. A legal "trust" is necessarily a species of *ownership*. The most natural and simple name by which to designate the entire class of trusts arising by operation of law would be "implied trusts" as distinguished from "express trusts" created by words intentionally used. Unfortunately, however, the term "implied trusts" is constantly used by text-writers and judges in so many and varying senses, that it would only produce confusion and uncertainty if one should employ it in this single and restricted meaning.

² See vol. 1, § 148.^a

³ The correctness of this conclusion is shown by the fact that no resulting or constructive trust growing out of the relations of parties or the use of

(^a) See, also, *Cone v. Dunham*, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647.

stances of this class are trusts only *sub modo*; they are termed trusts, because the beneficial owner is entitled to the same remedies against the holder of the legal title which are given to the beneficiary under a true trust.⁴ All trusts which arise by operation of law are, as the name indicates, excepted from the requirements of the statute of frauds.⁵ This entire grand division consists of two general classes: resulting trusts and constructive trusts. The line of distinction between these two classes is clear and definite; the failure to observe it has produced much unnecessary confusion.⁶ I shall describe, *first*, resulting trusts, and *second*, constructive trusts, following a classification which seems to me the necessary consequence of fundamental principles.

§ 1031. **First. Resulting Trusts.**—In all species of resulting trusts, *intention* is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the

funds will be enforced against the holder of the legal title who is clothed with an equal equity, even in favor of an infant: *Haggard v. Benson*, 3 Tenn. Ch. 268.

⁴ This is especially true of those trusts *ex maleficio* which arise from actual fraud, and certain others which arise from a breach of fiduciary duty: See *post*, § 1053, concerning constructive trusts.

⁵ See *ante*, § 1008; *Ward v. Armstrong*, 84 Ill. 151. It follows that such trusts need not be "declared" nor "evidenced" by any writing; the fact of their existence may be proved by parol.

⁶ Hardly any two writers *entirely* agree in their classification of resulting and constructive trusts; the same instances are treated by some as resulting, by others as constructive. Even courts have sometimes failed to recognize the line of distinction which separates the two; thus in a recent case (*Bickel's Appeal*, 86 Pa. St. 204), the court are represented as holding that a resulting trust in land only arises from fraud in obtaining the land, or from the payment of the purchase-money. In any accurate sense of the term, a resulting trust *never* arises from fraud.^b

(b) For a short but clear statement of the difference suggested, see *Scad-*

den Flat Gold Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440.

beneficial owner under the circumstances. The equitable theory of *consideration*, heretofore explained, is the source and underlying principle of the entire class.¹ Resulting trusts, therefore, are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title.^a In such case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner.^b This person is the one from whom the consideration actually comes, or who represents or is identified in right with the consideration; the resulting trust follows or goes with the real consideration.^{2c} All true resulting trusts may be reduced to two general types: 1. Where there is a gift to A, but the intention appears, from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest or only a part of it. In order that a case of this kind may arise, there must be a true *gift* so far as the immediate transferee, A, is concerned; the instrument must not even state any consideration, and no valid complete trust must be declared in favor of A or of any other person.

¹ See *ante*, § 981.

² The *theory* of equity is, that a transfer takes place by will, deed, or otherwise, but that it is the intention of all the parties to the transaction, presumed, if not expressed, that the transferee of the legal title is not to enjoy the beneficial ownership, but that he is to hold as trustee, as to the whole or a part of the estate, for the party whom the circumstances show to be the real beneficial owner. This description completely excludes the notion of fraud as a source of resulting trusts.

(a) Quoted in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 28 L. R. A. 707, 17 South. 525, 54 Am. St. Rep. 31. The text is cited in *Trumbo v. Fulk*, (Va.) 48 S. E. 525.

(b) See *Sanders v. Steele*, 124 Ala. 415, 26 South. 882, quoting the text

and citing Alabama cases. See, also, citing the text, *Shupe v. Bartlett*, 106 Iowa 654, 77 N. W. 455; *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077.

(c) The text is quoted in *Tenney v. Simpson*, 37 Kan. 579, 15 Pac. 512.

Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions. 2. The second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A, but the purchase price is paid by B. I shall briefly examine these two forms.

§ 1032. First Form — Trust Resulting to the Donor.— This type includes the three following subdivisions: 1. Where property is conveyed by will or deed upon some particular trust or particular objects, and these purposes fail in whole or in part, or the particular trusts are so uncertain and indefinite that they cannot be carried into effect, or they lapse, or they are illegal,—in all of these cases a trust, either with reference to the whole property or to the residuum, results in favor of the grantor, or the heirs, residuary devisees or legatees, or personal representatives of the testator.¹ The following are illustrations: Where

¹ *Aston v. Wood*, L. R. 6 Eq. 419; *Symes v. Hughes*, L. R. 9 Eq. 475; *Cardigan v. Cruzon-Howe*, L. R. 9 Eq. 358; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Wild v. Banning*, L. R. 2 Eq. 577; *Fisk v. Att'y-Gen.*, L. R. 4 Eq. 521; *Longley v. Longley*, L. R. 13 Eq. 133; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Biddulph v. Williams*, L. R. 1 Ch. Div. 203; *Pawson v. Brown*, L. R. 13 Ch. Div. 202; *Cruse v. Barley*, 3 P. Wms. 20; *Hill v. Bishop of London*, 1 Atk. 618-620; *Robinson v. Taylor*, 2 Brown Ch. 589; *Ripley v. Waterworth*, 7 Ves. 425, 435; *Stansfield v. Habbergham*, 10 Ves. 273; *Stubbs v. Sargon*, 3 Mylne & C. 507; 2 Keen, 255; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Ommaney v. Butcher*, 1 Turn. & R. 260, 270; *Wood v. Cox*, 2 Mylne & C. 684; 1 Keen, 317; *Fowler v. Garlike*, 1 Russ. & M. 232; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Straat v. Uhrig*, 56 Mo. 482; *Bennett v. Hutson*, 33 Ark. 762; *McCollister v. Willey*, 52 Ind. 382; and see the following notes.

(a) See, also, *Schlessinger v. Mal-lard*, 70 Cal. 326, 11 Pac. 728; *McDermith v. Voorhees*, 16 Colo. 402, 27 Pac. 250, 25 Am. St. Rep. 286; *Haskins v. Kendall*, 158 Mass. 224, 33

N. E. 495, 35 Am. St. Rep. 490; *St. Paul's Church v. Attorney-General*, 164 Mass. 188, 41 N. E. 231. In *Cleaver v. Mutual Reserve, etc., Assn.*, [1892] 1 Q. B. 147, it was held that

property is given by will or deed, stated to be *on trust*, but no trust is declared; or upon trusts thereafter to be declared, but no such declaration is made; or is given upon some trust which has wholly failed and become inoperative;² or when property is given upon a trust which is too uncertain, indefinite, and vague in its declaration to be carried into effect;³ or if property is given upon a trust which is illegal, and therefore void,⁴ or upon a trust which fails by lapse, and the property is not otherwise disposed of.⁵

² *Aston v. Wood*, L. R. 6 Eq. 419; *Symes v. Hughes*, L. R. 9 Eq. 475; *Cardigan v. Cruzon-Howe*, L. R. 9 Eq. 358; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Biddulph v. Williams*, L. R. 1 Ch. Div. 203; *Pawson v. Brown*, L. R. 13 Ch. Div. 202; *Brown v. Jones*, 1 Atk. 188; *Dawson v. Clark*, 18 Ves. 247, 254; *Morice v. Bishop of Durham*, 10 Ves. 537; *Pratt v. Sladden*, 14 Ves. 193, 198; *Sidney v. Shelley*, 19 Ves. 352, 359; *Collins v. Wakeman*, 2 Ves. 683; *Dunnage v. White*, 1 Jacob & W. 583; *Southouse v. Bate*, 2 Ves. & B. 396; *Brookman v. Hales*, 2 Ves. & B. 45; *Woollett v. Harris*, 5 Madd. 452; *Att'y-Gen. v. Windsor*, 8 H. L. Cas. 369; 24 Beav. 679; *Gloucester v. Osborn*, 1 H. L. Cas. 272; 3 Hare, 131; *Goodere v. Lloyd*, 3 Sim. 538; *Taylor v. Haygarth*, 14 Sim. 8; *Flint v. Warren*, 16 Sim. 124; *Coard v. Holderness*, 20 Beav. 147; *Fitch v. Weber*, 6 Hare, 145; *Onslow v. Wallis*, 1 Macn. & G. 506; *Barrs v. Fewkes*, 2 Hem. & M. 60; *Bennett v. Hutson*, 33 Ark. 762; *Russ v. Mebius*, 16 Cal. 350; *Sturtevant v. Jaques*, 14 Allen, 523, 526; *Shaw v. Spencer*, 100 Mass. 382, 388; 97 Am. Dec. 107.

³ *James v. Allen*, 3 Mer. 17; *Leslie v. Duke of Devonshire*, 2 Brown Ch. 187; *Stubbs v. Sargon*, 3 Mylne & C. 507; 2 Keen, 255; *Vezey v. Jamson*, 1 Sim. & St. 69; *Fowler v. Garlike*, 1 Russ. & M. 232; *Ellis v. Selby*, 1 Mylne & C. 286; 7 Sim. 352; *Kendall v. Granger*, 5 Beav. 300; *Williams v. Kershaw*, 5 Clark & F. 111; *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221; see *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550.

⁴ *Richards v. Delbridge*, L. R. 18 Eq. 11; *Pawson v. Brown*, L. R. 13 Ch. Div. 202; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Carriek v. Errington*, 2 P. Wms. 361; *Arnold v. Chapman*, 1 Ves. Sr. 108; *Page v. Leapingwell*, 18 Ves. 463; *Jones v. Mitchell*, 1 Sim. & St. 290; *Cook v. Stationers' Co.*, 3 Mylne & K. 262; *Pilkington v. Boughiey*, 12 Sim. 114; *Russell v. Jackson*, 10 Hare, 204; *Dashiell v. Att'y-Gen.*, 6 Har. & J. 1; *Stevens v. Ely*, 1 Dev. Eq. 497; *Lemmond v. Peoples*, 6 Ired. Eq. 137.

⁵ *Ackroyd v. Smithson*, 1 Brown Ch. 503; *Spink v. Lewis*, 3 Brown Ch. 355; *Hutcheson v. Hammond*, 3 Brown Ch. 128; *Williams v. Coade*, 10 Ves. 500;

a trust results to the executors of an insured, when the death of the insured was caused by the crime of the beneficiary.

(b) See, also, *Heiskell v. Trout*, 31

W. Va. 810, 3 S. E. 557; *In re Davis*, 112 Fed. 129.

(c) See, also, *Sperling v. Rochfort*, 16 Ch. Div. 18; or if the trust has terminated: *Hopkins v. Grimshaw*,

§ 1033. *The Same. Essential Elements.*—In this and all other forms belonging to the class under present consideration, there must be no pecuniary consideration coming from the grantee, for such a consideration would raise a trust in his own favor, and clothe him with the beneficial interest. Even if the conveyance merely recites a pecuniary consideration, the same effect would be produced.^a Furthermore, the deed or will must contain no declaration of use covering the whole estate in favor of the grantee or devisee; such a declaration of use would raise a trust in his favor, vest in him the beneficial estate to its extent, and so far defeat any resulting trust. Resulting trusts of this type are matters of intention. There is a substantial distinction between giving property expressly *for* a particular purpose, and giving it only *subject to* a particular purpose.^{1 b}

Muckleston v. Brown, 6 Ves. 52, 63; *Davenport v. Coltman*, 12 Sim. 588, 610; *Hawley v. James*, 5 Paige, 318. If the property, where the prior trust fails by lapse or otherwise, is given to some other person, then no trust results.

¹ The reason of this distinction lies wholly in the *intention or assumed intention* of the donor. When property is given to A expressly *for* a specific purpose, the instrument showing a clear intention that the gift is *for that purpose alone*,—e. g., land is given on trust to pay the grantor's debts,—then as to so much of the property given as is not required for the expressed purpose, a trust results to the donor. On the other hand, when property is given to A, *subject only to or charged with*, a particular purpose, the gift is held to be absolute; a beneficial interest as well as the legal estate vests in the donee; and no trust results to the donor, even though the special purpose wholly fails,—much less when there is a residuum of the property left after it is accomplished. The case is completely analogous to a conveyance or bequest to A of all the legal and beneficial interest in property, subject to or encumbered by a mortgage or any other kind of lien. It follows that

165 U. S. 342, 17 Sup. Ct. 401, 23 L. ed. 392; *In re Trusts of the Abbott Fund*, [1900] 2 Ch. 326 (resulting trust to subscribers of balance of fund raised by subscription, on death of the beneficiaries); *In re Printers, etc., Trades Protection Society*, [1899] 2 Ch. 184 (resulting trust on dissolution of voluntary association); compare *Cunnack v. Edwards*, [1896] 2 Ch. 679, [1895] 1 Ch. 489.

(a) This section is cited to the effect that where there is a consideration for the conveyance, the grantee takes the beneficial interest, in *Methodist Episcopal Church v. Jackson Square Evangelical Church*, 84 Md. 173, 35 Atl. 8.

(b) The distinction mentioned in the text is further supported by *In re West*, [1900] 1 Ch. 84, and the cases there cited.

If the intention appears from the whole instrument that the donee is to take the beneficial interest, even though *subject* to the particular object or purpose designated, then no trust will result to the donor, if that object or purpose should fail.

§ 1034. 2. **A Trust Declared in a Part only of the Estate Conveyed.**—A second subdivision includes those cases where the owner of both the legal and the equitable estates conveys the legal estate, but does not convey the equitable estate, or conveys only a portion of it, and a trust in the entire equitable estate in the one instance, or in the part of it undisposed of in the other, will, in general, result to the grantor, or to the heirs or representatives of the testator.¹

where property is devised or bequeathed to A, *subject to* or *charged with* the payment of the testator's debts or legacies, A takes the entire interest, subject only to the lien or charge, and there is no resulting trust: *King v. Denison*, 1 Ves. & B. 260, 272; *Wood v. Cox*, 2 Mylne & C. 684; *Tregonwell v. Sydenham*, 3 Dow, 194, 210. *King v. Denison*, *supra*, is the leading case illustrating this distinction. The court said: "If I give to A and to his heirs all my real estate, *charged with* my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise to him is *on trust, to pay my debts*, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just the difference; the former is a devise of an estate for the purpose of giving the devisee the beneficial interest, subject, however, to a particular purpose by way of charge; the latter is a devise for a particular purpose, *with no intention to give him any beneficial interest.*"

¹ As examples: Property is conveyed, devised, or bequeathed upon some particular trust which does not embrace the entire estate,—as to A in fee, in trust for B during his life,—or the purposes of which do not exhaust the whole beneficial interest,—e. g., in trust to pay the testator's debts, or some particular debts, or to pay some specified annuity,—a trust in the residue will result; or a devise of *all* the testator's estate of every kind, upon trusts applicable only to personal property, a trust as to the real estate devised will result to the heirs: *Longley v. Longley*, L. R. 13 Eq. 133; *Cottington v. Fletcher*, 2 Atk. 155; *Ellcock v. Mapp*, 3 H. L. Cas. 492; 2 Phill. Ch. 793; *Northern v. Carnegie*, 4 Drew. 587; *King v. Denison*, 1 Ves. & B. 260, 272; *Watson v. Hayes*, 5 Mylne & C. 125; *Dunnage v. White*, 1 Jacob & W. 583; *Lloyd v. Lloyd*, L. R. 7 Eq. 458; *Marshal v. Crutwel*, L. R. 20 Eq. 328; *Parnell v. Hingston*, 3 Smale & G. 337, 344; *Lloyd v. Spillet*, 2 Atk. 149, 150; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Davidson v. Foley*, 2 Brown Ch. 203; *Benbow v. Townsend*, 1 Mylne & K. 506; *Halford v. Stains*, 16 Sim. 488; *Cooke v.*

§ 1035. 3. In Conveyances without Consideration.—It was a doctrine of the English equity, in pursuance of the ancient principle that the use followed or was raised by the consideration, that when land was conveyed by deed without any consideration, and without any use or trust being declared, a trust resulted to the feoffor, the feoffee taking only the naked legal title. This doctrine, however, had no application to conveyances which operated under the statute of uses, since a use was raised in favor of the immediate grantee by a “bargain and sale” between strangers, and by a “covenant to stand seised” between relatives. If the doctrine has any existence under the conveyancing system of this country, so that a trust should result to the grantor from the absence of a consideration, it can only be where the deed simply contains words of grant or transfer, and does not recite nor imply any consideration, and does not, in the *habendum* clause or elsewhere, declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift.¹ *

Dealey, 22 Beav. 196; Sewell v. Denny, 10 Beav. 315; Read v. Stedman, 26 Beav. 495; McCollister v. Willey, 52 Ind. 382; Ponce v. McElvy, 47 Cal. 154, 159; Kennedy v. Nunan, 52 Cal. 326; Loring v. Eliot, 16 Gray, 568; Hogan v. Jaques, 19 N. J. Eq. 123; 97 Am. Dec. 644; Hogan v. Stayhorn, 65 N. C. 279. *

¹ Gould v. Lynde, 114 Mass. 366, holds that no trust results to the grantor upon a warranty deed in the usual form, which recites a consideration, and contains an *habendum* to the grantee's use: Osborn v. Osborn, 29 N. J. Eq. 385 (no trust results upon a voluntary conveyance from a husband to his wife); Bragg v. Geddes, 93 Ill. 39; Stucky v. Stucky, 30 N. J. Eq. 546; Davis v. Baugh, 59 Cal. 568; Gerry v. Stimson, 60 Me. 186; Philbrook v. Delano, 29 Me. 410; Farrington v. Barr, 36 N. H. 86; Graves v. Graves, 29 N. H. 129; Titcomb v. Morrill, 10 Allen, 15; Bartlett v. Bartlett, 14 Gray, 277; Cairns v. Colburn, 104 Mass. 274; Rathbun v. Rathbun, 6 Barb. 98, 105; Bank of

§ 1034, (a) See, also, Packard v. Marshall, 138 Mass. 301; Skellinger's Ex'rs v. Skellinger's Ex'r, 32 N. J. Eq. 659; Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Weaver v. Leiman, 52 Md. 708; Blount v. Walker, 31 S. C. 13, 9 S. E. 804. Compare Smith v. Cooke, [1891] App. Cas. 297, reversing Cooke v. Smith, 45 Ch. Div. 38 (trust deed for payment of creditors

construed; no resulting trust in surplus).

§ 1035, (a) Quoted in Luckhart v. Luckhart, 120 Iowa 248, 94 N. W. 461; Moore v. Jordan, 65 Miss. 229, 3 South. 737, 7 Am. St. Rep. 641. See, also, Ohmer v. Boyer, 89 Ala. 273, 7 South. 663; McCormack Harvesting Mach. Co. v. Griffin, 116 Iowa 397, 90 N. W. 84; Lawrence v. Lawrence,

§ 1036. *Parol Evidence.*—In all the instances belonging to this first form of resulting trust, the intention that the donee is not to enjoy the beneficial interest, but that a trust is to result, or the contrary intention, must appear expressly or by implication from the terms of the instrument itself by which the property is conveyed. If the instrument is a will, then no extrinsic evidence is ever admissible to

United States v. Housman, 6 Paige, 526; Squire v. Harder, 1 Paige, 494; 19 Am. Dec. 446; Miller v. Wilson, 15 Ohio 108.

The doctrine would doubtless apply under the special condition of facts described in the text. The case of *Russ v. Mebius*, 16 Cal. 350, contains an instructive discussion of the subject. The plaintiff, C. R., was owner in fee of a certain lot of land; he conveyed the lot to his father, the only consideration being a verbal promise by the father to make a will and thereby devise to the plaintiff certain other property of a stipulated value. The father died still holding the lot, but without in any manner performing his agreement with the plaintiff,—without bequeathing to him any property. The plaintiff brought this suit to establish a trust and to compel a reconveyance of the land. The court held that as the father's verbal agreement was void and unperformed, there was no consideration, express or implied, for the conveyance; and as it was clear that no gift was intended, a trust resulted in favor of the plaintiff, and he was entitled to have a conveyance to himself of the legal title. Mr. Justice Cope said (p. 355): "We are unable to see why the case does not fall within the doctrine of resulting trusts. The agreement was void, and the conveyance was executed without any consideration, express or implied. It is shown that the transaction was not intended as a gift, and as there was no consideration, a trust resulted in favor of the plaintiff by implication of law"; quoting Story's Eq. Jur., secs. 1197, 1198. In discussing another aspect of the case the judge said: "It was stated on the argument that the conveyance from the plaintiff to his father did not express the real consideration for which it was given, but acknowledged the payment by the father of a nominal consideration in money. This is an important matter. . . . If the statement was correct, parol evidence was inadmissible to establish the trust, and the plaintiff . . . must eventually fail to obtain the relief which he asks: . . . Story's Eq. Jur., sec. 1199. The doctrine of resulting uses and trusts is founded upon a mere implication of law, and, in general, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there is some evidence of fraud or mistake, the recitals in the deed are conclusive upon the grantor, and no resulting trust can be raised in his favor in oppo-

181 Ill. 248, 54 N. E. 918; *Hays v. Marsh*, 123 Iowa 81, 98 N. W. 604 (no trust when husband's deed to wife recites a valuable consideration); *Jacobson v. Nealand*, 122 Iowa 372, 98 N. W. 158 (same); *McClenahan*

v. Stevenson, 118 Iowa 106, 91 N. W. 925 (trust cannot be established by mere showing of want of consideration); *Fretz v. Roth*, (N. J. Eq.) 58 Atl. 676, and cases cited.

show the testator's meaning, nor even to show a mistake.¹ If the instrument is a deed, no extrinsic evidence of the donor's intention is admissible, unless fraud or mistake is alleged and shown. If, therefore, there is in fact no consideration, but the deed recites a pecuniary consideration, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital, and to show that there is in fact no consideration,—except in a case of fraud or mistake.²

§ 1037. Second Form. Conveyance to A — Price Paid by B. — In pursuance of the ancient equitable principle that the beneficial estate follows consideration and attaches to the party from whom the consideration comes,¹ the doctrine is settled in England and in a great majority of the

sition to the express terms of a conveyance." The judge quoted the strong case of *Leman v. Whitley*, 4 Russ. 423, where a son had conveyed land to a father, upon no actual consideration, but upon a mere temporary and verbal arrangement; but the deed recited and acknowledged a pecuniary consideration as paid by the father. After the father's death, the son filed a bill to have a trust declared. The master of rolls held that the recital of a pecuniary consideration raised a conclusive presumption that a beneficial interest was intended to be given to the grantee, and cut off the resulting trust in favor of the grantor; and parol evidence was not admissible, in the absence of any fraud or mistake (which was not pretended), to show the falsity of the recital; see also, to the same effect, *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446.

§ 1036, ¹ See *ante*, § 871, cases in note.

§ 1036, ² *Leman v. Whitley*, 4 Russ. 423; *Russ v. Mebius*, 16 Cal. 350; *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446.

§ 1037, ¹ See *ante*, § 981.

§ 1036, (a) The text is quoted in *Rogers v. Ramsey*, 137 Mo. 598, 39 S. W. 66; *Luckhart v. Luckhart*, 120 Iowa 248, 94 N. W. 461; *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. 554. See, also, *Salishury v. Clarke*, 61 Vt. 453, 17 Atl. 135; *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Moore v. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641, 3

South. 737; *Feeney v. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; *Hays v. Marsh*, 123 Iowa 81, 98 N. W. 604; *Jacobsen v. Nealand*, 122 Iowa 372, 98 N. W. 158.

§ 1037, (a) This section is cited to this effect in *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383.

American states, that where property is purchased and the conveyance of the legal title is taken in the name of one person, A, while the purchase price is paid by another person, B, a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him.^b In order that this effect may be produced, however, it is absolutely indispensable that the payment should be actually made by the beneficiary, B, or that an absolute obligation to pay should be incurred by him, *as a part of the original transaction of purchase*, at or before the time of the conveyance; no subsequent and *entirely independent* conduct, intervention, or payment on his part would raise any resulting trust.²

² This description assumes that the conveyance to A is made with the knowledge and consent, express or implied, of B, who pays the price,—that the whole transaction is in pursuance of a common understanding or arrangement. If the conveyance is taken by A secretly, contrary to B's wishes, in violation of a duty owed to him, or in fraud of his rights, the trust which arises in B's favor is not "resulting," but is "constructive." The two kinds are often confounded, but the distinction is important, and especially so in those states where the "resulting" trusts of this form have been in terms abolished by statute. The leading case is *Dyer v. Dyer*, 2 Cox, 92; 1 Lead. Cas. Eq., 4th Am. ed., 314, 319, 333; see notes of the English and American editors for a full collection of authorities. Lord Chief Baron Eyre laid down the general doctrine as follows: "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successively, results to the man who advances the purchase-money." See also *Withers v. Withers*, Amb. 151; *Wray v. Steele*, 2 Ves. & B. 388; *Loyd v. Read*, 1 P. Wms. 607; *Rider v. Kidder*, 10 Ves. 360; *Case v. Coddington*, 38 Cal. 191; *Dikeman v. Norrie*, 36 Cal. 94; *Roberts v. Ware*, 40 Cal. 634; *Currey v. Allen*, 34 Cal. 254; *Millard v. Hathaway*, 27 Cal. 119; *Bayles v. Baxter*, 22 Cal. 575; *Hidden v. Jordan*, 21 Cal. 92; *Wasley v. Foreman*, 38 Cal. 90; *Bludworth v. Lake*, 33 Cal. 255; *Davis v. Baugh*, 59 Cal. 568; *Hutchinson v. Hutchinson*, 8 Pac. Law J. 636; *Lehman v. Lewis*, 62 Ala. 129; *Burks v. Burks*, 7 Baxt. 353; *Mathis v. Stufflebeam*, 94 Ill. 481; *Smith v. Patton*, 12 W. Va. 541; *Hampson v. Fall*, 64 Ind. 382; *Keller v. Kunkel*, 46 Md. 565; *Brooks v. Shelton*, 54 Miss. 353;

(b) The text is quoted in *Chicago, B. & Q. R. R. Co. v. First Nat. Bk.*, 58 Nebr. 548, 78 N. W. 1064. This paragraph is quoted at large in *Jesser v. Armentrout's Ex'r*, 100 Va. 666,

42 S. E. 681; and cited in *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077; *Trumbo v. Fulk*, (Va.) 48 S. E. 525.

§ 1038. Special Rules.— To the general doctrine are added the following more specific rules: The trust results whether

Boskowitz v. Davis, 12 Nev. 446; *Du Val v. Marshall*, 30 Ark. 230; *Lee v. Browder*, 51 Ala. 288; *Billings v. Clinton*, 6 S. C. 90; *Sale v. McLean*, 29 Ark. 612; *Midmer v. Midmer's Ex'rs*, 26 N. J. Eq. 299; *Murphy v. Peabody*, 63 Ga. 522. Such a resulting trust may arise where a husband has paid for property with money belonging to his wife, and has taken the title in his own name, and where a parent has in like manner paid for property with money of his child, and taken the conveyance to himself; but if the transaction is secretly done, in violation of a fiduciary duty, the trust would be constructive, rather than resulting. See, as examples, *Johnson v. Anderson*, 7 Baxt. 251; *Thomas v. Standiford*, 49 Md. 181; *Catherwood v. Watson*, 65 Ind. 576 (but cut off by a sale to a *bona fide* purchaser); *Loften v. Witboard*, 92 Ill. 461; *Tilford v. Torrey*, 53 Ala. 120; *Moss v. Moss*, 95 Ill. 449 (but is cut off by a general release of all claims given to her husband); *Cunningham v. Bell*, 83 N. C. 328. In the following cases no trust resulted to the wife under the circumstances: *Kenneday v. Price*, 57 Miss. 771; *Hause v. Hause*, 57 Ala. 262; *Bibb v. Smith*, 12 Heisk. 728; *McCullough v. Ford*, 96 Ill. 439; *Hon v. Hon*, 70 Ind. 135. See also, as illustrations of the general doctrine, *Kelley v. Jenness*, 50 Me. 455; 79 Am. Dec. 623; *Baker v. Vining*, 30 Me. 121, 126; 50 Am. Dec. 617; *Hopkinson v. Dumas*, 42 N. H. 296; *Hall v. Young*, 37 N. H. 134; *Clark v. Clark*, 43 Vt. 685; *Kendall v. Mann*, 11 Allen, 15; *Dean v. Dean*, 6 Conn. 285; *Boyd v. McLean*, 1 Johns. Ch. 582; *Cutler v. Tuttle*, 19 N. J. Eq. 549, 558; *Nixon's Appeal*, 63 Pa. St. 279; *Stewart v. Brown*, 2 Serg. & R. 461; *Cecil*

(c) See, also, *Nettles v. Nettles*, 67 Ala. 599 (barred by laches); *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Parker v. Coop*, 60 Tex. 111; *Blum v. Rogers*, 71 Tex. 668, 9 S. W. 595; *Kinlow v. Kinlow*, 72 Tex. 639, 10 S. W. 729; *Camp v. Smith*, 98 Ind. 409; *Broughton v. Brand*, 94 Mo. 169, 7 S. W. 119; *Mosteller v. Mosteller*, 40 Kan. 658, 20 Pac. 464; *Mercier v. Mercier*, [1903] 2 Ch. 98; *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33; *Arnold v. Harris*, (Tenn. Ch. App.) 52 S. W. 715; *Boynton v. Miller*, 144 Mo. 681, 46 S. W. 754; *Condit v. Maxwell*, 142 Mo. 266, 44 S. W. 467; *Johnston v. Johnston*, 173 Mo. 91, 95 Am. St. Rep. 486, 73 S. W. 202, 61 L. R. A. 166; *Grantham v. Grantham*, 34 S. C. 504, 13 S. E. 675, 27 Am. St. Rep. 839; *Hicks v. Pogue*, (Tex. Civ. App.) 76 S. W. 786; *Miller v. Baker*,

166 Pa. St. 414, 31 Atl. 121, 45 Am. St. Rep. 680; *Booth v. Lenox*, (Fla.) 34 South. 566; *Berry v. Wiedman*, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866; *Cresap v. Cresap*, (W. Va.) 46 S. E. 582; *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844; *Madison v. Madison*, 206 Ill. 534, 69 N. E. 625; *Smith v. Willard*, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313.

(d) See, also, *Meredith v. Meredith*, 150 Ind. 299, 50 N. E. 29; *Lewis v. Stanley*, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677; *Dick v. Dick*, 172 Ill. 578, 50 N. E. 142; *Shupe v. Bartlett*, 106 Iowa 654, 77 N. W. 455; *Henderson v. Baniel*, (Tenn. Ch. App.) 42 S. W. 470; *Chapman v. Chapman*, 114 Mich. 144, 65 N. W. 215, 72 N. W. 131 (statute); *Snider v. Udell Wood-enwork Co.*, 74 Miss. 353, 20 South. 836 (fraud on part of wife).

the title is taken in the name of one grantee only, or of two or more grantees jointly; in the latter case there are

Bank v. Snively, 23 Md. 253; *McGovern v. Knox*, 21 Ohio St. 547, 551; 8 Am. Rep. 80; *Milliken v. Ham*, 36 Ind. 166; *Latham v. Henderson*, 47 Ill. 185; *Johnson v. Quarles*, 46 Mo. 423; *McLenan v. Sullivan*, 13 Iowa, 521; *Rogan v. Walker*, 1 Wis. 527; *Frederick v. Haas*, 5 Nev. 389.^e

(e) See, also, as recent examples of resulting trust: *Brainard v. Buck*, 184 U. S. 99, 22 Sup. Ct. Rep. 458, 46 L. ed. 449 (citing the text); *Lewis v. Wells*, 85 Fed. 896; *Hallett v. Parker*, 69 N. H. 134, 39 Atl. 583; *Smith v. Balcom*, 24 App. Div. 437, 48 N. Y. Supp. 487; *Carey v. Griffin*, 36 Misc. Rep. 469, 73 N. Y. Supp. 766; *Tillman v. Murrell*, 120 Ala. 239, 24 South. 712; *Gorrell v. Alspaugh*, 120 N. C. 362, 27 S. E. 85; *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24; *Jones v. Thorn*, 45 W. Va. 186, 32 S. E. 173; *Elrod v. Cochran*, 59 S. C. 467, 38 S. E. 122; *Neel v. Moore*, 19 Ky. Law Rep. 918, 39 S. W. 1042; *McClure v. Bryant*, 18 Tex. Civ. App. 141, 44 S. W. 3; *Rarick v. Vandevier*, 11 Colo. App. 116, 52 Pac. 743; *Branstetter v. Mann*, 6 Idaho 580, 57 Pac. 433; *Whiting v. Gould*, 2 Wis. 552; *Thum v. Wolstenholme*, 21 Utah 446, 61 Pac. 537 (citing the text); *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681; *Crowley v. Crowley*, 72 N. H. 241, 56 Atl. 190; *Dwyer v. O'Connor*, 200 Ill. 52, 65 N. E. 668; *Ackley v. Croucher*, 203 Ill. 530, 68 N. E. 86. For cases where no trust resulted, see *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 South. 512; *Evans v. Curtis*, 190 Ill. 197, 60 N. E. 56; *Brown v. Brown*, 62 Kan. 666, 64 Pac. 599; *Hutzler v. Groff*, (Tex.) 48 S. W. 206; *Rotter v. Scott*, 111 Iowa 31, 82 N. W. 437. See, also, as illustrations of the general doctrine, *Connor v. Follanshee*, 59 N. H. 124; *Moore v. Stinson*, 144 Mass. 596, 12 N. E. 410; *Beck v. Beck*, 43 N. J. Eq. 39;

Rice v. Pennypacker, 5 Del. Ch. 33; *Gregory v. Peoples*, 80 Va. 355; *Heiskell v. Powell*, 23 W. Va. 717; *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460; *Simmons v. Ingram*, 60 Miss. 886; *Richardson v. Taylor*, 45 Ark. 472; *Burns v. Ross*, 71 Tex. 516, 9 S. W. 468; *Boyer v. Libbey*, 88 Ind. 235; *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523, and note, 18 N. E. 334, 1 L. R. A. 327; *La Fitte v. Rups*, 13 Colo. 207, 22 Pac. 309; *Parker v. Newitt*, 18 Oreg. 274, 23 Pac. 246; *Woodard v. Wright*, 82 Cal. 202, 22 Pac. 1118; *Wolf v. Citizens' Bk. of Rogersville*, (Tenn. Ch. App.) 42 S. W. 39; *Cox v. Cox*, 95 Va. 173, 27 S. E. 834; and cases cited in following notes. It has been held that where property is bought with partnership funds and the title is taken in the name of one partner, a trust results to the partnership: *Kringle v. Rhomberg*, 120 Iowa 472, 94 N. W. 1115. See, however, *Gunnison v. Erie Dime S. & L. Co.*, 157 Pa. St. 303, 27 Atl. 747. It has been held that when a life tenant pays a mortgage under the mistaken belief that he owns the fee, no resulting trust arises: *Wilder's Ex'x v. Wilder*, 75 Vt. 178, 53 Atl. 1072. It has been held that the consideration moving from the party who becomes the *cestui* may consist of services rendered in effecting the sale: *Aborn v. Searles*, 18 R. I. 357, 27 Atl. 796.

As illustrating the rule that the payment must be made, or an absolute obligation incurred, by the beneficiary, as a part of the original trans-

joint trustees.¹ A trust also results in favor of one who pays only a part of the price. In other words, where two or more persons together advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other with respect to an undivided share of the property proportioned to his share of the price.^{2 a}

¹ *Ex parte Houghton*, 17 Ves. 251, 253; *Rider v. Kidder*, 10 Ves. 360, 367.

² *Wray v. Steele*, 2 Ves. & B. 388; *Case v. Coddington*, 38 Cal. 191; *Dikeman v. Norrie*, 36 Cal. 94; *McCreary v. Casey*, 50 Cal. 349; *Miller v. Birdsong*, 7 Baxt. 531; *Cramer v. Hoose*, 93 Ill. 503; *Smith v. Patton*, 12 W. Va. 541; *Rhea v. Tucker*, 56 Ala. 450; *Smith v. Smith*, 85 Ill. 189.

action of purchase, see *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. Rep. 417, 34 L. ed. 1091; *In re Stanger*, 35 Fed. 241; *Niver v. Crane*, 98 N. Y. 40; *Krauth v. Thiele*, 45 N. J. Eq. 408, 18 Atl. 351; *McDevitt v. Frantz*, 85 Va. 740, 8 S. E. 642; *Murry v. Sell*, 23 W. Va. 476; *Richardson v. Day*, 20 S. C. 418; *Brown v. Cave*, 23 S. C. 251; *Boozar v. Teague*, 27 S. C. 348, 3 S. E. 551; *Whaley v. Whaley*, 71 Ala. 159; *Bibb v. Hunter*, 79 Ala. 351; *Milner v. Freeman*, 40 Ark. 62; *Williams v. San Saba County*, 59 Tex. 442; *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030; *Boyer v. Libbey*, 88 Ind. 235; *Hunt v. Friedman*, 63 Cal. 510; *Arnold v. Harris*, (Tenn. Ch. App.) 52 S. W. 715 (same); *Long v. King*, 117 Ala. 423, 23 South. 534 (citing Alabama cases); *Dick v. Dick*, 172 Ill. 578, 50 N. E. 142 (citing Illinois cases); *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151; *Pickler v. Pickler*, 180 Ill. 168, 54 N. E. 311; *Arnold v. Ellis*, 20 Tex. Civ. App. 262, 48 S. W. 883; *Williamson v. Gore*, (Tex. Civ. App.) 73 S. W. 563; *Clark v. Timmons*, (Tenn. Ch. App.) 39 S. W. 534. If it be shown that the money was advanced as a loan, merely, to the grantee, the implication of a resulting trust is, of course, defeated: *Whaley v. Whaley*, 71 Ala. 159. But the fact that the payment

was made with money borrowed for the purpose from the person in whose name the title was taken does not prevent the trust from resulting to the person making such payment: *Robinson v. Leflore*, 59 Miss. 148; *Gardner v. Randell*, 70 Tex. 453, 7 S. W. 781; *Thomas v. Jameson*, 77 Cal. 91, 19 Pac. 177; or the advancement may consist in the extinguishment of a pre-existing debt owing from the grantee to the beneficiary: *Thomas v. Thomas*, 62 Miss. 531.

(a) The text is quoted in *Tenney v. Simpson*, 37 Kan. 579, 15 Pac. 512; cited generally in *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 402, and cited to this effect in *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077; *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460. See, also, *Webb v. Foley*, 20 Ky. Law Rep. 1207, 49 S. W. 40; *Sweet v. Stevens*, 23 Ky. Law Rep. 407, 63 S. W. 41; *Crawford v. James*, 163 Mo. 577, 63 S. W. 838; *McGee v. Wells*, 52 S. C. 472, 30 S. E. 602; *Sanders v. Steele*, 122 Ala. 415, 26 South. 882 (citing Alabama cases); *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460; *Brown v. Cave*, 23 S. C. 251; *Bibb v. Hunter*, 79 Ala. 351; *Thomas v. Thomas*, 62 Miss. 531; *Blum v. Rogers*, 71 Tex. 668, 9 S. W. 595; *Harris*

The doctrine in all of its phases applies alike to personal and to real property.³

§ 1039. **Purchase in the Name of a Wife or Child.**—Wherever the real purchaser — the one who pays the price — is under a legal, or even in some cases a moral, obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift to such recipient, and no trust results. If, therefore, a purchase of either real or personal property is made by a husband in the name of his lawful wife, or in the joint names of himself and his wife, or such a purchase is made by a father in the name of his legitimate

³ Where a bond, or shares of stock, or annuity, or any other thing in action, or kind of personal property, is assigned to one person, a trust therein will result in favor of another who advances the consideration of the transfer in whole or part: *Loyd v. Read*, 1 P. Wms. 607; *Ex parte Houghton*, 17 Ves. 251, 253; *Rider v. Kidder*, 10 Ves. 360; *Soar v. Foster*, 4 Kay & J. 152; *Beecher v. Major*, 2 Drew. & S. 431; *Garrick v. Taylor*, 29 Beav. 79; 7 Jur., N. S., 1174; *Sidmouth v. Sidmouth*, 2 Beav. 447, 454; and cases under last paragraph.^b

v. McIntyre, 118 Ill. 275, 8 N. E. 182; *Tenney v. Simpson*, 37 Kan. 353, 15 Pac. 187; *Simpson v. Tenney*, 41 Kan. 561, 21 Pac. 634; *Bear v. Koenigstein*, 16 Nebr. 65, 20 N. W. 104; *Thomas v. Jameson*, 77 Cal. 91, 19 Pac. 177; *Johnston v. Johnston*, 96 Md. 144, 53 Atl. 792; *Skehill v. Abbott*, 184 Mass. 147, 68 N. E. 37; *Aborn v. Searles*, 18 R. I. 357, 27 Atl. 796; *Bailey v. Hemenway*, 147 Mass. 326; *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372; but see, *contra*, *Storm v. McGrover*, 70 App. Div. 33, 74 N. Y. Supp. 1032; *Pickler v. Pickler*, 180 Ill. 168, 54 N. E. 311 (must pay a definite part); *Onasch v. Zinkel*, (Ill.) 72 N. E. 716 (same; citing Illinois cases); *Dudley v. Dudley*, 176 Mass. 34, 56 N. E. 1011; *Andrews v. Andrews*, 114 Iowa 524, 87 N. W. 494. Where part of the consideration was paid by the wife, it was held, in the following

cases, that a trust resulted: *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077; *Beringer v. Lutz*, 188 Pa. St. 364, 41 Atl. 643; *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34 (citing Alabama cases). *Contra*, *Butler v. McLean*, 122 N. C. 357, 29 S. E. 416; *Barger v. Barger*, 30 Oreg. 268, 47 Pac. 702 (the funds were mixed so that identification of any specific part was impossible). The same rule exists in case the part is paid by a son: *Caldwell v. Bryan's Ex'rs*, 20 Tex. Civ. App. 168, 49 S. W. 240.

(^b) See, also, *Robbins v. Robbins*, 89 N. Y. 251, 258; *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890 (quoting note 3, *supra*); *Monahan v. Monahan*, (Vt.) 59 Atl. 169 (deposit in bank); *In re Policy No. 6402 of the Scottish Eq. Life Assur. Soc.*, [1902] 1 Ch. 282.

child, or in the joint names of himself and child, no trust results in favor of the husband, or father, but the transaction is presumed to be a gift or advancement to or for the benefit of the wife or child.^{1 a} It appears to be now settled

¹ *Kingdon v. Bridges*, 2 Vern. 67; *Rider v. Kidder*, 10 Ves. 360; *Drew v. Martin*, 2 Hem. & M. 130; *Devoy v. Devoy*, 3 Smale & G. 403; *Soar v. Foster*, 4 Kay & J. 152 (must be a lawful wife); *Dyer v. Dyer*, 2 Cox, 92; *Finch v. Finch*, 15 Ves. 43, 50; *Murless v. Franklin*, 1 Swanst. 13, 17, 18; *Grey v. Grey*, 2 Swanst. 594, 597; *Tucker v. Burrow*, 2 Hem. & M. 515, 524; *Williams v. Williams*, 32 Beav. 370; *Christy v. Courtenay*, 13 Beav. 96; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Low v. Carter*, 1 Beav. 426; *Vance v. Vance*, 1 Beav. 605; *Sayre v. Hughes*, L. R. 5 Eq. 376; *In re Curteis's Trusts*, L. R. 14 Eq. 217; *Marshal v. Crutwell*, L. R. 20 Eq. 328 (where a trust did result upon a bank account being transferred into names of husband and wife merely for convenience); *Stevens v. Stevens*, 70 Me. 92; *Lorentz v. Lorentz*, 14 W. Va. 809; *Lochenour v. Lochenour*, 61 Ind. 595; *Baker v. Baker*, 22 Minn. 262; *Norton v. Mallory*, 3 Thomp. & C. 640; *Gilbert v. Gilbert*, 2 Abb. App. 256; *Farrell v. Lloyd*, 69 Pa. St. 239.^b

(a) Quoted in *Catoe v. Catoe*, 32 S. C. 595, 10 S. E. 1078. The text is cited to this effect in *Viers v. Viers*, 175 Mo. 444, 75 S. W. 395; *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460; *Hudson v. White*, 17 R. I. 519, 23 Atl. 57.

(b) See, also, *Heath v. Carter*, 20 Ind. App. 83, 50 N. E. 318; *Devine v. Devine*, 180 Ill. 447, 54 N. E. 336; *Spencer v. Terrell*, 17 Wash. 514, 50 Pac. 468; *Klamp v. Klamp*, 51 Nebr. 17, 70 N. W. 525; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *Veal v. Veal*, 89 Ky. 314, 25 Am. St. Rep. 534, 12 S. W. 384; *Evans v. Curtis*, 190 Ill. 197, 60 N. E. 56; *Lane v. Lane*, 80 Me. 570, 16 Atl. 323; *Bennett v. Camp*, 54 Vt. 36; *Whitley v. Ogle*, 47 N. J. Eq. 67, 20 Atl. 284; *Wheeler v. Kidder*, 105 Pa. St. 270; *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183; *Schuster v. Schuster*, 93 Mo. 438, 6 S. W. 259; *Gilliland v. Gilliland*, 96 Mo. 522, 10 S. W. 139; *Chambers v.*

Michael, 71 Ark. 373, 74 S. W. 516; *Johnston v. Johnston*, 96 Md. 144, 53 Atl. 792; *Solomon v. Solomon*, (Nebr.) 92 N. W. 124; *Kern v. Howell*, 180 Pa. St. 315, 36 Atl. 872, 51 Am. St. Rep. 641. But in such cases it may be shown that no advancement was intended; the presumption is rebuttable: *Culp v. Price*, 107 Iowa 133, 77 N. W. 848; *Walker v. Walker*, 199 Pa. St. 435, 49 Atl. 133; *Smithsonian Institute v. Meech*, 169 U. S. 398, 18 Sup. Ct. Rep. 396, 42 L. ed. 793; *Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Flanner v. Butler*, 131 N. C. 151, 92 Am. St. Rep. 773, 42 S. E. 557; *Lahey v. Broderick*, 72 N. H. 180, 55 Atl. 354; *Skahen v. Irving*, 206 Ill. 597, 69 N. E. 510; *Deck v. Tabler*, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837; *Bailey v. Dobbins*, (Nebr.) 93 N. W. 687; *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; *Trumbo v. Fulk*, (Va.) 48 S. E. 525; *Monahan v. Monahan*, (Vt.) 59 Atl. 169 (deposit in bank by husband in wife's name; ~~pro~~

that the same rule applies to a mother who purchases property in the name of her child, or in the joint names of herself and child, and pays the price with her own separate funds; no trust results.^{2c} The rule also applies where the person advancing the price has placed himself *in loco parentis* towards the other.³

§ 1040. Admissibility of Parol Evidence.— Since these resulting trusts are not embraced within the statute of frauds, their existence need not be evidenced by any writing, and may, therefore, be established by parol. In cases belonging to the first form,—purchases between strangers,—if the deed does not show on its face that the price was actually paid by another, and even, according to many decisions, if the deed recites that the payment was made by the grantee therein, the real fact may always be estab-

² In *re De Visme*, 2 De Gex, J. & S. 17 (holds that a trust did result); *Sayre v. Hughes*, L. R. 5 Eq. 376, 381; *Batstone v. Salter*, L. R. 19 Eq. 250; 10 Ch. 431; *Fowkes v. Pascoe*, L. R. 10 Ch. 343; but see, *per contra*, *Flynt v. Hubbard*, 57 Miss. 471.^d

³ *Beckford v. Beckford*, Lofft, 490 (father and illegitimate son); *Ehrand v. Dancer*, 2 Cas. Ch. 26 (grandfather and grandchild); *Curran v. Jago*, 1 Coll. C. C. 261 (husband and wife's nephew); *Higdon v. Higdon*, 57 Miss. 264 (brother and his sisters); *Loyd v. Read*, 1 P. Wms. 607; *Forrest v. Forrest*, 11 Jur., N. S., 317; *Sayre v. Hughes*, L. R. 5 Eq. 376, 389; *Smith v. Patton*, 12 W. Va. 541;^e but in *Tucker v. Burrow*, 2 Hem. & M. 515, Page Wood, V. C., held that the mere fact that a person had placed himself *in loco parentis* towards the illegitimate son of his daughter did not alone bring a purchase made in the name of such illegitimate grandson within this rule which prevents a resulting trust. He said: "The court has never held that any presumption of advancement arose merely from the fact of so distant a relationship (if it be a relationship) as this, nor yet *merely* from the fact that one of the parties was *in loco parentis* to the other."

sumption of gift overcome). Where the son purchased land in the name of his mother it was held that a trust resulted: *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526.

(c) The text is quoted in *Trumbo v. Fulk*, (Va.) 48 S. E. 525. See, also, *Hallenbeck v. Rogers*, 57 N. J. Eq. 199, 40 Atl. 576, 58 N. J. Eq.

580, 43 Atl. 1098; *Brown v. Brown*, 62 Kan. 666, 64 Pac. 599.

(d) See, also, *Cooley v. Cooley*, 172 Mass. 476, 52 N. E. 631; In *re Peabody*, 118 Fed. 266, 55 C. C. A. 360 (presumption is rebuttable).

(e) The text is cited to this effect in *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836. See, also, *Hamilton v. Steele*, 22 W. Va. 348.

lished by parol evidence; it may be proved by parol that the purchase price was wholly or partly paid by another person, and thus a trust may be shown to result in his favor. Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. It is settled by a complete unanimity of decision that such evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the alleged beneficiary beyond a doubt.^a Where the payment of a part only is claimed, the evidence must show, in the same clear manner, the exact portion of the whole price which was paid.¹ Parol evidence

¹ A few of the earliest decisions did not permit such evidence, on the ground that it would violate the statute of frauds, but they have long been overruled. Several of the cases cited below are examples of what kind and amount of parol evidence is or is not sufficient to raise a trust, and also when such a trust may be shown by circumstantial evidence alone: *Gascoigne v. Thwing*, 1 Vern. 366; *Bartlett v. Pickersgill*, 1 Eden, 515; *Ryall v. Ryall*, 1 Atk. 59; *Willis v. Willis*, 2 Atk. 71; *Lench v. Lench*, 10 Ves. 511, 517; *Groves v. Groves*, 3 Younge & J. 163; *Heard v. Pilley*, L. R. 4 Ch. 548, 552; *Whitmore v. Learned*, 70 Me. 276; *Parker v. Snyder*, 31 N. J. Eq. 164; *Agricultural etc. Ass'n v. Brewster*, 51 Tex. 257; *Miller v. Blöse's Ex'r*, 30 Gratt. 744; *Smith v. Patton*, 12 W. Va. 541; *Rhea v. Tucker*, 56 Ala. 450; *Hyden v. Hyden*, 6 Baxt. 406; *Lee v. Browder*, 51 Ala. 288; *Billings v. Clinton*, 6 S. C. 90; *Hennessey v. Walsh*, 55 N. H. 515 (evidence insufficient); *McCreary v. Casey*, 50 Cal. 349; *Murphy v. Peabody*, 63 Ga. 522; *Byers v. Wackman*, 16 Ohio St. 440; *Frederick*

(a) This section is cited generally in *Oberlender v. Butcher*, (Nebr.) 93 N. W. 764; to the effect that the trust may be proved by parol in *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; and to the effect that the evidence must be clear and satisfactory, in *Sing You v. Wong Free Lee*, (S. D.) 92 N. W. 1073. The text is quoted in *Catoe v. Catoe*, 32 S. C. 595, 10 S. E. 1078; *Walston v. Smith*, 70 Vt. 19, 39 Atl. 252 (a valuable decision discussing the early cases); see *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543, for a case discussing the proof required by the courts, for the establishment of

trusts generally. In the case of *Stone v. Manning*, 103 Tenn. 232, 52 S. W. 990, it was stated: "In *Sanford v. Weeden*, 2 Heisk. 76, Chief Justice Nicholson said: 'Different judges have employed different language in declaring the character and the weight of the proof which is necessary and sufficient to set up a resulting trust. The result of all the attempts to define the rule as to the amount of parol proof necessary in such cases is that the conscience of the court should be fully satisfied that the facts relied on to raise the trust are true and sufficient to create the trust.'"

is also admissible on the part of the grantee to defeat a trust. Since the whole doctrine of a resulting trust depends upon an equitable presumption of an intention, so this presumption may be overcome by parol evidence of an actual intention on the part of the one paying the price, that the transaction was to be a gift.²

v. Haas, 5 Nev. 389; *Boyd v. McLean*, 1 Johns. Ch. 582, 586; *Page v. Page*, 8 N. H. 187, 195; *Baker v. Vining*, 30 Me. 121, 126; 50 Am. Dec. 617; *Thomas v. Standiford*, 49 Md. 181.^b

² Of course a gift may be made between strangers, and may be made in the form of a purchase of property conveyed to A, the donee, while the donor, B, pays the price. Whenever this condition of fact is shown by the evidence, no trust can result: *Lane v. Dighton*, Amb. 409; *Bellasis v. Compton*, 2 Vern. 294; *Benbow v. Townsend*, 1 Mylne & K. 506; *Deacon v. Colquhoun*, 2 Drew. 21; *Beecher v. Major*, 2 Drew. & S. 431; *Garrick v. Taylor*, 29 Beav. 79; 7 Jur., N. S., 1174; *Wheeler v. Smith*, 1 Giff. 300; *Carter v. Montgomery*, 2 Tenn. Ch. 216;^c and the presumption may thus be rebutted as to a part of

(b) The following cases held the evidence sufficient to establish the trust: *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383 (quoting the text); *Chicago, B. & Q. R. R. Co. v. First Nat. Bk.*, 58 Nebr. 548, 78 N. W. 1064 (citing the text); *Oregon Lumber Co. v. Jones*, 36 Oreg. 80, 58 Pac. 769 (citing numerous Oregon decisions); *Crawford v. Jones*, 163 Mo. 577, 63 S. W. 838. See, as to the doctrine in general, *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. ed. 1091; *In re Stanger*, 35 Fed. 241; *Hoover v. Hoover*, 129 Pa. St. 201, 19 Atl. 854; *Witts v. Horney*, 59 Md. 584; *Donaghe v. Tams*, 81 Va. 132; *Lofton v. Sterrett*, 23 Fla. 565, 2 South. 837; *Bibb v. Hunter*, 79 Ala. 351; *Simmons v. Ingram*, 60 Miss. 886 (trust presumed for creditors of person advancing the consideration); *Thomas v. Thomas*, 62 Miss. 531; *Murphy v. Hanscome*, 76 Iowa 192, 40 N. W. 717; *Adams v. Burns*, 96 Mo. 361, 10 S. W. 26; *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056; *Parker v. Newitt*, 18 Oreg. 274, 23 Pac. 246. The following cases

held the evidence insufficient to establish the trust; the text being frequently quoted: *Hutton v. Cunningham*, 28 Ind. App. 295, 62 N. E. 644; *Pickler v. Pickler*, 180 Ill. 168, 54 N. E. 311; *Strang v. Messinger*, 148 Ill. 431, 36 N. E. 617; *Doan v. Dunham*, 64 Nebr. 137, 89 N. W. 640; *Rice v. Rigley*, 7 Idaho 115, 61 Pac. 290; *Wacker v. Wacker*, 147 Mo. 246, 48 S. W. 835; *Klamp v. Klamp*, 51 Nebr. 17, 70 N. W. 525; *Evans v. Curtis*, 190 Ill. 197, 60 N. E. 56; *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151; *Reynolds v. Blaisdell*, 23 R. I. 16, 49 Atl. 42; *In re Cornman's Estate*, 197 Pa. St. 125, 46 Atl. 940; *Fox v. People*, 201 Pa. St. 9, 50 Atl. 226; *Brinkman v. Sunken*, 174 Mo. 709, 74 S. W. 963; *Cline v. Cline*, 204 Ill. 130, 68 N. E. 545; *Malley v. Malley*, 121 Iowa 237, 96 N. W. 751.

(c) See, also, *Ward v. Ward*, 59 Conn. 188, 22 Atl. 149; *Tryon v. Huntoon*, 67 Cal. 325, 7 Pac. 741; *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4; *Funk v. Hensler*, 31 Wash. 528, 72 Pac. 102. See, also, *supra*, § 1039, note a.

§ 1041. **The Same. Between Family Relatives:**—In trusts of the second form, between family relatives, no evidence is necessary, in the first instance, to show the operation of the rule, since a presumption arises on the face of the transaction that a gift was intended, and that no trust results. This result, however, is merely a presumption, and may be overcome. Extrinsic evidence, either written or parol, is admissible on behalf of the husband or parent paying the price to rebut the presumption of an advancement or gift, and to show that a trust results; and conversely, such evidence may be used to fortify and support the presumption. In general, this extrinsic evidence, to defeat an advancement and establish a trust as against the party to whom the property is conveyed or transferred and those holding under him, must consist of matters *substantially contemporaneous* with the purchase, conveyance, or transfer, so as to be fairly connected with the transaction.^{1 a}

the trust, and not as to the remainder: *Rider v. Kidder*, 10 Ves. 360, 368; *Benbow v. Townsend*, 1 Mylne & K. 506.

¹ *Kilpin v. Kilpin*, 1 Mylne & K. 520; *Lamplugh v. Lamplugh*, 1 P. Wms. 111, 113; *Hall v. Hill*, 1 Dru. & War. 94, 114; *Murless v. Franklin*, 1 Swanst. 13; *Tucker v. Burrow*, 2 Hem. & M. 515, 524; *Sidmouth v. Sidmouth*, 2 Beav. 447, 455; *Williams v. Williams*, 32 Beav. 370; *Dumper v. Dumper*, 3 Giff. 583; *Devoy v. Devoy*, 3 Smale & G. 403; *Stevens v. Stevens*, 70 Me. 92.^b

What facts are sufficient or not to rebut the presumption of an advancement or gift, and to establish a resulting trust, is a question frequently considered by the English cases. The following have been held *not sufficient*: Possession of the estate and receipt of its rents by the father during his life, after conveyance to his child: *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Taylor v. Taylor*, 1 Atk. 386; *Christy v. Courtenay*, 13 Beav. 96;^c nor receipt by the

(a) This section is cited to the effect that the evidence must consist of matters substantially contemporaneous with the purchase or conveyance, in *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Smithsonian Inst. v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. ed. 793; and generally, in *Van Houten v. Van Houten*, (N. J. Eq.) 59 Atl. 555.

(b) See, also, *Lister v. Lister*, 35 N. J. Eq. 49; *Read v. Huff*, 40 N. J.

Eq. 229; *Earnest's Appeal*, 106 Pa. St. 310; *Hayes's Appeal*, 123 Pa. St. 138, 16 Atl. 600; *Hamilton v. Steele*, 22 W. Va. 348; *McClintock v. Loisseau*, 31 W. Va. 865, 8 S. E. 612; *Harden v. Darwin*, 66 Ala. 55; *Viers v. Viers*, 175 Mo. 444, 75 S. W. 395; *Monahan v. Monahan*, (Vt.) 59 Atl. 169.

(c) *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211, 2 S. W. 186; *White v. White*, 52 Ark. 188, 12 S. W. 201;

§ 1042. **Legislation of Several States.**—The second form of resulting trusts in real property, above described, where the title to land is taken in the name of one person and the price is paid by another, has been abolished by the legislation of several states.¹ In pursuance of these statutes,

father of the dividends of investments made in the name of his son: *Sidmouth v. Sidmouth*, 2 Beav. 447; but see *Smith v. Warde*, 15 Sim. 56; nor a devise, bequest, or lease of the property by the husband or parent after the purchase: *Crabb v. Crabb*, 1 Mylne & K. 511; *Dummer v. Pitcher*, 2 Mylne & K. 262; *Jeans v. Cooke*, 24 Beav. 513; *Murless v. Franklin*, 1 Swanst. 13.^d

¹ *New York*.—Rev. Stats. 1875, pt. 2, c. 1, art. 6, secs. 51, 52, 53, p. 1105, sec. 51: "Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section." Sec. 52: "Every such conveyance shall be presumed fraudulent as against the creditors at that time of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands." Sec. 53: "The provisions of the preceding section 51 shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the consent or knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person."

Michigan.—2 Comp. Laws 1871, p. 1331, sec. 7: Same as New York, sec. 51. Sec. 8: Same as New York, sec. 52, except the words "at that time" are omitted. Sec. 9: Same as New York, sec. 53.^a

Minnesota.—Young's Stats. 1880, p. 553, secs. 7, 8, 9.^b Same as New York, secs. 51, 52, 53.

Wisconsin.—2 Taylor's Rev. Stats. 1872, p. 1129, sec. 7: Same as New York, sec. 51. Sec. 8: Same as New York, secs. 2071, 2077, 2078, sec. 52, except the words "at that time" are omitted. Sec. 9: Same as New York, sec. 53.^c

Kansas.—Dassler's Comp. Laws 1881, p. 989,^d sec. 6: Same as New York, sec. 51. Sec. 7: Substantially the same as New York, sec. 52, except that it extends to subsequent as well as prior creditors, if the fraudulent intent is shown. Section 8 provides that the preceding section 6 shall not apply to the same cases described in New York, sec. 53, and then adds the following case:

Maxwell v. Maxwell, 109 Ill. 588; and see the cases cited in the notes to § 1039.

§ 1041, (d) Such presumption is repelled by proof that the deed was executed to defraud the husband's creditors: *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460.

§ 1042, (a) *Michigan*.—Howell's Stats. 1882, secs. 5569–5571.

§ 1042, (b) *Minnesota*.—Kelly's Stats. 1882, secs. 4009, 4011.

§ 1042, (c) *Wisconsin*.—Sanborn and Berryman's Stats. 1889, secs. 2077–2079.

§ 1042, (d) *Kansas*.—C. 114.

which follow substantially a common type in all these states, no trust ever results in favor of the one who pays the purchase price, wholly or partly, where the title is with his knowledge taken in the name of another person; but in place thereof, a trust arises in favor of the creditors of the one thus paying or advancing the price. This provision does not, however, include the cases where the grantee takes the deed in his own name without the knowledge and consent of the person paying the money, nor where the purchase is made in his own name with another's money, in violation of some duty or confidence; in these instances the trust, which is then really constructive rather than resulting, still arises. All of these statutes seem to be confined in their terms to conveyances of real property, so that the settled rules concerning resulting trusts in personal property appear to be left untouched. They also relate solely to the second form of resulting trusts, as heretofore described, so that the instances of the first form, where a trust results to the grantor, remain unaltered, and the rules concerning them in full force. In construing the first and main clause of the statute which abolishes the resulting trust in favor of the person paying the price, it is thoroughly settled by the New York courts that the provision implies his consent and co-operation in the mode of transfer, so that he in fact induces the conveyance of the title to the grantee, and that it does not apply unless he were aware that the conveyance was so made, and the

"Or where it shall be made to appear that, by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein, in trust, for the party paying the purchase-money, or some part thereof."

Indiana.—1 Stats. 1876, p. 915, secs. 6, 7, 8: Same as the Kansas secs. 6, 7, 8.^e

Kentucky.—Gen. Stats. 1873, p. 587,^f sec. 19: Substantially same as New York, sec. 51. The *Georgia Code* 1873, p. 400, sec. 2316, defines "implied" trusts,—resulting and constructive,—but without altering the doctrines of equity as generally settled, simply declaratory of existing rules.

(^e) *Indiana*.—2 Rev. Stats. 1888, secs. 2974-2976.

(^f) *Kentucky*.—C. 63, art. 1.

title was so taken. This seems to be the correct construction of the provision, which is the same in all the statutes.² With regard to the true interpretation of the clause creating a trust in favor of the creditors of the person paying the price, there has been some conflict among the decisions and *dicta* of the New York courts.³ Cases arising under the similar statutory provisions of the other states are collected in the foot-note.⁴

² *Reitz v. Reitz*, 80 N. Y. 538; reversing 14 Hun, 536; *Lounsbury v. Purdy*, 18 N. Y. 515; *Day v. Roth*, 18 N. Y. 448; *Siemon v. Schurck*, 29 N. Y. 598, 610; *Traphagen v. Burt*, 67 N. Y. 30; *Underwood v. Sutcliffe*, 77 N. Y. 58. Thus it is held that where a father paid the price and had a conveyance made to a third person, the purchase being intended for the benefit of a child and as an advancement, the whole transaction being completed without the child's knowledge, a trust resulted in favor of such child: *Siemon v. Schurck*, *supra*; 33 Barb. 9; *Gilbert v. Gilbert*, 2 Abb. App. 256.⁵

³ The earlier cases regarded the clause as creating a pure trust in favor of the creditors, which they could enforce simply as *cestuis que trustent*, without taking any legal proceedings against their debtor: *Garfield v. Hatmaker*, 15 N. Y. 475; *Wood v. Robinson*, 22 N. Y. 564; *McCartney v. Bostwick*, 32 N. Y. 53; 31 Barb. 390. The later decisions hold that only judgment creditors can reach the land by ordinary creditors' suit after having exhausted their legal remedies against the debtor: *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Dunlap v. Hawkins*, 59 N. Y. 342; 2 Thomp. & C. 292.

⁴ *Michigan*: *Munch v. Shabel*, 37 Mich. 166; *Weare v. Linnell*, 29 Mich. 224; *Linsley v. Sinclair*, 24 Mich. 380; *Fisher v. Fobes*, 22 Mich. 454; *Jackson v. Cleveland*, 15 Mich. 94; 90 Am. Dec. 266; *Groesbeck v. Seeley*, 13 Mich. 329; *Maynard v. Hoskins*, 9 Mich. 485; *Trask v. Green*, 9 Mich. 358.^h

Minnesota: *Baker v. Baker*, 22 Minn. 262; *Rogers v. McCauley*, 22 Minn. 384; *Matthews v. Torinus*, 22 Minn. 132; *Johnson v. Johnson*, 16 Minn. 512; *Durfee v. Pavitt*, 14 Minn. 424; *Gorton v. Massey*, 12 Minn. 145; *Foster v. Berkey*, 8 Minn. 351; *Baker v. Terrell*, 8 Minn. 195; *Sumner v. Sawtelle*, 8 Minn. 309; *Irvine v. Marshall*, 7 Minn. 286; *Wentworth v. Wentworth*, 2 Minn. 277; 72 Am. Dec. 97.ⁱ

(^g) See, also, *Woerz v. Rademacher*, 120 N. Y. 67, 23 N. E. 1113; *Niver v. Crane*, 98 N. Y. 40; *Lee v. Timken*, 10 App. Div. 213, 41 N. Y. Supp. 979. That the provision cannot be invoked to cover a fraud, see *Robbins v. Robbins*, 89 N. Y. 256. For cases considering the statute when the trusts were held to be express, see *Miller v. Monroe*, 59 App. Div. 623, 69 N. Y. Supp. 861; *Morgan v.*

Turner, 35 Misc. Rep. 399, 71 N. Y. Supp. 996.

(^h) *Michigan*.—*Hamilton v. Wickson*, 131 Mich. 71, 90 N. W. 1032; *Fairbairn v. Middlemiss*, 47 Mich. 372, 11 N. W. 203; *Pulford v. Morton*, 62 Mich. 25, 28 N. W. 716.

(ⁱ) *Minnesota*.—*Connelly v. Sheridan*, 41 Minn. 18, 16 Am. St. Rep. 667, 42 N. W. 601.

§ 1043. Interest and Rights of the Beneficiary.—The interest of the *cestui que trust* in a resulting trust is not a mere “equity”; it is an equitable estate in the land or other thing of which the legal title is vested in the trustee; and as such, it may be conveyed, transferred, devised, or other-

Kentucky: Ewing v. Bibb, 7 Bush, 654; Martin v. Martin, 5 Bush, 47; Graves v. Graves, 3 Met. 167; Lindsay v. Williams's Ex'rs, 2 Duvall, 475; Aynesworth v. Haldeman, 2 Duvall, 565.†

‡

Kansas: There is one marked difference between the statutes of Kansas and Indiana and those of the other states. While the *presumption* of a resulting trust in favor of the one paying the money is abrogated, it seems that such trust may be created by *express agreement* between the person taking the conveyance to himself and the person paying the price, even though this agreement is parol: Kennedy v. Taylor, 20 Kan. 558; Mitchell v. Skinner, 17 Kan. 563; Franklin v. Colley, 10 Kan. 260; Lyons v. Bodenhamer, 7 Kan. 455; Morrall v. Waterson, 7 Kan. 199; Winkfield v. Brinkman, 21 Kan. 682.†

Indiana: Derry v. Derry, 74 Ind. 560; Hon v. Hon, 70 Ind. 135; McCollister v. Willey, 52 Ind. 382; Tracy v. Kelley, 52 Ind. 535; Hampson v. Fall, 64 Ind. 382; Lochenour v. Lochenour, 61 Ind. 595; Milliken v. Ham, 36 Ind. 166; Hubble v. Osborn, 31 Ind. 249; Gaylord v. Dodge, 31 Ind. 41; Glidewell v. Spaugh, 26 Ind. 319; McDonald v. McDonald, 24 Ind. 68; Catherwood v. Watson, 65 Ind. 576.‡

Georgia: I add some illustrations of the Georgia Code concerning implied trusts, although it does not at all follow the New York type described in the text. Resulting trusts: Houser v. Houser, 43 Ga. 415; Street v. Lynch, 38 Ga. 631; McKinney v. Burns, 31 Ga. 295; Chastain v. Smith, 30 Ga. 96; Gordon v. Green, 10 Ga. 534; Williams v. Turner, 7 Ga. 348; Pitts v. Bullard, 3 Ga. 5; 46 Am. Dec. 405. Constructive trusts: Brown v. Crane, 47 Ga. 483; Alexander v. Alexander, 46 Ga. 283; Adams v. Jones, 39 Ga. 479, 508; Cameron v. Ward, 8 Ga. 245.¶

(d) *Kentucky*.—Curd v. Curd's Adm'rs, 21 Ky. Law Rep. 919, 53 S. W. 522; Watt v. Watt, 19 Ky. Law Rep. 25, 39 S. W. 48; Neel v. Moore, 19 Ky. Law Rep. 918, 39 S. W. 1042; Webb v. Foley, 20 Ky. Law Rep. 1207, 49 S. W. 40.

(k) *Wisconsin*.—Skinner v. James, 69 Wis. 605, 35 N. W. 37; Campbell v. Campbell, 70 Wis. 311, 35 N. W. 743; Cerney v. Pawlot, 66 Wis. 262, 28 N. W. 183.

(l) *Kansas*.—Tenney v. Simpson, 37 Kan. 353, 15 Pac. 187; Simpson v.

Tenney, 41 Kan. 561, 21 Pac. 634; Fink v. Umscheid, 40 Kan. 271, 19 Pac. 623, 2 L. R. A. 146; Mosteller v. Mosteller, 40 Kan. 658, 20 Pac. 464; Acker v. Priest, 92 Iowa 610, 61 N. W. 235.

(m) *Indiana*.—Camp v. Smith, 98 Ind. 409; Boyer v. Libey, 88 Ind. 235; Lord v. Bishop, 101 Ind. 334; Repp v. Leshar, 27 Ind. App. 360, 61 N. E. 609; Brown v. White, (Ind. App.) 67 N. E. 273.

(n) *Georgia*.—Cottle v. Harrold, 72 Ga. 830.

wise dealt with as property.¹ It is valid, and may be enforced not only against the trustee, but against his heirs, devisees, personal representatives, and all others who derive title from him as volunteers or purchasers with notice; but, being a purely equitable interest, it is cut off and destroyed as against all *bona fide* purchasers or mortgagees from the trustee for a valuable consideration and without notice.² The *cestui que trust* is entitled to the remedy of compelling a conveyance or assignment of the legal estate to himself by the trustee, or perhaps, in some instances, of compelling the trustee to hold the property for the benefit of the beneficiary, and subject to his power of enjoyment, control, and disposition.³

¹ *Stump v. Gaby*, 2 De Gex, M. & G. 623, 630; *Gresley v. Mousley*, 4 De Gex & J. 78, 90, 92; *Uppington v. Bullen*, 2 Dru. & War. 184; *Dickinson v. Burrell*, L. R. 1 Eq. 337; *Morgan v. Holford*, 1 Smale & G. 101; *Malin v. Malin*, 1 Wend. 625; *Clapper v. House*, 6 Paige, 149; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *McKissick v. Pickle*, 16 Pa. St. 140; *Kent v. Mahaffey*, 10 Ohio St. 204; *Kane Co. v. Herrington*, 50 Ill. 232.^a

² *Lehman v. Lewis*, 62 Ala. 129; *Flynt v. Hubbard*, 57 Miss. 471; *Catherwood v. Watson*, 65 Ind. 576; *McClure v. Doak*, 6 Baxt. 364 (postponed to the lien of a judgment recovered against the trustee); *Haggard v. Benson*, 3 Tenn. Ch. 268; *Hampson v. Fall*, 64 Ind. 382; *King v. Pardee*, 96 U. S. 90 (in Pennsylvania a resulting trust in land is barred by a delay of twenty-one years in enforcing it); *Baker v. Hardin*, 10 Heisk. 300 (not affected by judgments against the trustee); *Moss v. Moss*, 95 Ill. 449 (resulting trust in favor of a wife barred by a general release of all claims and demands given by her to her husband); *Roy v. McPherson*, 11 Neb. 197 (resulting trust in favor of a wife postponed to the liens of judgments against her husband).^b

³ *Millard v. Hathaway*, 27 Cal. 119; *Maloy v. Sloan*, 44 Vt. 311.^c

(a) See, also, *Cottle v. Harrold*, 72 Ga. 830; and in general, *ante*, § 375. The text is cited to the point in *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077.

(b) See *Lord v. Bishop*, 101 Ind. 334.

(c) See, also, *Burns v. Ross*, 71 Tex. 516, 9 S. W. 468. That the *cestui que trust* or his heirs cannot enforce the trust when the transaction was intended as a fraud on his creditors, see *Sell v. West*, 125 Mo. 621, 46

Am. St. Rep. 508, 28 S. W. 969 (although the claims of such creditors are barred by the statute of limitations). For an important discussion of the application of the "clean hands" maxim, see *Monahan v. Monahan*, (Vt.) 59 Atl. 169, especially the dissenting opinion, citing or quoting the text, §§ 398, 399, 401, 404 (where the securities were taken in the name of another for the purpose of evading taxation).

§ 1044. **Second. Constructive Trusts.**—Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust.² They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum*; and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly "constructive." An exhaustive analysis would show, I think, that all instances of constructive trusts properly so called may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser *intended* to act in pursuance of his fiduciary duty, the notion of fraud is not invoked, simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud.¹ This notion

¹ I refer to the class of cases where a trustee uses trust funds to pay for property purchased in his own name; equity assumes that he intended to act in accordance with his fiduciary duty, although in the majority of such

(a) The text is quoted, and a number of cases cited, in *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298; also, in *Stubbin's Adm'r v. Briggs*, 24 Ky. Law Rep. 230, 68 S. W. 392; *Wilson v. Louisville Trust*

Co., 19 Ky. Law Rep. 1590, 44 S. W. 121. This section is cited in *McMonagle v. McGlinn*, 85 Fed. 88; *Farmers & Traders' Bank v. Kimball Milling Co.*, 1 S. D. 388, 36 Am. St. Rep. 739; 47 N. W. 402; *Johnston v. Little*, (Ala.) 37 South. 592.

of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud.^{2 b} Courts of equity, by thus extending the fundamental principle of trusts — that is, the principle of a division between the legal estate in one and the equitable estate in another — to all cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy

instances the actual intention is undoubtedly to violate the duty. It will be seen that, in my opinion, certain kinds of so-called trusts which are often spoken of as “constructive” do not at all belong to that class.

² The effect of actual or constructive fraud in producing these trusts is well described in Mr. Perry's treatise (sec. 166): “If one party procures the legal title to property from another by fraud, misrepresentation, or concealment, or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the property in the hands of the offending party, and will convert him into a trustee of the legal title, and will order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party who is the beneficial owner.” See *Jenckes v. Cook*, 9 R. I. 520; *McLane v. Johnson*, 43 Vt. 48; *Collins v. Collins*, 6 Lans. 368; *Thompson v. Thompson*, 16 Wis. 91; *Pillow v. Brown*, 26 Ark. 240.^c

(b) Quoted in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707.

(c) See also, citing the text, *Meredith v. Meredith*, 149 Ind. 299, 50 N. E. 29. For a case discussing the difference between express and con-

structive trusts, see *Soar v. Ashwell*, [1893] 2 Q. B. 390. See, also, *Mara v. Browne*, [1896] 1 Ch. 199; *Luscombe v. Grigsby*, 11 S. Dak. 408, 78 N. W. 357; *Reynolds v. Aetna Life Ins. Co.*, 28 App. Div. 591, 51 N. Y. Supp. 446.

in protecting the rights of property; they can follow the real owner's specific property, and preserve his real ownership, although he has lost or even never had the legal title, and can thus give remedies far more complete than the compensatory damages obtainable in courts of law. The principle is one of universal application; it extends alike to real and to personal property, to things in action, and funds of money. Salutary and efficient as the principle is, however, many of the constructive trusts which it creates are only trusts *sub modo*; they have little resemblance, in their essential nature, to express trusts.³ In applying this principle, care should be taken to distinguish between actual trusts and those relations which are only trusts by way of metaphor; between persons who are true trustees holding the legal title for a beneficial *owner*, and those who simply occupy a position which is analogous in some respects to that of a trustee. The use of these terms to designate relations and parties which have no essential element in common with actual trusts and trustees can only produce confusion and inaccuracy.⁴

³ The Language of Lord Westbury on this point, in *Rolfe v. Gregory*, 4 De Gex, J. & S. 576, 579, is very instructive. The case was one where a person had fraudulently obtained trust property; but the remarks will apply to all such constructive trusts based upon actual fraud: "When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of trust."

⁴ The distinction is clearly stated by Lord Westbury in *Knox v. Gye*, L. R. 5 H. L. 656, 675. It was argued, according to the common mode of expression, that a surviving partner is a trustee of the share of his deceased partner; but the lord chancellor referred to the case of the vendor and vendee of land, and said that although the vendor might by a metaphor be called a trustee for the vendee, *he was trustee only to the extent of his obligation to perform the agreement* between himself and the vendee, and proceeded as follows: "In like manner here the surviving partner may be called trustee

(d) The text is quoted in *Wilson v. Louisville Trust Co.*, 19 Ky. Law Rep. 1590, 44 S. W. 121.

§ 1045. **Kinds and Classes.**—The specific instances in which equity impresses a constructive trust are numberless, — as numberless as the modes by which property may be obtained, through bad faith and unconscientious acts. It is possible, however, to distinguish and describe the general groups or types under which all these instances may be arranged, and thus to present a comprehensive view of the whole subject.

§ 1046. 1. **Arising from Contract, Express or Implied.**—There are certain relations which are often spoken of as trusts, and as constituting a species of constructive trusts, but which are not, in any true and complete sense, trusts, and can only be called so by way of analogy or metaphor.* Since they lack the element of fraud, they do not, in any view, properly belong to the division of constructive trusts.¹ It is commonly said that a trust is created by a contract for the sale of land; that the vendor holds the legal title as

for the dead man, *but the trust is limited to the discharge of the obligation, which is liable to be barred by the lapse of time.* As between the express trustee and *cestui que trust*, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, *for there is not a more fruitful source of error in law than the inaccuracy of language.* The application to a man who is improperly and by metaphor only called a trustee of all the consequences which would follow if he were a trustee by express declaration,—in other words, a complete trustee,—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as a metaphor.”

¹ There is a tendency among writers to enlarge the meaning of the word “trust” beyond its legitimate signification. By some, the various equitable liens and similar rights arising from contract are made to be the most important, and with a very few exceptions the only instances of constructive trusts. As Lord Westbury shows, such a mode of treatment can produce nothing but confusion. The cases included in the first subdivision of the text are not constructive trusts, and are mentioned simply for purposes of completeness, and to distinguish between correct and mistaken conceptions.†

(a) Quoted in *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113. Cited to this effect in *Gallagher v. Asphalt*

Co. of America, (N. J. Eq.) 55 Atl. 259.

(b) Quoted in *O’Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707.

a trustee for the purchaser. Whatever of truth there is in this mode of statement, whatever of a real trust relation exists, it certainly has nothing in common with constructive trusts; it rather resembles an express trust.² In like manner, the survivors of a partnership are called trustees for the estate of the deceased partner, with respect to his share of the firm property. This expression is mostly metaphorical; there is certainly nothing in the relation resembling a constructive trust.³ Extending the analogy still further, courts regard partnership property, after an insolvency or dissolution of the firm, and in the proceeding for winding up its affairs, as a trust fund for the benefit of the firm creditors;⁴ and the capital stock and other property of private corporations, especially after their dissolution, is treated as a trust fund in favor of creditors.⁵ These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of the individual partners or corporators, *and that*

² See *ante*, vol. 1, §§ 368, 372; *Coman v. Lakey*, 80 N. Y. 345, 350; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605, 607; *Hensler v. Sefrin*, 19 Hun, 564; *Felch v. Hooper*, 119 Mass. 52; *Musham v. Musham*, 87 Ill. 80. In the face of the great number of decisions and opinions by the ablest courts, it would be impossible to assert that the vendor is not truly a trustee; but he is a trustee only to a partial extent, measured by his obligation. It is plain that this trust arises from the express contract, is included within its terms by the interpretation of equity; it therefore resembles those express trusts which are inferred from the entire provisions of an instrument.

³ See *Knox v. Gye*, L. R. 5 H. L. 656, 675, per Lord Westbury.

⁴ *Campbell v. Mullett*, 2 Swanst. 551, 574; *West v. Skip*, 1 Ves. Sr. 239, 456; *Ex parte Ruffin*, 6 Ves. Sr. 119, 126; *Murray v. Murray*, 5 Johns. Ch. 60; *Young v. Frier*, 9 N. J. Eq. 465.

⁵ *Wood v. Dummer*, 3 Mason, 308; *Mumma v. Potomac Co.*, 8 Pet. 281, 286; *Vose v. Grant*, 15 Mass. 505, 517, 522; *Spear v. Grant*, 16 Mass. 9, 15; *Lyman v. Bonney*, 101 Mass. 562; *Brewer v. Boston Theatre*, 104 Mass. 378; *Goodin v. Cincinnati etc. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Bartlett v. Drew*, 57 N. Y. 587; 60 Barb. 648; *Hastings v. Drew*, 76 N. Y. 9; *Tinkham v. Borst*, 31 Barb. 407.

the creditors have a lien upon it for their own security; but it is plain that no constructive trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property, and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means.^{6 d} I have thus collected the

⁶ *Hastings v. Drew*, 76 N. Y. 9, 16; *Bartlett v. Drew*, 57 N. Y. 587; 60 Barb. 648.

(d) Quoted in *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707; *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810. The text is cited in *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378.

"Trust fund doctrine."—The real extent of the so-called trust fund doctrine as applied to the assets of corporations is stated in a series of decisions by the United States Supreme Court. Speaking by Justice Field, that court said in *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. ed. 721: "We do not question the general doctrine invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. The doctrine only means that the property must first be apportioned to the payment of the debts of the company before any portion can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers, for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no ex-

istence." Again, in *Hollins v. Brierfield, etc., Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113, it was said: "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case. Neither the insolvency of the corporation nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon." The doctrine applies when corporate property has been divided among the stockholders, leaving debts unpaid: *Missouri, L. M. & S. Co. v. Reinhard*, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746.

In accordance, however, with the limitations laid down above, it is held, by the great weight of authority, that a corporation, either solvent

instances which are sometimes, though improperly, classed with constructive trusts, in order the more clearly to indicate the nature of the trusts which are truly constructive, and which are described in the following paragraphs.

§ 1047. 2. Money Received Which Equitably Belongs to Another.—By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money

or insolvent, may pay or secure certain creditors to the exclusion of others: *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525, 54 Am. St. Rep. 31, 28 L. R. A. 707; *Pollak v. Muscogee Mfg. Co.*, 108 Ala. 467, 18 South. 611, 54 Am. St. Rep. 165; *Worthen v. Griffith*, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50; *Albany, etc., Co. v. Southern Agric. Works*, 76 Ga. 135, 2 Am. St. Rep. 26; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265; *Rockford Grocery Co. v. Standard G. & M. Co.*, 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205; *First Nat. Bank v. Dovetail, etc., Co.*, 143 Ind. 550, 40 N. E. 810, 52 Am. St. Rep. 435; *Rollins v. Shaver Wagon, etc., Co.*, 80 Iowa 380, 45 N. W. 1037, 20 Am. St. Rep. 427; *Butler v. Harrison L. & M. Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464; *Ames v. Heslet*, 19 Mont. 188, 47 Pac. 805, 61 Am. St. Rep. 496; *Sabin v. Columbia Fuel Co.*, 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756 (so long as corporation is a going concern); *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841 (preference may be made so long as corporation is a going concern); *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; and see cases cited in monographic note, 45 Am. St. Rep. 826. Of course, in such jurisdictions the creditor may obtain a preference by attachment or by judgment: *La*

Grange B. T. Co. v. Nat. Bank, 122 Mo. 154, 26 S. W. 710, 43 Am. St. Rep. 558; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 40 S. E. 431, 8 Am. St. Rep. 88; *Ballin v. Merchants' Exchange Bank*, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357. An exception is made where directors and other officers of an insolvent corporation are also creditors. After the corporation becomes insolvent, the officers are not allowed to obtain a preference: *Rockford Grocery Co. v. Standard G. & M. Co.*, 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205; *La Grange B. T. Co. v. Nat. Bank*, 122 Mo. 154, 26 S. W. 710, 43 Am. St. Rep. 558; *Campbell, etc., Mfg. Co. v. Marder, Luse & Co.*, 50 Nebr. 283, 69 N. W. 774, 61 Am. St. Rep. 573; *Hill v. Pioneer Lumber Co.*, 113 N. C. 173, 18 S. E. 107, 37 Am. St. Rep. 621, 21 L. R. A. 560; *Olney v. Conanicut Land Co.*, 16 R. I. 597, 18 Atl. 181, 27 Am. St. Rep. 767; *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841. Occasionally, however, it is held that even a director is entitled to obtain a preference. As stated in a Missouri case, "The trust fund doctrine . . . can extend no further than to restrain the disposition thereof to good faith creditors of the corporation, whether director or non-director creditors": *Butler v. Harrison L. & M. Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464. A director acting in good

which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or violation of fiduciary duty, and the like.^a It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit;¹ but in many

¹ See *Frue v. Loring*, 120 Mass. 507,—a decision based upon the narrow and statutory jurisdiction of the Massachusetts courts, and not in harmony with the general doctrines of equity.

faith may deal with a solvent corporation and take security from it. The subsequent insolvency will not preclude him from enforcing his security: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

On the other hand, a few courts have argued that the assets of a corporation are in reality a trust fund, and accordingly have held that an insolvent corporation cannot pay or secure certain creditors to the exclusion of others: *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 22 N. E. 293, 15 Am. St. Rep. 644, 5 L. R. A. 378 (citing the text); *Fowler v. Bell*, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 32 L. R. A. 825 (no preference allowed after corporation has become insolvent and has ceased to do business); *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810; *Cook v. Moody*, 18 Wash. 114, 50 Pac. 1020, 63 Am. St. Rep. 872. In Tennessee, the assets become a trust fund for equal *pro rata* distribution, from the date of insolvency. There must, however, be some positive act of insolvency, such as the filing of a bill to administer its assets, or the making of a general assignment, or a permanent cessation to do

business: *Memphis Barrel, etc., Co. v. Head*, 99 Tenn. 172, 42 S. W. 13, 63 Am. St. Rep. 825. If the company continues to be a going concern, it may make preferences, although the liabilities greatly exceed the assets: *Tradesman Pub. Co. v. Knoxville C. W. Co.*, 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593.

The property of a corporation may perhaps be regarded as a trust fund for creditors and stockholders in the sense that it cannot be given away or disposed of without consideration, or in fraud of creditors and stockholders: *Buck v. Ross*, 68 Conn. 29, 35 Atl. 763, 57 Am. St. Rep. 60; *Atlas Nat. Bank v. More*, 152 Ill. 528, 38 N. E. 684, 43 Am. St. Rep. 274; *In re Brockway Mfg. Co.*, 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470; *Cole v. Millerton Iron Co.*, 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; *Durlacher v. Frazer*, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. Rep. 918.

(a) Quoted in *York v. Farmers' Bank*, (Mo. App.) 79 S. W. 968. This section is cited in *H. Stern, Jr., & Bros. Co. v. Wing*, (Mich.) 97 N.

instances a resort to the equitable jurisdiction is proper and even necessary.²

§ 1048. 3. Acquisition of Trust Property by a Volunteer, or Purchaser with Notice.—Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary.^a Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a *bona fide* purchaser for a valuable consideration and without notice.^b This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust; it enables them to follow trust property,—

² Com. Dig., tit. Chancery, 2, A, 1; 2 Fonbl. Eq., b. 2, c. 1, sec. 1, note b.

W. 791; Robinson v. Pierce, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 45 L. R. A. 66.

(a) The text is quoted in Walston v. Smith, 70 Vt. 19, 39 Atl. 252.

(b) The text is quoted in Farmers & Traders' Bk. v. Fidelity, etc., Co. of Md., 22 Ky. Law Rep. 22, 56 S. W.

671. The text is cited to the effect that a purchaser from a trustee, in contravention of the trust, becomes thereby a constructive, not an express, trustee, in Robinson v. Pierce, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 991, 45 L. R. A. 66.

lands, chattels, funds of securities, and even of money,—as long as it can be identified, into the hands of all subsequent holders who are not in the position of *bona fide* purchasers for value and without notice; it furnishes all those distinctively equitable remedies which are so much more efficient in securing the beneficiary's rights than the mere pecuniary recoveries of the law.¹ Even when the original

¹ *Adair v. Shaw*, 1 Schoales & L. 243, 262; *Rolfe v. Gregory*, 4 De Gex, J. & S. 576; *Leigh v. Macauley*, 1 Younge & C. 260, 265, 266; *Smith v. Barnes*, L. R. 1 Eq. 65; *Boursot v. Savage*, L. R. 2 Eq. 134; *Newton v. Newton*, L. R. 6 Eq. 135; *Heath v. Crealock*, L. R. 18 Eq. 215; *In re European Bank*, L. R. 5 Ch. 358, 362; *Ex parte Cooke*, L. R. 4 Ch. Div. 123; *In re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Lane v. Dighton*, Amb. 409; *Mansell v. Mansell*, 2 P. Wms. 678; *Lench v. Lench*, 10 Ves. 511; *Lewis v. Maddocks*, 17 Ves. 48, 56; *Pennell v. Deffell*, 4 De Gex, M. & G. 372, 388; *Mayor etc. v. Murray*, 7 De Gex, M. & G. 497; *Ernest v. Croysdill*, 2 De Gex, F. & J. 175; *Griffin v. Blanchar*, 17 Cal. 70; *Sharp v. Goodwin*, 51 Cal. 219; *Scott v. Umharger*, 41 Cal. 410; *Price v. Reeves*, 38 Cal. 457; *Siemon v. Schurck*, 29 N. Y. 598; *Swinburne v. Swinburne*, 28 N. Y. 568; *Stephens v. Board of Education*, 79 N. Y. 183; 35 Am. Rep. 511 (trust moneys paid by trustee to his creditor in discharge of an antecedent debt, but without notice of the trust,

(c) Trustee may sue, as well as beneficiary.—In such cases, where there exists a right on the part of the *cestui* to obtain possession of his property, there has arisen the question as to whether the trustee, who has been guilty of a breach of trust in conveying the property, cannot sue and recover the property for the benefit of the *cestui*: In *Wetmore v. Porter*, 92 N. Y. 76, Ames Cas. on Trusts 262, a trustee of bonds allowed them to be used as security by a partnership, of which he was a member, the remaining partner having knowledge that they were trust property when they were so used; upon suit, by the trustee, for the return of the bonds, the defendant objected on the ground that the trustee should have been joined as defendant; that his collusion in his individual capacity in the use of the bonds prevented his bringing the suit

for their return. The lower court concluded that the proper remedy was for "the *cestui que trust* to have another trustee appointed who shall bring the proper action". The judgment was reversed in the court of appeals, the court saying, "Whoever receives property knowing that it is the subject of a trust, and has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of its *cestui que trust*, but also of the trustee, to reclaim possession of the specific property, or to recover damages for its conversion in case it has been converted;" (citing *Briggs v. Davis*, 20 N. Y. 15, 75 Am. Dec. 363) and again, "We see no reason why a trustee who has been guilty even of an intentional fault is not entitled to his *locus penitentiae* and an opportunity to repair the wrong which he may have committed". The result of the

property is placed beyond the reach of the beneficiary by a sale to a *bona fide* purchaser for value and without notice, the trust, as will more fully appear hereafter, attaches to

cannot be followed by the beneficiary); *Holden v. New York and Erie Bank*, 72 N. Y. 286; *Newton v. Porter*, 69 N. Y. 133, 137, 139; 25 Am. Rep. 152; *Dotterer v. Pike*, 60 Ga. 29; *Musham v. Musham*, 87 Ill. 80; *Phelps v. Jackson*, 31 Ark. 272; *Veile v. Blodgett*, 49 Vt. 270; *Dey v. Dey*, 26 N. J. Eq. 182; *Mercier v. Hemme*, 50 Cal. 606; *Boyd v. Brinckin*, 55 Cal. 427; *Planters' Bank v. Prater*, 64 Ga. 609; *McVey v. McQuality*, 97 Ill. 93; *Burnett v. Gustafson*, 54 Iowa, 86; 37 Am. Rep. 190 (moneys paid to a creditor in discharge of an antecedent debt, but without notice of any trust, cannot be followed); *Michigan etc. R. R. v. Mellen*, 44 Mich. 321; *Winona etc. R. R. v. St. Paul etc. R. R.*, 26 Minn. 179; *Mechanics' Bank v. Seton*, 1 Pet. 399; *Russell v. Clark's Ex'rs*, 7 Cranch, 69, 97; *Wilson v. Mason*, 1 Cranch, 24; *Powell v. Monson etc. Mfg. Co.*, 3 Mason, 347; *Murray v. Ballou*, 1 Johns. Ch. 566; *Tradesman's Bank v. Merritt*, 1 Paige, 302; *Mechanics' Bank v. Levy*, 3 Paige, 606.^d

case seems most just and equitable, when it is considered that the trustee's suit is for the benefit, not of himself, but of the *cestui*, and that the defendant is not deprived of property to which he has established any *equitable* claim. See, as supporting the principle of the case, *Franco v. Franco*, 3 Ves. Jr. 75; *Price v. Blake-more*, 6 Beav. 569; *Baynard v. Woolley*, 20 Beav. 583; *Crichton v. Crichton*, [1896] 1 Ch. 870; *Sharp v. Jackson*, [1899] A. C. 419 (conveyance, to make good a breach, not void as in preference of creditors); *Meeks v. Olpherts*, 100 U. S. 564, 25 L. ed. 735; *Willson v. Louisville Trust Co.*, 19 Ky. Law Rep. 1590, 44 S. W. 121 (holding the *cestui* barred by the statute of limitations running against the trustee in such a case); *Lee v. Horton*, 104 N. Y. 538, 11 N. E. 51 (approving *Wetmore v. Porter*, *supra*); *Zimmerman v. Kinkle*, 108 N. Y. 282, 15 N. E. 407 (same); *Place v. Hayward*, 117 N. Y. 487, 23 N. E. 25; *Abbott v. Reeves*, 49 Pa. St. 494, 88 Am. Dec. 510; *Atwood v. Lester*, 20 R. I. 660, 40 Atl. 866 (ap-

proving *Wetmore v. Porter*, *supra*). In such cases it must, obviously, be a suit by the trustee in his *fiduciary*, or *representative* capacity, and not as an *individual*: *McColl v. Fraser*, 40 Hun 111 ("we think the complaint was properly dismissed for the reason that the action is prosecuted in the individual name of the plaintiff, and not in the character of a trustee of the funds which he collected as agent"); *Moss v. Cohen*, 32 N. Y. Supp. 1078, 11 Misc. Rep. 184 (same). The court was evidently not convinced of the inequitable position of the defendant in *Munnerlyn v. Augusta Sav. Bank*, 94 Ga. 356, 21 S. E. 575, where they admitted the right of the beneficiary in such case but refused to allow any relief where the beneficiary and the trustee were joined as plaintiffs; the ground on which the case is to be supported is not apparent; see, also, *Harris v. Smith*, 98 Tenn. 286, 39 S. W. 393.

(d) See, also, *Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955; *National Bank v. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693; *Union Pacific R. R. Co.*

the proceeds in the hands of the trustee who makes the transfer. The statement and grounds of the rule show that it does not extend to the case where the property is duly transferred or purchased in pursuance of an express trust to convey or sell, and for the purpose of carrying such trust

v. McAlpine, 129 U. S. 305, 314, 9 Sup. Ct. Rep. 286, 32 L. ed. 673; Wetmore v. Porter, 92 N. Y. 77; Dodge v. Stevens, 94 N. Y. 209; Baker v. New York Nat. Ex. Bank, 100 N. Y. 31, 50 Am. Rep. 150, 2 N. E. 452; Zimmerman v. Kinkle, 108 N. Y. 287, 15 N. E. 407; Cobb v. Knight, 74 Me. 253; Leake v. Watson, 58 Conn. 332, 18 Am. St. Rep. 270, 20 Atl. 343, 8 L. R. A. 666; Swift v. Williams, 68 Md. 236, 11 Atl. 835; Bath Paper Co. v. Langley, 23 S. C. 129; Rabb v. Flenniken, 32 S. C. 189, 10 S. E. 943; Bigham v. Coleman, 71 Ga. 576; Lee v. Lee, 67 Ala. 406, 423; Drake v. Thyng, 37 Ark. 228; Mills v. Swearingen, 67 Tex. 269, 3 S. W. 268 (where the trust moneys are loaned in pursuance of the requirements of the trust, the borrower does not become a trustee); Everett v. Railway Co., 67 Tex. 430, 3 S. W. 678; Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. 172. See, also, *ante*, §§ 688, 770.

The following cases are mere examples, wherein the *cestui* was allowed to follow the *res*: Missouri Broom Mfg. Co. v. Guymon, 115 Fed. 112, 53 C. C. A. 16; Duckett v. National Bk. of Baltimore, 88 Md. 8, 41 Atl. 161, 1062; Pancoast v. Geishaker, 58 N. J. Eq. 537, 43 Atl. 883; Flaherty v. Kayser, 62 N. J. Eq. 758, 48 Atl. 565; Butler v. Butler, 164 Ill. 171, 45 N. E. 426; Otis v. Otis, 167 Mass. 245, 45 N. E. 737; Hanrick v. Gresley, (Tex. Civ. App.) 48 S. W. 994; Elting v. First Nat. Bk., 173 Ill. 368, 50 N. E. 1095; Lehnard v. Specht, 54 N. E. 208, 54 N. E. 315;

Hale v. Dressen, 73 Minn. 277, 76 N. W. 31; Luse v. Rankin, 57 Nebr. 632, 78 N. W. 258; Foote v. Utah Com. & Sav. Bk., 17 Utah 283, 54 Pac. 104; Haslam v. Haslam, 19 Utah 1, 56 Pac. 243; Schenck v. Wicks, 23 Utah 576, 65 Pac. 732; Chapman v. Hughes, 134 Cal. 641, 66 Pac. 982; Mordecai v. Seignious, 53 S. C. 95, 30 S. E. 717; Harris v. Smith, 98 Tenn. 286, 39 S. W. 343; Webb v. Foley, 20 Ky. Law Rep. 1207, 49 S. W. 40; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691 (the action not based on the wrong of the trustee); James v. Allen, (N. J. Eq.) 57 Atl. 1091; Winter v. Truax, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160. To the effect that one who purchases without notice is not bound by the trust, see Whittle v. Vanderbilt Mfg. & Milling Co., 83 Fed. 48; Spencer v. Weber, 26 App. Div. 285, 49 N. Y. Supp. 687; Tapley v. Tapley, 115 Ga. 109, 41 S. E. 235; Bevan v. Citizens' Nat. Bk., 19 Ky. Law Rep. 242, 43 S. W. 242; Baily v. Dyer, 23 Ky. Law Rep. 1585, 65 S. W. 595. For a few recent cases considering what constitutes notice, see London & Canadian L. & A. Co., Limited, v. Duggan, [1893] A. C. 506; Simpson v. Molson's Bk., [1895] A. C. 270; Union Bk. of Austria, Limited, v. Murray-Aynsley, [1898] A. C. 693; Royalty v. Shirley, 21 Ky. Law Rep. 1015, 53 S. W. 1044; see, also, McWaid v. Blair State Bk., 58 Nebr. 618, 79 N. W. 620; Interstate Nat. Bank v. Claxton, (Tex. Civ. App.) 77 S. W. 44.

into effect. And where the rule does apply, there is some distinction between money and other kinds of trust property. If a trustee or other fiduciary person, in violation of his own duty, uses trust money to pay an antecedent debt of his own to a creditor who has no notice of the breach of trust, or that the money is subject to the trust, in such a manner that the money is received as a general payment, and not as a distinct and separate fund, then the money becomes free from the trust, and cannot be followed by the beneficiary into the hands of the creditor, although, in general, an antecedent debt does not constitute a valuable consideration.^{2 e}

² The reason given for this conclusion is, that money is not "ear-marked"; when received by the creditor and mingled with his other pecuniary assets, it cannot be distinguished and identified. Under these circumstances other kinds of property would remain subject to the trust, since the creditor would not be a *bona fide* purchaser for value: *Stephens v. Board of Education*, 79 N. Y. 183; 35 Am. Rep. 511; *Burnett v. Gustafson*, 54 Iowa, 86; 37 Am. Rep. 190; *Justh v. Bank of Commonwealth*, 56 N. Y. 478, 484.

(e) In *Jewell v. Clay*, 107 Iowa 52, 77 N. W. 511, the court, in speaking of *Jones v. Cheesebrough*, 75 N. W. 97, said: "We held, in effect, that it was not sufficient, in order that a trust be established, to trace trust funds into the estate of an insolvent trustee; that it must further appear, by presumption of law or otherwise, that the fund has been preserved to the trustee as by an increase of assets in his hands, from which it may be taken without impairing the rights of general creditors". The text is quoted in *Smith v. Des Moines Nat. Bk.*, 107 Iowa 620, 78 N. W. 238.

(f) Following trust funds that have been "mingled."—When a right is claimed against a trust *res*, as such, it is fundamental that a definite, specified object be ascertained; this would be true whether the trust relation was that resulting from an express or an "implied" trust. In the following cases, the general prin-

ciple that connects them is that which applies to the certainty and identification of the *res*, or its product. In a number of cases it has been held that though trust funds have been mixed with a general account they may still be followed if it can be clearly shown that the account or fund has been "swelled" by the addition of the trust funds: *In re Hallett's Estate*, 13 Ch. Div. 696; *In re Oatway*, [1903] 2 Ch. 356; *Peters v. Bain*, 133 U. S. 693, 10 Sup. Ct. Rep. 354, 33 L. ed. 696; *Massey v. Fisher*, 62 Fed. 958; *Montagu v. Pacific Bk.*, 81 Fed. 602; *In re Wolff*, 99 Fed. 485; *Samson v. Rouse*, 72 Vt. 422, 48 Atl. 666; *Bohle v. Hasselbroch*, 64 N. J. Eq. 334, 51 Atl. 508, 61 L. R. A. 323; *Roca v. Byrne*, 145 N. Y. 182, 45 Am. St. Rep. 599, 39 N. E. 812 (it seems it should not have been held a trust, for interest was paid on the amount); *Winstandley v. Second Nat. Bank*, 13

§ 1049. 4. Fiduciary Persons Purchasing Property with Trust Funds.— Another important form of the trust arises from the acts of persons already possessing some fiduciary character or standing in some fiduciary relation. Whenever a trustee or other person in a fiduciary capacity, acting apparently within the scope of his powers,— that is, having

Ind. App. 544, 41 N. E. 956 (the case is criticised in 9 Har. Law Rev. 428, as "erroneously" assuming that the money was to be held in trust when collected); In re Holmes, 37 App. Div. 15, 55 N. Y. Supp. 708, 159 N. Y. 532, 53 N. E. 1126; United Nat. Bk. v. Weatherby, 70 App. Div. 279, 75 N. Y. Supp. 3; In re Steinway's Estate, 37 Misc. Rep. 705, 76 N. Y. Supp. 452; Capital Nat. Bk. v. Coldwater Nat. Bk., 49 Nebr. 786, 59 Am. St. Rep. 572, 69 N. W. 115; State v. Midland State Bank, 52 Nebr. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; Farmers & Traders' Bk. v. Kimball M. Co., 1 S. Dak. 388, 36 Am. St. Rep. 739, 47 N. W. 402; Kimmel v. Dickson, 5 S. Dak. 221, 49 Am. St. Rep. 869, 58 N. W. 561, 25 L. R. A. 309; Twohy Mercantile Co. v. Melbye, 83 Minn. 394, 86 N. W. 411; Marshall's Ex'rs v. Hall, 42 W. Va. 641, 26 S. E. 300; Culver v. Guyer, 129 Ala. 602, 29 South. 779; Farmers & Traders' Bk. v. Fidelity, etc., Co. of Md., 108 Ky. 384, 56 S. W. 671; Guignon v. First Nat. Bk., 22 Mont. 140, 55 Pac. 1051, 1097; Hopkins v. Burr, 24 Colo. 502, 65 Am. St. Rep. 238, 52 Pac. 670; Hazeltine v. McAfee, 5 Kan. App. 119, 48 Pac. 886; Kansas State Bk. v. First State Bk., 62 Kan. 788, 64 Pac. 634; Dunham v. Siglin, 39 Oreg. 291, 64 Pac. 661; Reeves v. Pierce, 64 Kan. 502, 67 Pac. 1108; Myers v. Board of Education, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; Schwartz v. Gerhardt, (Oreg.) 75 Pac. 698; City of

Lincoln v. Morrison, 64 Nebr. 822, 90 N. W. 905, 57 L. R. A. 885. In many of the foregoing cases it was stated that there was a sufficient identity if it could be shown that the trust fund was traced into the vault of the bank and that the depositor had kept an equal amount on deposit since the fund was paid in. The court was thereby satisfied that the trust *res* had contributed its value to the increase of the deposit. In passing on this question the Supreme Court of the United States in National Bk. v. Ins. Co., 104 U. S. 54, 26 L. ed. 693, stated: "The Master of the Rolls, Sir George Jessel (In re Hallett's Estate, 13 Ch. Div. 696), showed that the modern doctrine of equity, as regards property disposed of by persons in fiduciary positions, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it; . . . and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or money deposited in a bank account." In Holmes v. Gilman, 138 N. Y. at 376, 34 Am. St. Rep. 463, 34 N. E. 205, 20 L. R. A. 566, Peckham, J., in speaking of the right to

authority to do what he does,—purchases property with trust funds, and takes the title thereto in his own name, without any declaration of trust, a trust arises with respect to such property in favor of the *cestui que trust* or other beneficiary. Equity regards such a purchase as made in

follow the proceeds of trust funds, stated: "The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the *cestui que trust* has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. . . . It is somewhat akin to the principles of *Silsbury v. McCoon* (3 N. Y. 379, 53 Am. Dec. 307), where corn was wrongfully taken from its owner and converted into whisky. The court held the property was not changed in the hands of the wrongdoer and the whisky belonged to the owner of the original material." In applying this principle to the case of a deposit of money in bank, *Mitchel, J., in Twohy Mercantile Co. v. Melbye*, 78 Minn. 357, 81 N. W. 20, stated: "This doctrine has its basis in the right of property, and not in any theory of a preference to the owner of the property over creditors of the tortfeasor because of the unlawful conversion. It proceeds upon the theory that the product or avails of the property have imparted to them the nature of the original property, and belong to the same party. Hence the necessity, in order to impress a fund with a trust on this ground, to establish its identity with the property or fund which was originally subject to the trust."

When trust money has been mingled with other funds, and the trustee has subsequently withdrawn a portion, it is presumed by the court that he has withdrawn his own money and left the trust funds; and therefore it is only necessary to show that an amount has remained on deposit that is equal to the amount of the trust fund: *In re Wolff*, 99 Fed. 485; *Young v. Glendenning*, 194 Pa. St. 550, 45 Atl. 364 (if it has all been withdrawn, the *cestui's* right is gone); *Blair v. Hill*, 50 App. Div. 33, 63 N. Y. Supp. 670; *Wulbern v. Timmons*, 55 S. C. 456, 33 S. E. 568; *Guignon v. First Nat. Bk.*, 22 Mont. 140, 55 Pac. 1051, 1097; *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47, 38 Pac. 926, 29 L. R. A. 226. The principle is recognized in practically all of the cases above in this note though not a point for express decision. The leading case is *In re Hallett's Estate*, 13 Ch. Div. 696, in which Jessel, M. R., stated: "It seems to me perfectly plain that he (the trustee) cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag, with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purpose £100, is it tolerable for anybody

trust for the person beneficially interested, independently of any imputation of fraud, and without requiring any proof of an intention to violate the existing fiduciary obligation, because it assumes that the purchaser intended to act in pursuance of his fiduciary duty, and not in violation of it.

to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some other money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers? Where the entire fund has been dissipated it has been pertinently remarked: "Knight Bruce's chest — Jessel's bag — is empty;" *Slater v. Oriental Mills*, 18 R. L. 352, 27 Atl. 443. See, also, for a valuable case, *Metropolitan Nat. Bk. v. Campbell Com. Co.*, 77 Fed. 705.

In the following cases, where the *cestui's* right to follow the *res* was denied, the principle acted upon is generally the same as in the foregoing cases. It has generally been a question as to whether the court was satisfied that the *cestui's* property had really contributed to the fund in dispute. It is apparent, however, that in some of them the court followed a slightly more exacting rule than that adopted by some of the foregoing cases: In *Union Nat. Bk. v. Goetz*, 138 Ill. 127, 32 Am. St.

Rep. 119, 27 N. E. 907, after quoting from *Thompson's Appeal*, 22 Pa. St. 16, the court stated: "Enough has been shown to clearly indicate the line of decisions holding the doctrine that trust funds can only be pursued when they can be clearly distinguished from other property held by the trustee or by those representing him, and that this court is fully committed to that rule." See, also, *Boone Co. Nat. Bk. v. Latimer*, 67 Fed. 27; *Cushman v. Goodwin*, 95 Me. 353, 50 Atl. 50; *Ellicott v. Kuhl*, 60 N. J. Eq. 333, 46 Atl. 945; *Tucker v. N. H. Tr. Co.*, 69 N. H. 187, 44 Atl. 927; *Wetherell v. O'Brien*, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904; *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261, 33 Am. St. Rep. 302, 31 N. E. 414, 16 L. R. A. 516; *Hank v. Van Ingen*, 196 Ill. 20, 63 N. E. 705; *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458, 14 South. 84; *Bright v. King*, 20 Ky. Law Rep. 186, 45 S. W. 508; *Robinson v. Woodward*, 20 Ky. Law Rep. 1142, 48 S. W. 1082; *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47, 38 Pac. 926, 29 L. R. A. 226; *Ferchen v. Arndt*, 26 Oreg. 121, 46 Am. St. Rep. 603, 37 Pac. 161, 29 L. R. A. 664; *Texas Moline Plow Co. v. Kingman Texas Impl. Co.*, (Tex. Civ. App.) 80 S. W. 1042; *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118; *Officer v. Officer*, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

There are a few cases that have been criticised as attempting to extend the rule beyond its legitimate

This doctrine is of wide application; it extends to trustees, executors and administrators, directors of corporations, guardians, committees of lunatics, agents using money of their principals, partners using partnership funds, husbands purchasing property with money belonging to the

limits. It is stated that they maintain that a trustee's estate will be held subject to the claim of the *cestui* even though it is not shown that the trust *res* directly contributed to that portion of the estate which is held. That such holding is incorrect will be clearly seen by comparing them with the cases cited above in this note. The line of cases criticised is that headed by *McLeod v. Evans*, 66 Wis. 410, 57 Am. Rep. 287, 28 N. W. 173, 214; and including *Davenport Plow Co. v. Lamp*, 80 Iowa 722, 20 Am. St. Rep. 442, 45 N. W. 1049; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629. These cases have been overruled by *Monotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383. In speaking of *In re Hallett's Estate*, *supra*, with approval, Cassaday, J., said: "That case is as favorable to the plaintiff as any in the English courts; and yet it nowhere sanctions the proposition that the owner of property or money intrusted is entitled to a preference over other creditors of an insolvent estate out of property or assets to which no part of the trust fund, or the proceeds thereof, are traceable. All such cases turn upon the question of fact whether the trust property or fund, or the proceeds thereof, are traceable into any specific property or fund." In Nebraska the court followed *McLeod v. Evans*, *supra*, even though it had been overruled, as above: *Capital Nat. Bk. v. Coldwater Nat. Bk.*, 49 Nebr. 786, 59 Am. St. Rep. 572, 69 N. W. 115

(citing all the cases); but in *State v. Bank of Commerce*, 54 Nebr. 725, 75 N. W. 28, the court refused to follow the erroneous view, and by a later decision it seems to be definitely settled that *McLeod v. Evans* shall no longer be taken as an authority in that state: *City of Lincoln v. Morrison*, 64 Nebr. 822, 90 N. W. 905, 57 L. R. A. 885, and the earlier decision of *State v. Midland Bk.*, 52 Nebr. 1, 66 Am. St. Rep. 484, 71 N. W. 1011, is qualified in its effect. The later decisions of Kansas are influenced by *McLeod v. Evans*: *Myers v. Board of Education*, 51 Kan. 87, expressly follows it; the other decisions follow *Myers v. Board*, *supra*: See *Hazeltine v. McAfee*, 5 Kan. App. 119, 48 Pac. 886; *Kansas St. Bk. v. First St. Bk.*, 62 Kan. 788, 64 Pac. 634; *Reeves v. Pierce*, 64 Kan. 502, 67 Pac. 1108. It is not clear from the cases, just what the court of Missouri will hold; but they seem to have laid down a very loose rule in the following cases: *Evangelical Synod v. Schoeneich*, 143 Mo. 652, 45 S. W. 647; *Tierman's Ex'rs v. Security Bldg. & L. Assn.*, 152 Mo. 135, 53 S. W. 1072; *Pundmann v. Schoeneich*, 144 Mo. 149, 45 S. W. 1112; but see *Midland Nat. Bk. v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994. The rule in *McLeod v. Evans*, *supra*, is severely criticised in *Slater v. Oriental Mills*, 18 R. I. 352, 27 Atl. 443, a valuable case, presenting this doctrine in its proper light. The recent case of *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, is

separate estate of their wives, parents, and children, and all persons who stand in fiduciary relations towards others. Equity jurisprudence contains few more efficient doctrines than this in maintaining the beneficial rights of property.¹

¹ This form of trusts is treated by some writers as belonging to the denomination of "resulting" trusts, and it has one striking element in common with them,—the *intention* with which it is presumed the purchase was made. In every other respect it differs from resulting trusts, and clearly belongs, on principle, to the class of "constructive" trusts. It is always established *in invitum*, and although an assumption of fraud is not necessary, some element of fraud, actual or constructive, is in fact generally present: *Deg v. Deg*, 2 P. Wms. 412, 414; *Perry v. Phellips*, 4 Ves. 108; 17 Ves. 173; *Bennett v. Mahew*, cited 1 Brown Ch. 232; 2 Brown Ch. 287; *Keech v. Sandford*, Sel Cas. Ch. 61; 1 Lead. Cas. Eq. 48, 49, 62; *Lench v. Lench*, 10 Ves. 511; *Trench v. Harrison*, 17 Sim. 111; *Mathias v. Mathias*, 3 Smale & G. 552; *Ousley v. Anstruther*, 10 Beav. 453, 461; *Flanders v. Thompson*, 3 Woods, 9; *Watson v. Thompson*, 12 R. I. 466; *Thomas v. Standiford*, 49 Md. 181; *Burks v. Burks*, 7 Baxt. 353; *Miller v. Birdsong*, 7 Baxt. 531; *Winkfield v. Brinkman*, 21 Kan. 682; *Moss v. Moss*, 95 Ill. 449; *Dodge v. Cole*, 97 Ill. 338; 37 Am. Rep. 111; *Derry v. Derry*, 74 Ind. 560; *Roy v. McPherson*, 11 Neb. 197; 7 N. W. 873; *Reickhoff v. Brecht*, 51 Iowa, 633; 2 N. W. 522; *Barrett v. Bamber*, 81 Pa. St. 247; *Jones v. Dexter*, 130 Mass. 380; 39 Am. Rep. 459; *Michigan etc. R. R. Co. v. Mellen*, 44 Mich. 321; 6 N. W. 845; *Schlaefel v. Corson*, 52 Barb. 510; *McLarren v. Brewer*, 51 Me. 402; *White v. Drew*, 42 Mo. 561; *Stow v. Kimball*, 28 Ill. 93; *Barker v. Barker*, 14 Wis. 131; *Church v. Sterling*, 16 Conn. 388; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Bancroft v. Consen*, 13 Allen, 50; *Reid v. Fitch*, 11 Barb. 399; *Bridenbecker v. Lowell*, 32 Barb. 9; *Rohb's Appeal*, 41 Pa. St. 45; *Smith v. Burnham*, 3 Sum. 435; *Oliver v. Piatt*, 3 How. 333, 401; *Homer v. Homer*, 107 Mass. 82; *Settembre v. Putnam*, 30 Cal. 490; *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134.^a

The recent case of *Ferris v. Van Vechten*, 73 N. Y. 113, reversing 9 Hun, 12,

also useful for its statements of the competing rules upon this subject, and its review of the authorities.

See, also, *post*, § 1076.

(a) See a valuable discussion in *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160, 24 South. 984, 45 L. R. A. 66, and in the dissenting opinion of McIver, J., in *Green v. Green*, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525; see, also, citing the text, *Moore v. McLure*, 124 Ala. 120, 27 South. 499; *First Nat. Bank v. Leech*, 207 Ill. 215, 69 N. E. 890; *Bevan v. Citizens' Nat. Bk.*, 19 Ky. Law Rep. 1261, 43 S. W. 242; *Seibel v. Bath*, 5 Wyo. 409, 40 Pac.

756. See, generally, *Lagarde v. Aniston L. & S. Co.*, 126 Ala. 496, 28 South. 199; *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868; *James v. Groff*, 157 Mo. 402, 57 S. W. 1081; *Hill v. True*, 104 Wis. 294, 80 N. W. 462; *Wood v. Rahe*, 96 N. Y. 414, 48 Am. Rep. 640; *Hartsock v. Russell*, 52 Md. 619; *McCully v. McCully*, 78 Va. 159; *Brazel v. Fair*, 26 S. C. 370, 2 S. E. 293; *Rannels v. Isgrigg*, 99 Mo. 19, 12 S. W. 343; *Rose v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803, and cases cited; *Haney v. Legg*, 129 Cal. 619, 30 South. 34, 87 Am. St. Rep. 81

The evidence that the purchase was made with trust funds must, however, be clear and unmistakable.

§ 1050. 5. **Renewal of Leases by Partners and Other Fiduciary Persons.**^a—Another special form of constructive trusts, depending upon a much more general principle to be examined in subsequent paragraphs, has been established by a unanimity of decision. One member of a partnership cannot, during its existence, without the knowledge and consent of his copartners, take a renewal lease, in his own name or otherwise, for his own benefit and to the exclusion of his fellows, of premises leased by the firm or occupied by them as tenants. A lease so taken by a partner inures to the benefit of the whole firm; it is regarded as a continuation of or as “grafted on” the old lease; a trust will be impressed upon the leasehold estate; equity will treat the partner as a trustee for the firm, and if necessary and possible, will compel him to assign the renewal lease to it; if a condition inserted in such lease against assigning should prevent the relief of an actual assignment, it will not in the least prevent the court from enforcing the trust by

is a **very** instructive decision illustrating the extent and limits of this doctrine. An attempt was made to reach land purchased by a trustee, on the ground that it was paid for with trust funds. There was no evidence as to what amount of trust moneys was thus used, and in fact there was no direct positive evidence that *any* such funds were appropriated by the trustee in paying for the land. Held, that the doctrine could not be invoked on behalf of the plaintiff. While the general rule was fully admitted, in order that it should be applicable, the trust fund must be clearly and distinctly traced, and positively shown to have been used in the purchase. The relief could not be granted upon any mere inference. If the evidence only showed that at one time the trustee had trust funds in his hands, and that afterwards he bought and took the title to a piece of land in his own name, but went no farther, the court could not draw the inference from these bare facts that the trust funds were employed in the purchase, and could not impress a trust upon the land.^b

(distinguishing these trusts from “resulting” trusts); and see *ante*, §§ 422, 587.

(b) See, also, *Phillips v. Overfield*, 100 Mo. 466, 13 S. W. 705; *Sisemore v. Pelton*, 17 Oreg. 546, 21 Pac. 667. The text is cited to the point in *Bevan*

v. Citizens' Nat. Bk., 19 Ky. Law Rep. 1261, 43 S. W. 242; see, also, *ante*, § 1048, note.

(a) This section is cited in *Mal-lory v. Mallory-Wheeler Co.*, 61 Conn. 135, 23 Atl. 708.

compelling the partner to hold the legal title for the benefit of all. This rule applies under every variety of circumstances, provided the rights of the other partners are still subsisting at the time when the renewal lease is obtained. It operates with equal force whether the renewal lease was to begin during the continuance of the firm or after its termination; whether the partnership was for an undetermined period, or was to end at a specified time, and the renewal lease was not to take effect until the expiration of that prescribed time; whether there was or was not a right in the firm, by contract, custom, or courtesy, to a renewal of the original lease from the lessor; and even whether the landlord would or would not have granted a new lease to the other partners or to the firm. All these facts are wholly immaterial to the application of the doctrine, for its operation does not in the slightest degree depend upon the terms and provisions of the original lease, nor upon the attitude of the landlord. The doctrine is not confined to partners; it extends in all its breadth and with all its effects to trustees, guardians, and all other persons clothed with a fiduciary character, who are in possession of premises as tenants on behalf of their beneficiaries, or who are in possession as tenants of premises in which their beneficiaries are interested.^{1 b} As this rule results from

¹ In *Phyfe v. Wardell*, 5 Paige, 268, 28 Am. Dec. 430, Walworth, C., thus states the doctrine in its general form: "If a person who has a particular or special interest in a lease obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewed lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease." In *Mitchell v. Reed*, 61 N. Y. 123, 139, 19 Am. Rep. 252, the court, after a full examination of the authorities, summed up the discussion with the following propositions, which they held to be settled conclusions: "1. A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee, and as he held the original lease. 2. This does

(b) See, also, *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541 (confidential agent). The doctrine was carefully re-examined in the recent case of *In*

re Biss, [1903] 2 Ch. 40, 55, 64. The following is from the syllabus in that case: "A person renewing is only held to be a constructive trustee of

the relation of trust and confidence existing between the partners or other persons interested, it might be regarded as an outgrowth of the doctrine formulated in the preceding paragraph. It is more directly, however, a particular application of a broad principle of equity, extending to all actual and *quasi* trustees, that a trustee, or person clothed with a fiduciary character, shall not be permitted to use his position or functions so as to obtain for himself any

not depend upon any right which the *cestui que trust* has to the renewal, but upon the theory that the new lease is, in technical terms, a 'graft' upon the old one; and that the trustee 'had a facility,' by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit. 3. This doctrine extends to commercial partnerships, and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely, or 'behind the backs' of his associates, for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners, or to the firm. 4. It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal cannot be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership. 5. It cannot necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common; or there may be other reasons of a fiduciary nature why the transaction cannot be entered into." This conclusion and the statements of the text are fully sustained by the following cases, in which the doctrine has been applied under every variety of circumstances: *Keech v. Sandford*, Sel. Cas. Ch. 61; 1 Lead. Cas. Eq., 4th Am. ed., 48, 49, 62; *Holt v. Holt*, 1 Cas. Ch. 190; *Manlove v. Bale*, 2 Vern. 84; *Rakestraw v. Brewer*, 2 P. Wms. 511; *Pickering v. Vowles*, 1 Brown Ch. 197; *Lee v. Vernon*, 5 Brown Parl. C. 10, *Hargrave, arg.*; *Alden v. Fouracie*, 3 Swanst. 489; *Cook v. Collingridge, Jacob*, 607, 619; *Brown v. De Tastet, Jacob*, 284; *Griffin v. Griffin*, 1 Schoales & L. 352; *Featherston-*

the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested; as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mortgagee of a mortgaged lease." Tenants in common do not stand in such fiduciary relation to each other: *Id.*, p. 57; *Kennedy v. De Trafford*, [1897] App. Cas. 180.

For the extension of the general

doctrine of this paragraph to the cases where agents for purchase make use of information acquired in their fiduciary capacity to purchase for themselves after the termination of the agency, and adversely to the principal's interest, see *ante*, § 959, notes; *Trice v. Comstock*, 57 C. C. A. 646, 121 Fed. 620, 61 L. R. A. 176 (an instructive case); *De Bardeleben v. Bessemer L. & I. Co.*, (Ala.) 37 South. 511 (president of corporation); *Morris v. Reigel*, (S. Dak.) 101 N. W. 1086.

advantage or profit inconsistent with his supreme duty to his beneficiary.²

§ 1051. 6. Wrongful Appropriation or Conversion into a Different Form of Another's Property.—In the foregoing fourth form of constructive trust the fiduciary person appropriates trust funds in the purchase of property, but the court imputes no wrongful intent; it *assumes* that he was acting in pursuance of his trust. In the present case the wrongful intent necessarily exists; the intended violation of a fiduciary duty and of another's beneficial rights is the essential element. A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands

haugh v. Fenwick, 17 Ves. 298, 311; Moody v. Matthews, 7 Ves. 174, 185, and note in Sumner's ed.; Clegg v. Fishwick, 1 Macn. & G. 294; Clegg v. Edmondson, 8 De Gex, M. & G. 787; Clements v. Hall, 2 De Gex & J. 173; Burton v. Wookey, 6 Madd. 367; Blissett v. Daniel, 10 Hare, 493, 522, 536; Gardner v. McCutcheon, 4 Beav. 534; Lees v. Laforest, 14 Beav. 250; York etc. R'y Co. v. Hudson, 16 Beav. 485; Perens v. Johnson, 3 Smale & G. 419; Burdon v. Barkus, 3 Giff. 412; 4 De Gex, F. & J. 42; Holridge v. Gillespie, 2 Johns. Ch. 30; Van Horne v. Fonda, 5 Johns. Ch. 388, 407; Davoue v. Fanning, 2 Johns. Ch. 252, 258; Phyfe v. Wardell, 5 Paige, 268; 28 Am. Dec. 430; Armour v. Alexander, 10 Paige, 571; Wood v. Perry, 1 Barb. 114, 134; Gibbes v. Jenkins, 3 Sand. Ch. 130; Dickinson v. Codwise, 1 Sand. Ch. 214, 226; Dougherty v. Van Nostrand, 1 Hoff. Ch. 68, 70; Bennett v. Van Syckel, 4 Duer, 162; Dunlop v. Richards, 2 E. D. Smith, 181; Struthers v. Pearce, 51 N. Y. 357; Leach v. Leach, 18 Pick. 68, 76; Baker v. Whiting, 3 Sum. 475, 495; Kelley v. Greenleaf, 3 Story, 93, 101; Huson v. Wallace, 1 Rich. Eq. 1, 2, 4, 7; Lacy v. Hale, 37 Pa. St. 360; Barrett v. Bamber, 81 Pa. St. 247; Winkfield v. Brinkman, 21 Kan. 682; Jones v. Dexter, 130 Mass. 380; 39 Am. Rep. 459; Laffan v. Naglee, 9 Cal. 662; 70 Am. Dec. 678; Gower v. Andrew, 8 Pac. L. J. 617 (the rule correctly applied by the majority of the court to a confidential managing clerk of a firm).

In the cases where the rule was not applied it will be found that there were always some controlling facts which prevented its operation, even though the rule itself was fully recognized: See Acheson v. Fair, 3 Dru. & War. 512; Nesbitt v. Tredennick, 1 Ball & B. 29, 48; Maunsell v. O'Brien, 1 Jones (Ir.) 176, 184; Phillips v. Reeder, 18 N. J. Eq. 95; Musselman's Appeal, 62 Pa. St. 81; 1 Am. Rep. 382; Van Dyke v. Jackson, 1 E. D. Smith, 419; Anderson v. Lemon, 8 N. Y. 236; 4 Sand. 552.

² Fox v. Mackreth, 2 Brown Ch. 400; 2 Cox, 320; 1 Lead. Cas. Eq., 4th Am. ed., 188, 212, 237; Pooley v. Quilter, 2 De Gex & J. 327; 4 Drew. 184; Fosbrooke v. Balguy, 1 Mylne & K. 226; Docker v. Somes, 2 Mylne & K. 655. This principle is discussed in the following section.

wrongfully uses it for the purchase of lands, taking the title in his own name;* or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name,—in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a *bona fide* purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded. As a necessary consequence of this doctrine, whenever property subject to a trust is wrongfully sold and transferred to a *bona fide* purchaser, so that it is freed from the trust, the trust immediately attaches to the price or proceeds in the hands of the vendor, whether such price be a debt yet unpaid due from the purchaser, or a different kind of property taken in exchange, or even a sum of money paid to the vendor, as long as the money can be identified and reached in his hands or under his control.¹ It is not essential for the application of this

¹ The doctrine was most clearly and tersely stated by Turner, L. J., in *Pennell v. Deffell*, 4 De Gex, M. & G. 372, 388: "It is an undoubted principle of this court that as between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust": *Fox v. Mackreth*, 1 Lead. Cas. Eq., 188, 212, 237; *Taylor v. Plumer*, 3 Maule & S. 562, 574, 576; *Ex parte Dumas*, 1 Atk. 232, 233; *Lane v. Dighton*, Amb. 409, 411, 413; *Lench v. Lench*, 10 Ves. 511, 517; *Lewis v. Madocks*, 17 Ves. 48, 51, 58; *Grigg v. Cocks*, 4 Sim. 438; *Ernest v. Croysdill*, 2 De Gex, F. & J. 175; *Barnes v. Addy*, L. R. 9 Ch. 244; *Ex parte Cooke*, L. R. 4 Ch. Div. 123; *Nant-y-Glo etc. Co. v. Grave*, L. R. 12 Ch. Div. 738; *In re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Rolfe v. Gregory*, 4 De Gex, J. & S. 576; *Mansell v. Mansell*, 2 P. Wms. 678; *Wells v. Robinson*, 13 Cal.

(a) See, also, *Hanna v. McLaughten*, 158 Ind. 292, 63 N. E. 475.

doctrine that an actual trust or fiduciary relation should exist between the original wrong-doer and the beneficial owner. Wherever one person has wrongfully taken the property of another, and converted it into a new form, or

133, 140, 141; Lathrop v. Bampton, 31 Cal. 17; 89 Am. Dec. 141; Schlaeffer v. Corson, 52 Barb. 510; Swinburne v. Swinburne, 28 N. Y. 568 (a most instructive case); Hastings v. Drew, 76 N. Y. 9, 16; Bartlett v. Drew, 57 N. Y. 587; Holden v. New York etc. Bank, 72 N. Y. 286; Newton v. Porter, 69 N. Y. 133, 136-140; 25 Am. Rep. 152; Taylor v. Mosely, 57 Miss. 544; Burks v. Burks, 7 Baxt. 353; Broyles v. Nowlin, 59 Tenn. 191; Tilford v. Torrey, 53 Ala. 120; Pindall v. Trevor, 30 Ark. 249; Friedlander v. Johnson, 2 Woods, 675; McDonough v. O'Neil, 113 Mass. 92; Tracy v. Kelley, 52 Ind. 535; Cookson v. Richardson, 69 Ill. 137; Coles v. Allen, 64 Ala. 98 (when no trust arises); Dodge v. Cole, 97 Ill. 338; 37 Am. Rep. 111; Derry v. Derry, 74 Ind. 560; Newton v. Taylor, 32 Ohio St. 399; Barrett v. Bamber, 81 Pa. St. 247; Veile v. Blodgett, 49 Vt. 270; Hubbard v. Burrell, 41 Wis. 365 (proceeds charged with a trust on sale to a *bona fide* purchaser); Michigan etc. R. R. v. Mellen, 44 Mich. 321; Murray v. Lylburn, 2 Johns. Ch. 441, 443; Boyd v. McLean, 1 Johns. Ch. 582; Shaw v. Spencer, 100 Mass. 382; 1 Am. Rep. 115; 97 Am. Dec. 107; Shelton v. Lewis, 27 Ark. 190; Mathews v. Heyward, 2 S. C. 239; Thompson v. Perkins, 3 Mason, 232; Duncan v. Jaudon, 15 Wall. 165.^b

In order that this species of trust may arise, it is not indispensable that the conventional relation of trustee and *cestui que trust*, or even any fiduciary relation, should exist between the original wrong-doer and the beneficial owner, although such relation generally exists in these cases. Where securities had been stolen, and transferred and sold by the thief, a trust was held impressed upon them and on their proceeds, in the hands of a transferee, with notice: Newton v. Porter, 69 N. Y. 133, 140; 25 Am. Rep. 152; Bank of America v. Pollock, 4 Edw. Ch. 215.^c

(^b) The above portion of the text is quoted in Schneider v. Sellers, (Tex.) 84 S. W. 417 (trustee conveys to purchaser with notice and he to *bona fide* purchaser; *cestui que trust* may recover value from first purchaser). This section is cited in Seibel v. Bath, 5 Wyo. 409, 40 Pac. 756. See, also, Houghton v. Davenport, 74 Me. 590; Parks v. Parks, 66 Ala. 326; Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77; Humphreys v. Butler, 51 Ark. 351, 11 S. W. 479; Riehl v. Evansville Foundry Ass'n, 104 Ind. 70, 3 N. E. 633; Munro v. Collins, 95 Mo. 33, 7 S. W. 461; Adams v. Lam-bard, 80 Cal. 426, 22 Pac. 180; War-

ren v. Union Bk. of Rochester, 157 N. Y. 259, 68 Am. St. Rep. 777, 51 N. E. 1036, 43 L. R. A. 256; Frohlich v. Seacord, 180 Ill. 85, 54 N. E. 286; Twohy Mercantile Co. v. Melbye, 78 Minn. 357, 81 N. W. 20, 83 Minn. 394, 86 N. W. 411; Rose v. Taylor, 17 Tex. Civ. App. 535, 43 S. W. 285, 44 S. W. 326; see, also, Merchants' Nat. Bk. v. Phillip, etc., Co., (Tex. Civ. App.) 39 S. W. 217.

(^c) The case of Bank of America v. Pollock, *supra*, is commented on favorably by several of the cases, *supra*, note b; and is expressly approved in Tecumseh Nat. Bk. v. Russell, 50 Nebr. 277, 69 N. W. 763.

transferred it, the trust arises and follows the property or its proceeds.^a

§ 1052. 7. **Wrongful Acquisition of the Trust Property by a Trustee or Other Fiduciary Person.**—In several of the preceding subdivisions, the trustee, by means of trust funds, has acquired property from a third person, which thereby becomes subject to the original trust. The present species includes all the various instances in which the trustee or other fiduciary person wrongfully acquires the title and beneficial use of the very trust property itself,—the property *in specie* which forms the subject-matter of the trust. The doctrine may be stated in its most general form, that whenever a trustee or person clothed with any fiduciary character takes advantage of the relation, and by means of it acquires the title or use of the trust property, or makes a profit or advantage to himself out of the trust and confidence, then a constructive trust is impressed upon such property, profits, or proceeds in his hands, in favor of the original beneficiary. The following are some of the most important applications of this doctrine: When a trustee, administrator, agent, attorney, or other fiduciary person, without the knowledge or consent of his beneficiary, purchases the trust property at a public or private sale; or when, by taking advantage of the trust and confidence reposed, and of the superiority conferred upon him by the relation, he unconscientiously acquires title to the trust property by purchase or gift directly from the beneficiary; or when he uses the trust property for his own benefit, or in his own business, and by means of such use obtains additional gains and profits,—in these and all similar cases equity impresses a constructive trust upon the property purchased or obtained, and upon the profits and acqui-

(d) The text is quoted with approval in *Farmers & Traders' Bk. v. Fidelity, etc., Co. of Md.*, 108 Ky. 384, 56 S. W. 671; *Schneider v. Sellers*, (Tex.) 84 S. W. 417; *Thum v. Wolstenholme*, 21 Utah 446, 61 Pac. 537;

and cited in *American Soda Fountain Co. v. Futrall*, (Ark.) 84 S. W. 505 (property subject to a chattel mortgage exchanged for other property; mortgagee entitled to a lien on the property received in exchange).

tions so made, for the benefit of the party beneficially entitled.¹ This form of constructive trusts embraces many particular instances, and the principle is extended to all abuses of confidence, whereby the one in whom the confidence is reposed obtains an advantage.

¹The dealings between persons in fiduciary relations have been fully examined in the previous section concerning "constructive fraud." The cases there cited are also authorities for and illustrations of the text, since the trust above mentioned arises from the wrongful dealings with trust property there described: See cases cited *ante*, under §§ 957, 963; *a* Fox v. Mackreth, 2 Brown Ch. 400; 2 Cox, 320; 1 Lead. Cas. Eq., 4th Am. ed., 188, 212, 237; Morret v. Paske, 2 Atk. 52, 54; Powell v. Glover, 3 P. Wms. 252, note; Docker v. Somes, 2 Mylne & K. 655; Wedderburn v. Wedderburn, 4 Mylne & C. 41; Great Luxembourg R'y Co. v. Magnay, 25 Beav. 586; Kimber v. Barber, L. R. 8 Ch. 56; Pooley v. Quilter, 2 De Gex & J. 427; 4 Drew. 184; Fosbrooke v. Balmguy, 1 Mylne & K. 226; Willett v. Blanford, 1 Hare, 253; Townend v. Townend, 1 Giff. 201; Fawcett v. Whitehouse, 1 Russ. & M. 132, 149; Bulkley v. Wilford, 2 Clark & F. 102, 177; Ernest v. Croysdill, 2 De Gex, F. & J. 175; Rolfe v. Gregory, 4 De Gex, J. & S. 576; Heath v. Crealock, L. R. 18 Eq. 215; Barnes v. Addy, L. R. 9 Ch. 244; Ex parte Cooke, L. R. 4 Ch. Div. 123; Nant-y-Glo etc. Co. v. Grave, L. R. 12 Ch. Div. 738; In re Hallett's Estate, L. R. 13 Ch. Div. 696; Webster v. King, 33 Cal. 348; Scott v. Umbarger, 41 Cal. 410; Guerrero v. Ballerino, 48 Cal. 118; Tracy v. Colby, 55 Cal. 67; Tracy v. Craig, 55 Cal. 91; Davis v. Rock Creek etc. Co., 55 Cal. 359; 36 Am. Rep. 40; Swinburne v. Swinburne, 28 N. Y. 568; Bennett v. Austin, 81 N. Y. 308; Hastings v. Drew, 76 N. Y. 9; Holden v. New York and Erie Bank, 72 N. Y. 286; Smith v. Frost, 70 N. Y. 65; Hubbell v. Medbury, 53 N. Y. 98; Gardner v. Ogden, 22 N. Y. 327; 78 Am. Dec. 192; Manning v. Hayden, 5 Saw. 360; Broyles v. Nowlin, 59 Tenn. 191; Pindall v. Trevor, 30 Ark. 249; Cookson v. Richardson, 69 Ill. 137; Reickhoff v. Brecht, 51 Iowa, 633; 2 N. W. 522; Treadwell v. McKeon, 7 Baxt. 201; Newton v. Taylor, 32 Ohio St. 399; Barrett v. Bamber, 81 Pa. St. 247; Jones v. Dexter, 130 Mass. 380; 39 Am. Rep. 459; Rea v. Copelin, 47 Mo. 76; Whitwell v. Warner, 20 Vt. 425; Giddings v. Eastman, 5 Paige, 561; Brown v. Lynch, 1 Paige, 147; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Grumley v. Webb, 44 Mo. 444; 100 Am. Dec. 304.^b

(a) And *post*, §§ 1075-1078.

(b) See, also, Powell v. Powell, 80 Ala. 11; Wren v. Followell, 52 Ark. 76, 12 S. W. 155; Carrier v. Heather, 62 Mich. 441, 29 N. W. 38; Weaver v. Fisher, 110 Ill. 146; Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Allen v. Jackson, 122 Ill. 567, 13 N. E. 840; Vallette v. Tedens, 122 Ill. 607, 3 Am. St. Rep. 502, 14 N. E. 52; Byington v. Moore, 62 Iowa 470,

17 N. W. 644; Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554; Bryan v. McNaughton, 38 Kan. 98, 16 Pac. 57; Holmes v. Holmes, 106 Ga. 858, 33 S. E. 216; Ravenswood S. & G. Ry. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. 285 (president of corporation wrongfully took salary); and see cases cited at end of note, § 1056.

§ 1053. 8. Trusts *ex Maleficio*.— In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein;^a and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust.^b The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer.¹

1 See *ante*, cases cited under §§ 946–951, which furnish many examples of these trusts; *Dyer v. Dyer*, 1 Lead. Cas. Eq., 4th Am. ed., 314, 350–364, note of Am. ed.; conveyances obtained from persons of weak mind, by undue influence, etc.: *Addison v. Dawson*, 2 Vern. 678; *Ex parte Roberts*, 3 Atk. 308, 310 (lunacy); *Att'y-Gen. v. Sothorn*, 2 Vern. 497; *Gould v. Okeden*, 4 Brown Parl. C. 198; *Price v. Berrington*, 7 Hare, 394; 3 Macn. & G. 486; *Harvey v. Mount*, 8 Beav. 439; deeds or wills fraudulently destroyed, in order to deprive the owner of his title: *Tucker v. Phipps*, 3 Atk. 359, 360; *Downes v. Jennings*, 32 Beav. 290; *Bailey v. Stiles*, 2 N. J. Eq. 220; see *ante*, § 919; owners conveying away their property, through mistake or ignorance of their rights: *Bingham v. Bingham*, 1 Ves. Sr. 126; *Naylor v.*

(a) Quoted in *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. Rep. 519; *Kroll v. Coach*, (Oreg.) 78 Pac. 397; *Schneider v. Sellers*, (Tex.) 84 S. W. 417.

(h) Quoted by Mr. Chief Justice Fuller in *Moore v. Crawford*, 130 U. S. 122, 128, 9 Sup. Ct. Rep. 447, 32 L. ed. 878. For recent decisions, quot-

ing the text, see *Parrish v. Parrish*, 33 Oreg. 486, 54 Pac. 352; *Savage v. Johnston*, 125 Ala. 673, 28 South. 547; *Kent v. Dean*, 128 Ala. 600, 30 South. 543; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255; *Schneider v. Sellers*, (Tex.) 84 S. W. 417; see, also, *Barnes v. Thuet*, 116 Iowa 359, 89 N. W. 1085.

While these instances are so many and various, there are certain special forms of frequent occurrence and great importance which require particular mention.

§ 1054. (1) **A Devise or Bequest Procured by Fraud.**—Whenever a person procures a devise or bequest to be made directly to himself,—and thereby preventing perhaps an intended testamentary gift to another,—through false and fraudulent representations, assurances, or promises that he will carry out the original and true purpose of the testator, and will apply the devise or bequest to the benefit of the third person who is the real object, and who would otherwise have been the actual recipient of the testator's bounty, and after the testator's death he refuses to comply with his

Winch, 1 Sim. & St. 555, 564; *Hollinshead v. Simms*, 51 Cal. 158; *Mercier v. Hemme*, 50 Cal. 606; *Dewey v. Moyer*, 72 N. Y. 70, 76; *Hammond v. Pennock*, 61 N. Y. 145; *Fulton v. Whitney*, 6 Hun, 16; *Baier v. Berberich*, 6 Mo. App. 537 (a combination to prevent bidding at a public sale of land renders the purchaser a trustee); *Beach v. Dyer*, 93 Ill. 295 (no trust against the grantee in a fraudulent conveyance of land, unless he was a party to the fraud); *Huxley v. Rice*, 40 Mich. 73 (trust from actual fraud); *Troll v. Carter*, 15 W. Va. 567; *Phelps v. Jackson*, 31 Ark. 272; *Hendrix v. Nunn*, 46 Tex. 141; *Veile v. Blodgett*, 49 Vt. 270; *Newell v. Newell*, 14 Kan. 202; *Jenkins v. Doolittle*, 69 Ill. 415; *Greenwood's Appeal*, 92 Pa. St. 181 (extent of such trustee's liability); *Barnes v. Taylor*, 30 N. J. Eq. 7 (ditto).^c

(c) The text is quoted in *Kroll v. Coach*, (Oreg.) 78 Pac. 397; cited in *American Soda Fountain Co. v. Futrall*, (Ark.) 84 S. W. 505 (the trust enforced in equity though there may be an action at law for damages). See, also, to the same general effect: *Walker v. Walker*, 199 Pa. St. 435, 49 Atl. 133; *Nester v. Gross*, 66 Minn. 371, 69 N. W. 39; *Cowin v. Hurst*, 124 Mich. 545, 83 Am. St. Rep. 344, 83 N. W. 274; *Lohler v. Lohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Kahn v. Klaus*, 64 Kan. 24, 67 Pac. 542; *Owen v. Monroe Co. Alliance*, 77 Miss. 500, 27 South. 383; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Jones v. Van Doren*, 130 U. S. 684, 9 Sup. Ct. Rep. 685, 32 L. ed. 1077; *Piper v. Hoard*, 107 N.

Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626; *Christy v. Sill*, 95 Pa. St. 380; *Bailey's Appeal*, 96 Pa. St. 253; *Hack v. Norris*, 46 Mich. 587, 10 N. W. 104 (vendees of *non compos mentis*); *Culbertson v. Young*, 50 Mich. 190, 15 N. W. 77; *Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853; *Coggswell v. Griffith*, 23 Nebr. 334, 36 N. W. 538; *Newis v. Topfer*, 121 Iowa 433, 96 N. W. 905; *O'Dell v. Moss*, 137 Cal. 542, 70 Pac. 547; *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143; *Bridgens v. West*, (Tex. Civ. App.) 80 S. W. 417; *Missouri Broom Mfg. Co. v. Guymon*, 115 Fed. 112, 53 C. C. A. 16; *Chantler v. Hubbell*, (Wash.) 75 Pac. 802; *Moore v. Crump*, (Miss.) 37 South. 109; *Lockhart v. Leeds*, (U. S.) 25 Sup. Ct. 76 (relocators of mine

former assurances or promises, but claims to hold the property in his own right and for his own exclusive benefit,—in such case equity will enforce the obligation by impressing a trust upon the property in favor of the one who has been defrauded of the testator's intended gift, and by treating the actual devisee or legatee as a trustee holding the mere legal title, and by compelling him to carry the trust into effect through a conveyance to the one who is beneficially interested. It is not necessary that the representations, assurances, or promises of the actual devisee or legatee should be in writing; they may be entirely verbal. There are a few cases which seem to hold that a trust will arise under these circumstances from a *mere verbal promise* of the devisee or legatee to hold the property for the benefit of another person. This position, however, is clearly opposed to settled principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud.¹

1 *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, per Lord Westbury (see *ante*, vol. 1, § 431); *Podmore v. Gunning*, 7 Sim. 644; 5 Sim. 485. In this case the vice-chancellor said, as the ground of his decision: "I have always understood that the court would interfere to prevent the obtaining of an estate by fraud, notwithstanding the statute of frauds." See also *Sellack v. Harris*, 5 Vin. Abr. 521; *Chamberlaine v. Chamberlaine*, Freem. Ch. 52; *Devenish v. Baines*, Prec. Ch. 3; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchfield*, 2 Vern. 506; *Drakeford v. Wilks*, 3 Atk. 539; *Walker v. Walker*, 2 Atk. 98; *Reech v. Kennigate*, Amb. 67; 1 Ves. Sr. 123; *Muckleston v. Brown*, 6 Ves. 52; *Stickland v. Aldridge*, 9 Ves. 516; *Chamberlain v. Agar*, 2 Ves. & B. 259; *Seagrave v. Kirwan*, 1 Beat. 157; *Dixon v. Olmius*, 1 Cox, 414; *Bulkley v. Wilford*, 8 Bligh, N. S., 111; *Chester v. Urwick*, 23 Beav. 407; *Middleton v. Middleton*, 1 Jacob & W. 94, 96; *Church v. Rutland*, 64 Pa. St. 432; *Hoge v. Hoge*, 1 Watts, 163, 213; 26 Am. Dec. 52; *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 29 N. J. Eq. 417. In this last case the point was directly decided that a trust arises from such a verbal promise made to the testator. The chancellor said (p. 419): "It is fraud for V. to have induced the testator to make a bequest to him, including money intended by the former for the complainants, at his suggestion and on his promise to pay them that money, after the testator's decease,

obtained title through fraudulent conspiracy with complainant's partner, whereby latter was to fail in his duty to perfect the original location; com-

plainant, in ignorance of this conspiracy, failed to perfect the location within the time required by the statute).

§ 1055. (2) Purchase upon a Fraudulent Verbal Promise.— A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose,— as, for example, a promise to convey the land to a designated individual, or to reconvey

out of the legacy to him, and then after receiving the entire legacy, to refuse to pay them the money which he had so promised to pay.” But, *per contra*, in *Bedilian v. Seaton*, 3 Wall. Jr. 279; Fed. Cas. No. 1,218, it seems to be held not only that no trust will arise from a mere verbal promise to the testator, however solemn, but none will arise from a fraudulent promise,— only a contract which equity will enforce. See also *ante*, cases cited under § 919; 1 Lead. Cas. Eq., 4th Am. ed., 350.^a

(a) *Socher's Appeal*, 104 Pa. St. 609; *Williams v. Vreeland*, 32 N. J. Eq. 734, and cases collected in the reporter's note; *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464; *Shields v. McAuley*, 37 Fed. 302; *Williams v. Fitch*, 18 N. Y. 546; *Ragsdale v. Ragsdale*, 68 Miss. 92, 24 Am. St. Rep. 256, 8 South. 315. The majority of the recent decisions do not insist on an actual fraudulent intention on the part of the legatee or devisee as necessary to the creation of a trust of this nature. In the important case of *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53, the trial court found as a fact that the legatees had made no express promise to obtain the bequest, and had practiced no fraud; the court say (p. 412): “This finding is assailed, but unsuccessfully so far as it frees the legatees from a charge of actual fraud. In that respect we agree that there was no evil or selfish intention on their part”; and further, “Where, in such case, the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him to be by him applied for the benefit of others, it has all the force and effect of an ex-

press promise”; citing *Wallgrave v. Tebbs*, 2 Kay & J. 321; *Schultz's Appeal*, 80 Pa. St. 405. In *Sprinkle v. Hayworth*, 26 Gratt. 384, *Staples, J.*, dissented from the majority holding, and correctly stated: “If, for example (in the familiar instance), the testator communicates his intention to the devisee of charging a legacy on his estate, and the devisee should tell him it is unnecessary, and he will pay it, the legacy being thus prevented, the devisee will be required to make it good. In such case it does not matter whether the devisee made the representation fraudulently or not. The fraud is in the refusal to pay the legacy; not in the promise, but in the breach.” The whole subject underwent an exhaustive discussion in *In re Fleetwood*, L. R. 15 Ch. Div. 594, and it was held that no actual or personal fraud on the part of the legatee was necessary to give the court jurisdiction to enforce the trust. The case of *In re Stead*, [1900] 1 Ch. 237, is a valuable one discussing the case when the devise is to tenants in common, or to joint tenants. In *Moore v. Ransdel*, 156 Ind. 658, 59 N. E. 936, 60 N. E. 1068, the court said: “An actual fraudu-

it to the grantor, and the like,—and having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement.^{1 a}

¹ The trust in such cases arises wholly from the fraud; the statute of frauds requiring a written declaration of trust does not apply, since trusts *ex maleficio* are excepted from its operation: *Hunt v. Roberts*, 40 Me. 187; *Hodges v. Howard*, 5 R. I. 149; *Fraser v. Child*, 4 E. D. Smith, 153; *Hoge v. Hoge*, 1 Watts, 163, 214; 26 Am. Dec. 52; *Cousins v. Wall*, 3 Jones Eq. 43; *Cameron v. Ward*, 8 Ga. 245; *Jones v. McDougal*, 32 Miss. 179; *Martin v. Martin*, 16 B. Mon. 8; *Arnold v. Cord*, 16 Ind. 177; *Laing v. McKee*, 13 Mich. 124; 87 Am. Dec. 738; *Nelson v. Worrall*, 20 Iowa, 469; *Coyle v. Davis*, 20

lent intention on the part of the heir or devisee is not necessary to the creation of a trust of this nature." See, also, *Curdy v. Berton*, 79 Cal. 420, 12 Am. St. Rep. 157, 21 Pac. 858; *In re Keleman*, 126 N. Y. 73, 26 N. E. 968; *In re Maddock*, [1902] 2 Ch. 220; *In re Hetley*, [1902] 2 Ch. 866; *In re Pitt Rivers*, [1902] 1 Ch. 403; *Tennant v. Tennant*, 43 W. Va. 547, 27 S. E. 334; *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; *Pol-lard v. McKenney*, (Nebr.) 96 N. W. 679.

The object of the trust must, however, be communicated to the legatee or devisee in the testator's lifetime; otherwise there cannot be that acquiescence or implied promise on the part of the former which is necessary to raise the trust: See *In re Boyes*, L. R. 26 Ch. Div. 531. In *Oliffe v. Wells*, 130 Mass. 221, the distinction was made that where the will shows on its face that the devise or bequest is in trust, but the purposes of the trust are not stated, then the equitable estate results to the heirs at law or next of kin of the testator, and

cannot be divested by anything short of a testamentary disposition. This distinction seems to be entirely unsupported by authority; indeed, in many of the cases cited in this note the devise or bequest was expressed to be in trust, and not absolute: See *Cagney v. O'Brien*, 83 Ill. 72; *Podmore v. Gunning*, 7 Sim. 644; *In re Fleetwood*, L. R. 15 Ch. Div. 594; *Riordan v. Banon*, 10 Ir. Eq. 469; *Curdy v. Berton*, 79 Cal. 420, 12 Am. St. Rep. 157, 21 Pac. 858. In *Carver v. Todd*, 48 N. J. Eq. 102, 21 Atl. 943, 27 Am. St. Rep. 466, a trust arising out of an oral promise by a devisee was enforced against the creditors of the devisee.

(a) The text is quoted in *Parrish v. Parrish*, 33 Oreg. 486, 54 Pac. 352; *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116; *Gregory v. Bowlesby*, 115 Iowa 327, 88 N. W. 822; and cited in *Johnston v. Reilly*, (N. J. Eq.) 57 Atl. 1049; *Kent v. Dean*, 128 Ala. 600, 30 South. 543; *Mosely v. Mosely*, 86 Ala. 289, 5 South. 732. The question as to what constitutes fraud, in such cases, is not perfectly clear. Some cases

§ 1056. (3) No Trust from a Mere Verbal Promise.—The foregoing cases should be carefully distinguished from those in which there is a *mere* verbal promise to purchase and convey land. In order that the doctrine of trusts *ex*

Wis. 564; *Hidden v. Jordan*, 21 Cal. 92, 99–102; *Sandfoss v. Jones*, 35 Cal. 481, 489; *Coyote etc. Co. v. Ruble*, 8 Or. 284; *Troll v. Carter*, 15 W. Va. 567.^b

The doctrine is often used with great efficacy to prevent the triumph of fraud, and to protect persons under necessities, in cases where, at execution sale, or mortgage foreclosure, or other compulsory public sale, a party buys in the land under a prior fraudulent promise made to the owner that the purchaser will take the title, hold the property for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase price; and having thus by a fraudulent contrivance cut off competition, and prevented the owner from making other arrangements to protect

maintain that it must be fraud existing at the time the deed is made to the one sought to be held as constructive trustee: *Grove v. Kase*, 195 Pa. St. 325, 45 Atl. 1054, is an example. *Phillips, J.*, in *Pope v. Daffray*, 176 Ill. 478, 52 N. E. 58, quotes from *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310, as follows: "If A voluntarily conveys land to B, the latter having taken no measure to procure the conveyance, but accepting it and verbally promising to hold the property in trust for C, the case falls within the statute, and chancery will not enforce the parol promise. But if A was intending to convey the land directly to C, and B interposed and advised A not to convey directly to C, but to convey to him, promising, if A would do so, he, B, would hold the land in trust for C, chancery will lend its aid to enforce the trust, upon the ground that B obtained the title by fraud and imposition upon A. The distinction may seem nice, but it is well established. In the one case B has had no agency in procuring the conveyance to himself; in the other, he has had an active and fraudulent agency." The question that may well be asked, is, does it make any differ-

ence whether B intended at the time he obtained the conveyance, to violate the confidence reposed in him, or is it sufficient if he actively procures the conveyance and then, at some later time, concludes to violate it? It seems that his conduct in either case would be equally inequitable; and the fraud, after he has actively procured the conveyance, would consist in his holding the property contrary to the terms of the agreement. See the statement in *Goodwin v. McMin*, 193 Pa. St. 646, 74 Am. St. Rep. 703, 44 Atl. 1094; see, also, *Seichrist's Appeal*, 66 Pa. St. 237, and *Whitney v. Hay*, 181 U. S. 77, 21 Sup. Ct. Rep. 537, 45 L. ed. 758. Such reasoning, however, is criticised in *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229, and a quotation is taken from *Perry v. McHenry*, 13 Ill. 227, wherein the court was considering the breach of the contract alone, and had rightly concluded that such breach was not sufficient to establish the trust. The criticism seems to have been formed without a real conception of the elements that constitute the inequitable conduct.

(b) It is said, in such cases, that the court will not allow the statute

maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an

his property, and having obtained the property perhaps for much less than its real value, he refuses to abide by his verbal promise, and retains the land or other property as absolutely his own. Equity will relieve the defrauded owner by impressing on the property a trust *ex maleficio*, and by treating the purchaser as a trustee *in invitum*. This application of the doctrine was explained and the authorities were examined in *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696; and *Wheeler v. Reynolds*, 66 N. Y. 227. See also *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Walker v. Hill's Ex'rs*, 22 N. J. Eq. 519; *Merritt v. Brown*, 21 N. J. Eq. 401, 404; *Farnham v. Clements*, 51 Me. 426; *McCulloch v. Cowher*, 5 Watts & S. 427, 430; *Kisler v. Kisler*, 2 Watts, 323; 27 Am. Dec. 308; *Schmidt v. Gatewood*, 2 Rich. Eq. 162; *Green v. Ball*, 4 Bush, 586; *Moore v. Tisdale*, 5 B. Mon. 352; *Rose v. Bates*, 12 Mo. 30; *Wolford v. Herrington*, 86 Pa. St. 39; 1 Lead. Cas. Eq., 4th Am. ed., 350-364.^c

As to enforcing such a verbal promise free from fraud, where the statute of frauds is not pleaded as a defense, see *Combs v. Little*, 4 N. J. Eq. 310; 40 Am. Dec. 207; *Marlatt v. Warwick*, 18 N. J. Eq. 108; 19 N. J. Eq. 439; *Merritt v. Brown*, 21 N. J. Eq. 401, 404.

of frauds to be used as an instrument of fraud: In *re Duke of Marlborough*, [1894] 2 Ch. 133; *Whitney v. Hay*, 181 U. S. 77, 21 Sup. Ct. Rep. 537, 45 L. ed. 758; *Potts v. Fitch*, 47 W. Va. 63, 34 S. E. 959; *Halsell v. Wise Co. Coal Co.*, 19 Tex. Civ. App. 564, 47 S. W. 1017; *Smith v. Balcom*, 24 App. Div. 437, 48 N. Y. Supp. 487. See, also, *Fischbeck v. Gross*, 112 Ill. 208; *Henschel v. Mamerio*, 120 Ill. 660, 12 N. E. 203; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599; *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572 (conveyance obtained by fraudulent promise to make a will in grantor's favor); *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; *Dickson v. Stewart*, (Nebr.) 98 N. W. 1085; *Catalani v. Catalani*, 124 Ind. 54, 24 N. E. 375,

19 Am. St. Rep. 73; *Avery v. Stewart*, (N. C.) 48 S. E. 775.

(c) See, also, *Rochevoucauld v. Bonstead*, [1897] 1 Ch. 196; *Cowperthwaite v. First Nat. Bank*, 102 Pa. St. 397; *Kraft v. Smith*, 117 Pa. St. 183, 11 Atl. 86; *Salsbury v. Black*, 119 Pa. St. 207, 4 Am. St. Rep. 631, 13 Atl. 67; *Tankard v. Tankard*, 84 N. C. 286; *McNair v. Pope*, 100 N. C. 404, 6 S. E. 234; *Fishback v. Green*, 87 Ky. 107, 7 S. W. 881; *Merrett v. Poulter*, 96 Mo. 237, 9 S. W. 586; and see *Lamar v. Wright*, 31 S. C. 60, 9 S. E. 736; *Boyd v. Hankinson*, 34 C. C. A. 197, 92 Fed. 49; *Smith v. Balcom*, 24 App. Div. 437, 48 N. Y. Supp. 487; *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015; *Allen v. Arkenburgh*, 158 N. Y. 697, 53 N. E. 1122; *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; *Mich. Tr. Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255; *Luscombe v.*

element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts.¹

¹ *Leman v. Whitley*, 4 Russ. 423; *Levy v. Brush*, 45 N. Y. 589; *Wheeler v. Reynolds*, 66 N. Y. 227; *Payne v. Patterson*, 77 Pa. St. 134; *Bennett v. Dollar Sav. Bank*, 87 Pa. St. 382; *Hon v. Hon*, 70 Ind. 135; *Gibson v. Decius*, 82 Ill. 304; *Farnham v. Clements*, 51 Me. 426; *Pattison v. Horn*, 1 Grant Cas. 301; *Hogg v. Wilkins*, 1 Grant Cas. 67; *Barnet v. Dougherty*, 32 Pa. St. 371; *Campbell v. Campbell*, 2 Jones Eq. 364; *Chambliss v. Smith*, 30 Ala. 366; *Whiting v. Gould*, 2 Wis. 552; 1 Lead. Cas. Eq., 4th Am. ed., 355-364.^a

Grigsby, 11 S. Dak. 408, 78 N. W. 357; *Barnes v. Thuett*, 116 Iowa 359, 89 N. W. 1085; *Hebron v. Kelly*, 75 Miss. 74, 21 South. 799; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Thompson v. Thompson*, (Tenn. Ch. App.) 54 S. W. 145; *Phillips v. Hardenburg*, (Mo.) 80 S. W. 891.

(a) This section is cited in *Moseley v. Moseley*, 86 Ala. 289, 5 South. 732; *Seymour v. Cushway*, 100 Wis. 580, 7 N. W. 769, 69 Am. St. Rep. 957 (parol partnership to deal in real estate). See, also, *Salisbury v. Clarke*, 61 Vt. 453, 17 Atl. 135; *Slocum v. Wooley*, 43 N. J. Eq. 453, 11 Atl. 264; *Salter v. Bird*, 103 Pa. St. 436; *Salisbury v. Black*, 119 Pa. St. 200, 4 Am. St. Rep. 631, 13 Atl. 67; *Watson v. Young*, 30 S. C. 144, 8 S. E. 706; *Bland v. Talley*, 50 Ark. 76, 6 S. W. 234; *McClain v. McClain*, 57 Iowa 167, 10 N. W. 333; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984; *Whiting v. Dyer*, 21 R. I. 278, 43 Atl. 181; *Sipes v. Decker*, 102 Wis.

588, 78 N. W. 769; *Bardon v. Hartley*, 112 Wis. 74, 87 N. W. 809; *Thorp v. Gordon*, (Tex. Civ. App.) 43 S. W. 323; *Lyons v. Bass*, 108 Ga. 573, 34 S. E. 721; *Davis v. Stambaugh*, 163 Ill. 557, 45 N. E. 170; *Dilts v. Stewart*, (Pa.) 1 Atl. 587 (and note at the end of the case); see, also, the following cases in which it was held there was no trust: *Nagengast v. Alz*, 93 Md. 522, 49 Atl. 333 (not from a promise to sell when the other can "raise money"); *Fitzgerald v. Fitzgerald*, 168 Mass. 488, 47 N. E. 431; *Perkins v. Perkins*, 181 Mass. 401, 63 N. E. 926; *McCloskey v. McCloskey*, 205 Pa. St. 491, 55 Atl. 180; *Emerson v. Galloupe*, 158 Mass. 146, 32 N. E. 118; *Martin v. Martin*, (Iowa) 94 N. W. 493. If, however, the parties stood in a relation of confidence with each other, the fact that, at the time of the conveyance and promise to reconvey, there was no fraudulent intent on the part of the grantee is immaterial; a constructive trust arises: See *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640 (mother and son); *Brisson v. Brisson*, 75 Cal.

§ 1057. (4) *Trusts in Favor of Creditors.*—In carrying out the general principle of trusts for the purpose of working ultimate justice, and reaching property where the legal title has been parted with, and is beyond the scope of legal process, a constructive trust is said to arise in favor of judgment creditors with respect to the property of their debtors, which has been transferred with the intent to defraud the creditors of their rights, or of which the legal title is vested in third persons with a like fraudulent intent, or which is of such a nature that it cannot be taken by execution upon judgments in legal actions.¹

§ 1058. *Rights and Remedies of the Beneficiary.*—The essential nature of constructive trusts has been explained in a former paragraph.¹ Equity regards the *cestui que trust*,

§ 1057,¹ The trust is, in reality, one in name alone; the creditor's right to reach the debtor's property is in no true sense an *interest* in that property; it is, at most, only an equitable lien on the property. Since the creditor's right to pursue his debtor's property under the circumstances mentioned is constantly spoken of by judges and text-writers as based upon a trust affecting such property, I have simply enumerated the case among the different species of constructive trusts. The examination of the doctrine is postponed until the subject of "creditors' suits" and other similar remedies is reached: See *Dewey v. Moyer*, 72 N. Y. 70, 76; *Bliss v. Matteson*, 45 N. Y. 22, 24; *Savage v. Murphy*, 34 N. Y. 508; 90 Am. Dec. 733; 8 Bosw. 75; *King v. Wilcox*, 11 Paige, 589; *Loomis v. Tift*, 16 Barb. 541, 543; *Mead v. Gregg*, 12 Barb. 653; *Day v. Cooley*, 118 Mass. 524; *Partridge v. Messer*, 14 Gray, 180; *Case v. Gerrish*, 15 Pick. 49, 50; *Mann v. Darlington*, 15 Pa. St. 310; *Jones v. Reeder*, 22 Ind. 111; *Kahn v. Gumberts*, 9 Ind. 430; and see *ante*, §§ 972, 973.^a

§ 1058,¹ See *ante*, § 1044.^a

525, 7 Am. St. Rep. 189, 17 Pac. 689, 90 Cal. 323, 27 Pac. 186 (wife and husband); *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Broder v. Conklin*, 77 Cal. 331, 19 Pac. 513 (attorney and client); *Bartlett v. Bartlett*, 15 Nebr. 593, 19 N. W. 691 (wife and husband); *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108 (conveyance to *de facto* guardian); *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Haight v. Pearson*, 11 Utah 51, 39 Pac. 479; *Bowler v. Curler*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. 226; *Koe-*

foed v. Thompson, (Nebr.) 102 N. W. 268 (conveyance to co-tenant); compare *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429 (relation between tenants in common not confidential).

§ 1057, (a) The author's note is quoted in *Sims v. Gray*, 93 Iowa 38, 61 N. W. 171. See, also, *Kitchell v. Jackson*, 71 Ala. 556; *Rieg v. Burnham*, 55 Mich. 39, 20 N. W. 708, 21 N. W. 431; *Mason v. Pierson*, 69 Wis. 585, 34 N. W. 921.

§ 1058, (a) See, also, *ante*, § 375.

in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. Numerous important questions concerning the conduct of trustees, their relations with the trust property and with the beneficiaries, which arise from express trusts, can have no existence in connection with constructive trusts. Every act of the trustee in holding, managing, investing, or otherwise dealing with the trust property as though he could retain it, is itself a violation of his paramount obligation to the beneficiary. If the trustee refuses or delays to convey the property to its beneficial owner, and retains it, derives benefit from its use, and appropriates its rents, profits, and income, he must account for all that he thus receives, and pay over the amount found to be due to the *cestui que trust*, as well as convey to him the *corpus* of the trust fund. The beneficiary, therefore, being the true owner, may always, by means of an equitable suit, compel the trustee to convey or assign the *corpus* of the trust property, and to account for and pay over the rents, profits, issues, and income which he has actually received, or, in general, which he might with the exercise of reasonable care and diligence have received.^{2 b} In such a suit the plaintiff is also entitled to any additional or auxiliary remedy, such as injunction, cancellation, accounting, which may be necessary to render his final relief fully efficient. No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it

² There are instances, where the trustee has acted in good faith, in which a court of equity would only hold him accountable for what he had *actually* received, and would not charge him with proceeds or profits which he might have received, nor with compound interest, etc.:^c See *Barnes v. Taylor*, 30 N. J. Eq. 7; *Greenwood's Appeal*, 92 Pa. St. 181.

(b) Cited to this effect in *Ravenswood, S. & G. Ry. Co. v. Woodyard*, 46 W. Va. 558, 33 S. E. 285.

(c) This note is cited in *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383.

and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a *bona fide* purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrong-doing trustee.³ The existence of a constructive trust, as of a resulting one, must be proved by clear, unequivocal evidence.⁴

SECTION VI.

POWERS, DUTIES, AND LIABILITIES OF EXPRESS TRUSTEES.

ANALYSIS.

- § 1059. Divisions.
- § 1060. *First.* Powers and modes of acting.
- §§ 1061–1083. *Second.* Duties and liabilities.
- §§ 1062–1065. I. To carry the trust into execution.
 - § 1062. 1. The duty to conform strictly to the directions of the trust.
 - § 1063. 2. The duty to account.
 - § 1064. 3. The duty to obey directions of the court.
 - § 1065. 4. The duty to restore the trust property at the end of the trust.
- §§ 1066–1074. II. To use care and diligence.
 - § 1067. 1. The duty of protecting the trust property.
 - § 1068. 2. The duty not to delegate his authority.
 - § 1069. 3. The duty not to surrender entire control to a co-trustee.
 - § 1070. 4. The amount of care and diligence required.
 - § 1071. 5. The duty as to investments.

³ Lathrop v. Bampton, 31 Cal. 17; 89 Am. Dec. 141.

⁴ As to delay in enforcing the beneficiary's right, see Rolfe v. Gregory, 4 De Gex, J. & S. 576; Manning v. Hayden, 5 Saw. 360; North Car. R. R. v. Drew, 3 Woods. 691 (acquiescence); German Am. Sem. v. Kiefer, 43 Mich. 105.

(d) The text is quoted in the following cases: Ferchen v. Arndt, 26 Oreg. 121, 46 Am. St. Rep. 603, 37 Pac. 161, 29 L. R. A. 664; Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. Rep. 221, 29 N. E. 904; Guignon v.

First Nat. Bank, 22 Mont. 140, 55 Pac. 1051, 1097. See, also, citing the text, Bartz v. Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848; see, also, ante, § 989.

- § 1072. The necessity of making investments.
- § 1073. Kinds of investments: When particular securities are expressly authorized.
- § 1074. The same: When no directions are given.
- §§ 1075-1078. III. To act with good faith.
 - § 1075. 1. The duty not to deal with the trust property for his own advantage.
 - § 1076. 2. The duty not to mingle trust funds with his own.
 - § 1077. 3. The duty not to accept any position, or enter into any relation, or do any act inconsistent with the interests of the beneficiary.
 - § 1078. 4. The duty not to sell trust property to himself, nor to buy from himself.
- §§ 1079-1083. IV. Breach of trust, and liability therefor.
 - § 1080. Nature and extent of the liability.
 - § 1081. Liability among co-trustees.
 - § 1082. Liability for co-trustees.
 - § 1083. The beneficiary acquiescing, or a party to the breach of trust.
 - § 1084. *Third.* The trustee's compensation and allowances.
 - § 1085. Allowances for expenses and outlays; lien therefor.
 - § 1086. *Fourth.* Removal and appointment of trustees.
 - § 1087. Appointment of new trustees.

§ 1059. Divisions.—The duties and liabilities of the trustees and corresponding rights of the beneficiaries in trusts arising by operation of law have been explained in the preceding section. The discussions of the present section refer primarily and mainly to the powers, duties, and liabilities of the trustees in express trusts of all kinds and for all purposes, and the statement of their duties and liabilities necessarily includes the correlative rights and remedies of the *cestuis que trustent*; some of the conclusions may, however, apply to the trustees in resulting and constructive trusts. The entire subject embraces the following subdivisions: 1. The trustee's powers and modes of acting; 2. His duties and liabilities; 3. His compensation and allowances; 4. Removal and appointment of trustees.

§ 1060. First. Powers and Modes of Acting.—Although an acceptance by the trustee is not required in order to assure the interest and rights of the beneficiary, it is essential to the existence of any power or liability of the trustee himself; both his powers and his liabilities originate upon his accept-

ance.¹ The acceptance may be express by executing an instrument in writing, or implied from acts done by the trustee in carrying the trust into effect or in dealing with the trust property.² When property is given upon trust to two or more trustees, they become joint owners, and, in general, all who have accepted must unite in conveyances and similar solemn and important acts.³ It results from the joint tenancy of trustees that when one dies or resigns, all the estate and powers remain in the survivors or sur-

¹ See *ante*, § 1007; *Ainsworth v. Backus*, 5 Hun, 414; *Thorne v. Deas*, 4 Johns. 84; *Smedes v. Bank of Utica*, 20 Johns. 372.

² *Urch v. Walker*, 3 Mylne & C. 702; *Crewe v. Dicken*, 4 Ves. 97; *Armstrong v. Morrill*, 14 Wall. 120, 139; see *Life Ass'n of Scotland v. Siddal*, 3 De Gex, F. & J. 58; *Youde v. Clond*, L. R. 18 Eq. 634.^a

³ This assumes, of course, that there is no express provision to the contrary in the instrument creating the trust: *Learned v. Welton*, 40 Cal. 349; *Saunders v. Schmælzle*, 49 Cal. 59, 67; *Boston v. Robbins*, 126 Mass. 384; *In re Bernstein*, 3 Redf. 20; *Crane v. Hearn*, 26 N. J. Eq. 378; *Lee v. Sankey*, L. R. 15 Eq. 204; *Charlton v. Earl of Durham*, L. R. 4 Ch. 433 (but a receipt by one of two executors who are also trustees is operative and sufficient).^b

(a) See, also, *Girard v. Flutterer*, 84 Ala. 323, 4 South. 292; *Kennedy v. Winn*, 80 Ala. 165; executor, by accepting that office, accepts the trusts vested in him as such: *Earle v. Earle*, 93 N. Y. 104. As stated in § 1007, *ante*, a trustee's acceptance is presumed, therefore to avoid liability he should disclaim before conduct indicating acceptance, or before the *cestui* has acted in reliance on the presumed acceptance. The disclaimer may be either by deed or parol; see *Adams v. Adams*, 21 Wall. 185, 22 L. ed. 504, *Ames Cas. on Trusts* 227; *Burritt v. Silliman*, 13 N. Y. 93, 64 Am. Dec. 532; *Beekman v. Bonsor*, 23 N. Y. 298, 575; *Matter of Robinson*, 37 N. Y. 261 (mere failure to act for twenty years is equivalent to a disclaimer); see *In re Lord and Fullerton's Contract*, [1896] 1 Ch. 228; *Adams v. Adams*, 64 N. H. 224, 9 Atl. 100 (the failure of the trustee to act for more than

two years, and allowing the property to go to ruin, justified the inference that he had refused to act); *Curtis v. Crossley*, 59 N. J. Eq. 358, 45 Atl. 905; *New South Bldg. & Loan Assn. v. Gann*, 101 Ga. 678, 29 S. E. 15.

(b) *Wilder v. Ranney*, 95 N. Y. 7; *Ham v. Ham*, 58 N. H. 70; *Crowley v. Hicks*, 72 Wis. 539, 40 N. W. 151; see *Bailey's Petition*, 15 R. I. 60, 1 Atl. 131; *Franklin Institute v. People's Sav. Bank*, 14 R. I. 632; where only a part of several trustees disclaimed the remaining ones were bound by the trust: *Bonifant v. Greenfield*, Cro. El. 80; *Adams v. Taunton*, 5 Madd. 435; *Re Stevenson*, 3 Paige 420, and cases in the note; *King v. Donnelly*, 5 Paige 46 (if they all disclaim, the legal estate nominally vests in them for the benefit of the *cestui*, and the court may remove them and appoint others); *Re Van Schoonhoven*, 5 Paige 559 (and the disclaiming trustee cannot

vivor; and this right of survivorship will not be affected merely because there is a power of appointing new trustees in the place of those dying or ceasing to act; it will operate until the new trustees are appointed.⁴ Upon the death of a single trustee or a last survivor, the trust may devolve upon his heir or administrator until a new trustee is appointed.⁵

§ 1061. **Second. Duties and Liabilities.**—In this subdivision I shall state the general duties of express trustees, the violations of them which constitute a breach of trust, and the nature and extent of the liabilities incurred thereby. The doctrines to be examined are those which courts of equity apply in controlling the conduct of all classes of per-

⁴ Lane v. Debenham, 11 Hare, 188; Warhurton v. Sandys, 14 Sim. 622; In re Waddell's Contract, L. R. 2 Ch. Div. 172; In re Cooke's Contract, L. R. 4 Ch. Div. 454; Saunders v. Schmalzle, 49 Cal. 59, 67; In re Bernstein, 3 Redf. 20.^c

⁵ Robson v. Flight, 4 De Gex, J. & S. 608 (the heir at law in such case cannot exercise *discretionary* powers given to the trustee, although he holds the estate subject to the trust); Sander v. Heathfield, L. R. 19 Eq. 21; Rackham v. Siddall, 1 Macn. & G. 607; Lord v. Wightwick, 4 De Gex, M. & G. 803; Russell v. Peyton, 4 Ill. App. 473; and see Clark v. Tainter, 7 Cush. 567; Treadwell v. Cordis, 5 Gray, 341, 359; Warden v. Richards, 11 Gray, 277; Dunning v. Ocean Nat. Bank, 6 Lans. 296; Evans v. Chew, 71 Pa. St. 47; Waters v. Margerum, 60 Pa. St. 39; Gray v. Henderson, 71 Pa. St. 368.^d

later accept the trust unless reappointed); Jackson v. Ferris, 15 Johns. 346 (the remaining trustee has full power to deal with the property in such case); Leggett v. Hunter, 19 N. Y. 445 (same); Clemens v. Clemens, 60 Barh. 366 (same, and subsequent death of disclaiming trustee vests title absolutely in the one accepting); De Saussure v. Lyons, 9 S. C. 492 (three of six executors and trustees qualified, and they were held capable of transferring the property left them); Putnam Free School v. Fisher, 30 Me. 523 (those accepting the trust are competent to con-

vey); Ratcliff v. Sangston, 18 Md. 383; Long v. Long, 62 Md. 33; Nicoll v. Miller, 37 Ill. 387 (one trustee disclaiming will not defeat a conveyance to the trustees).

(^c) Bailey's Petition, 15 R. I. 60, 1 Atl. 131; Long v. Long, 62 Md. 33; Golder v. Bresler, 105 Ill. 419.

(^d) See, also, In re Townsend's Contract, [1895] 1 Ch. 716; Boyer v. Sims, 61 Kan. 593, 60 Pac. 309; Dillard v. Dillard, 97 Va. 434, 34 S. E. 60 (containing a good statement as to the effect of the death of one trustee when a discretion was vested in three of them).

sons who are clothed with fiduciary relations towards property in which others are beneficially interested, including trustees proper, executors and administrators, guardians of infants or of persons *non compotes mentis*, directors or managers of corporations, and other *quasi* trustees.¹ All the various duties of actual and *quasi* trustees may be grouped under three general heads: 1. To carry out the trust; 2. To use care and diligence; 3. To act with good faith; and each of these contains several more specific obligations.

§ 1062. I. To Carry the Trust into Execution.—1. The Duty to Conform Strictly to the Directions of the Trust.^a—Under the general obligation of carrying the trust into execution, trustees and all fiduciary persons are bound, in the first place, to conform strictly to the directions of the trust. This is in fact the corner-stone upon which all other duties rest, the source from which all other duties take their origin. The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligations. If the trust is express, created by deed or will, then the provisions of the instrument must be followed and obeyed. If the fiduciary relation is established by law and regulated by settled legal rules, then these legal rules must constantly guide and restrain the conduct of the one who occupies the relation. In this manner the acts, powers, duties, and liabilities of executors, administrators, guardians, and corporation directors are governed by a fixed system of legal

¹ These doctrines are embodied in the proposed Civil Code of New York, secs. 1177–1188, 1196–1201, 1202–1207, and in the Civil Code of California, secs. 2228–2239, 2258–2263, 2267–2269, 2273–2275.

§ 1061, (a) The text is cited, as respects corporation directors, in *Bosworth v. Allen*, 168 N. Y. 157, 164, 85 Am. St. Rep. 667, 61 N. E. 163, 55 L. R. A. 751.

§ 1062, (a) Sections 1062–1087 are cited in *Jones v. Watford*, 64 N. J. Eq. 785, 53 Atl. 397. § 1062 is cited in *In re Holscher's Heirs*, (Iowa) 101 N. W. 759 (as to guardian's responsibility to the court).

rules which constitute their instrument or declaration of trust.¹ A trustee can use the property only for the purposes contemplated in the trust, and must conform to the provisions of the trust in their true spirit, intent, and meaning, and not merely in their letter. If, therefore, through non-feasance, he omits to carry the trust into execution, or through misfeasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have been thus violated.² Trustees, in carry-

¹ In the case of corporation directors and officers, the charters and by-laws are the primary source of the fiduciary power and duty. Even if the trust is a pure resulting or constructive one, the simple duty to convey the property and pay over all its profits to the beneficiary is marked out by the law.

² As an illustration merely, in a trust to sell, the trustee must not sell except for a proper object, and must protect the interests of all the *cestuis que trustent* in selling, by obtaining, as far as may be reasonable, the full value, or the best possible price, etc.: *Mortlock v. Buller*, 10 Ves. 292, 308; *Wilkins v. Fry*, 1 Mer. 244, 268; *Ord v. Noel*, 5 Madd. 438; *Adair v. Brimmer*, 74 N. Y. 539; *Penny v. Cook*, 19 Iowa, 538.^b The following cases are given only as illustrations of the doctrine, since its application must necessarily depend upon the circumstances of each case: *Stroughill v. Anstey*, 1 De Gex, M. & G. 635; *Boulton v. Beard*, 3 De Gex, M. & G. 608; *Lord v. Wightwick*, 4 De Gex, M. & G. 803; *In re Woodburn's Will*, 1 De Gex & J. 333; *Brunskill v. Caird*, L. R. 16 Eq. 493; *Carlyon v. Truscott*, L. R. 20 Eq. 348; *Thompson v. Hudson*, L. R. 2 Ch. 255; *Talbot v. Marshfield*, L. R. 3 Ch. 622; *Dance v. Goldingham*, L. R. 8 Ch. 902; *Tolson v. Sheard*, L. R. 5 Ch. Div. 19; *Avery v. Griffin*, L. R. 6 Eq. 606; *Vyse v. Foster*, L. R. 8 Ch. 309; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Roberts v. Moseley*, 64 Mo. 507; *Vose v. Trustees, etc.*, 2 Woods, 647; *Hill v. Den*, 54 Cal. 6; *Iles v. Martin*, 69 Ind. 114; *Bowman v. Pinkham*, 71 Me. 295; *In re Lewis*, 81 N. Y. 421; *James v. Cowing*, 82 N. Y. 449; *Sharp v. Goodwin*, 51 Cal. 219 (if trustees for creditors sell and transfer the property to a third person who has notice of the trust, but pays value, and he converts the property into money and pays off all the creditors, then they have no cause of action against the original trustees).^c

(b) See, also, *Huse v. Den*, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790.

(c) See, also, *Livermore v. Maxwell*, 87 Iowa 705, 55 N. W. 37, citing the text; *Reed v. Stouffer*, 56 Md. 236; *Boisseau v. Boisseau*, 79 Va. 73, 52 Am. Rep. 616; *Berrien v. Thomas*, 65 Ga. 61; *Jones v. McPhilips*, 82 Ala. 102, 2 South. 468;

Baker v. Ducker, 79 Cal. 365, 21 Pac. 764 (when property is held by a religious society in trust for its members, none of the members, though they constitute a majority, have any right or power to divert the property to the use of another and different church organization). That a power to sell does not generally imply a power to pledge or mortgage, see

ing the trust into execution, are not confined to the very letter of the provisions. They have authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual. This implied discretion in the choice of measures and acts is subject to the control of a court of equity, and must be exercised in a reasonable manner.³ It follows from their

³ The following are examples, and individual cases can only be cited as examples upon such a proposition: *Kekewich v. Marker*, 3 Macn. & G. 310; *Barnett v. Sheffield*, 1 De Gex, M. & G. 371; *Manser v. Dix*, 8 De Gex, M. & G. 703; *Tait v. Lathbury*, L. R. 1 Eq. 174; *In re Peyton's Trust*, L. R. 7 Eq. 463; *In re Chawner's Will*, L. R. 8 Eq. 569; *Messeena v. Carr*, L. R. 9 Eq. 260; *In re Lord Hotham's Trusts*, L. R. 12 Eq. 76; *In re Shaw's Trusts*, L. R. 12 Eq. 124; *Armstrong v. Armstrong*, L. R. 18 Eq. 541; *Hayward v. Pile*, L. R. 5 Ch. 214; *Astley v. Earl of Essex*, L. R. 6 Ch. 898; *Austin v. Austin*, L. R. 4 Ch. Div. 233; *Leeming v. Lady Murray*, L. R. 13 Ch. Div. 123; *Hayes v. Oatley*, L. R. 14 Eq. 1; *Goddard v. Brown*, 12 R. I. 31; *Aldrich v. Aldrich*, 12 R. I. 141; *Luigi v. Luchesi*, 12 Nev. 306; *Phelps v. Harris*, 51 Miss. 789; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Vallette v. Bennett*, 69 Ill. 632; *Zabriskie's*

Loring v. Brodie, 134 Mass. 453; *Wilson v. Md. Life Ins. Co.*, 60 Md. 150; *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247; but see *Waterman v. Baldwin*, 68 Iowa 255, 28 N. W. 435; *Bent-Otero Imp. Co. v. Whitehead*, 25 Colo. 354, 71 Am. St. Rep. 140, 54 Pac. 1023; *Schanewerk v. Hoberrecht*, 117 Mo. 22, 38 Am. St. Rep. 691, 22 S. W. 949 (deed directing a sale "at the court house door" is not properly followed by a sale at the court house door and at the church door also); *Hinton v. Pritchard*, 120 N. C. 1, 58 Am. St. Rep. 768, 26 S. E. 627 (where, in such case, the trustee is forced to use his discretion, it must be exercised in a reasonable and intelligent manner); *Hickok v. Still*, 168 Pa. St. 155, 47 Am. St. Rep. 880, 31 Atl. 1100 (a direction to sell during the settlor's life or at his death does not authorize the trustee to give an option to purchase within thirty-

three and one-third years); see, also, *Maxwell v. Barringer*, 110 N. C. 76, 28 Am. St. Rep. 668, 14 S. E. 516; *Mallory v. Kissler*, 18 Utah 11, 72 Am. St. Rep. 765, 54 Pac. 892; *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43 (the *cestui's* interest is not affected by an improper sale); *In re Cole's Estate*, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402 ("as the testator's [settlor's] scheme was worked out and inscribed in the will, so must it be. The trustees must carry out that to the letter"); *More v. Calkins*, 95 Cal. 455, 29 Am. St. Rep. 128, 30 Pac. 583 (the death of the grantor does not revoke a power of sale in a trust deed); see for the effect of a statute authorizing a sale on petition of part of the beneficiaries, *In re Freeman's Estate*, 181 Pa. St. 405, 59 Am. St. Rep. 659, 37 Atl. 591.

general duty that trustees cannot set up the adverse title of a stranger against their *cestuis que trustent*, and much

Ex'rs v. Wetmore, 26 N. J. Eq. 18; *Macon etc. R. R. v. Georgia etc. R. R.*, 63 Ga. 103; *Starr v. Moulton*, 97 Ill. 525.^d

Whenever the instrument of trust expressly confers upon trustees a discretion as to acts and measures in carrying out the general object of the trust, a court of equity will not generally interfere to control such discretion, except to prevent its abuse or unreasonable exercise to the actual or probable prejudice of the beneficiaries: *In re Beloved Wilkes's Charity*, 3 Macn. & G. 440; *Brophy v. Bellamy*, L. R. 8 Ch. 798; *In re Hodges*, L. R. 7 Ch. Div. 754; *Tabor v. Brooks*, L. R. 10 Ch. Div. 273; *Thomas v. Derang*, 1 Keen, 729; *Sillibourne v. Newport*, 1 Kay & J. 602; *In re Coe's Trust*, 4 Kay & J. 199; *Walker v.*

(d) See, also, *Moulton v. Holmes*, 57 Cal. 337. A direction in a will appointing a particular person solicitor or agent to the trustees imposes no duty on the trustees to continue such person their solicitor or agent: *Foster v. Elsley*, 19 Ch. Div. 518; citing *Finden v. Stephens*, 2 Phill. Ch. 142; *Shaw v. Lawless*, 5 Clark & F. 129. See *Clay v. Rufford*, 5 De G. & S. 768; *In re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332 (the consent of the *cestui*, required by the deed, must be given though he is bankrupt); *In re Peake's Settled Estates*, [1894] 3 Ch. 520 (see the effect of statute, and authorization by the court); *In re Crowther*, [1895] 2 Ch. 56 (a discretion to postpone the sale of property carries with it an implication to carry on the business); *In re Smith*, [1896] 1 Ch. 171 (same, but not indefinitely; court may limit the time); see *In re Rumney and Smith*, [1897] 2 Ch. 351; *In re Morrison*, [1901] 1 Ch. 701; see, for cases where a power of sale was implied from the general terms of the trust deed, *Boston Safe Deposit Co. v. Mixter*, 146 Mass. 100, 15 N. E. 141; *Harvard College v. Weld*, 159 Mass. 114, 34 N. E. 175 ("to manage and invest to the best advantage" carries a power to sell); *Purdie v. Whitney*, 20 Pick. 25 (a

direction to "invest and reinvest in stocks" carries an implication to sell that is "strictly necessary"); approved in *Goodrich v. Proctor*, 1 Gray 567; see, also, *Bohlen's Estate*, 75 Pa. St. 304; *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681 (a trust to manage property, and deliver to the beneficiaries at their majority, does not carry an implied power to sell); see for notice of sale under trust deed, *Yellowly v. Beardsly*, 76 Miss. 613, 71 Am. St. Rep. 536, 24 South. 973. As to implied power to lease, see *Hutcheson v. Hodnett*, 115 Ga. 990, 42 S. E. 422, and cases cited.

"Where in the administration or management of a trust estate by the trustees, especially where the estate consists of a business or of shares in a mercantile company, there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential, in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some

less buy up and hold such adverse title for their own benefit.⁴

§ 1063. 2. The Duty to Account.^a—As a branch of the general obligation of carrying the trust into execution, a trustee is also bound to account for all the trust property. He must not only render a full account of his conduct at the time of final settlement, but it is one of his most imperative duties to keep regular and accurate accounts during

Walker, 5 Madd. 424; *Banks v. Le Despencer*, 11 Sim. 508, 527; *Cowley v. Hartstonage*, 1 Dow, 361, 378; *Potter v. Chapman*, Amb. 98; *Wain v. Earl of Egmont*, 3 Mylne & K. 445; *Costabadie v. Costabadie*, 6 Hare, 410, 414; *Att'y-Gen. v. Mosely*, 2 De Gex & S. 398; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Goddard v. Brown*, 12 R. I. 31; *Aldrich v. Aldrich*, 12 R. I. 141; *Haydel v. Hurck*, 5 Mo. App. 267; *Starr v. Moulton*, 97 Ill. 525; *Morton v. Southgate*, 28 Me. 41; *Littlefield v. Cole*, 33 Me. 552; *Hawes Place Cong. Soc. v. Trustees etc.*, 5 Cush. 454; *Leavitt v. Beirne*, 21 Conn. 1; *Arnold v. Gilbert*, 3 Sand. Ch. 531; *Mason v. Mason's Ex'rs*, 4 Sand. Ch. 623; *Pulpress v. African Ch.*, 48 Pa. St. 204; *Cochran v. Paris*, 11 Gratt. 348, 356.^c

⁴ *Newsome v. Flowers*, 30 Beav. 461; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Roberts v. Moseley*, 64 Mo. 507; *Morrow v. Saline Co. Comm'rs*, 21 Kan. 484; and see *Neale v. Davis*, 5 De Gex, M. & G. 258, 263.^f

not being *sui juris* or not yet in existence, the court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustee": *In re New*, [1901] 2 Ch. 534. For an example of change of scheme by court's direction for purpose of effectuating testator's general intention, see *Pennington v. Metropolitan Museum of Arts*, (N. J. Eq.) 55 Atl. 468.

(e) See, also, *Haight v. Brisbin*, 96 N. Y. 135; *Garvey v. Garvey*, 150 Mass. 185, 22 N. E. 889; *Veazie v. Forsaith*, 76 Me. 172; *Bacon v. Bacon*, 55 Vt. 243; *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877, 14 Atl. 490; *Pole v. Pietsch*, 61 Md. 570; *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560 (a trustee substituted by the court for one who had discretion is not thereby clothed with

discretion); *Wayland v. Crank's Ex'r*, 79 Va. 602; *Faulk v. Dashiell*, 62 Tex. 642, 50 Am. Rep. 542; *Bull v. Cromie*, 81 Ky. 646. An interesting illustration of such control by the court is the case of *Collister v. Fassitt*, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586 (discretion as to amount of annuity to be paid beneficiary: court named a fixed amount when the discretion had not been fairly and honestly exercised).

(f) See, also, *Neyland v. Bendy*, 69 Tex. 711, 7 S. W. 497; *Baker v. Springfield, etc., Ry. Co.*, 86 Mo. 75.

(a) This section is cited in *Bosworth v. Allen*, 168 N. Y. 157, 164, 85 Am. St. Rep. 667, 61 N. E. 163, 55 L. R. A. 751; *In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74; *Page v. Marston*, 94 Me. 342, 47 Atl. 529.

the whole course of the trust of all property coming into, passing out of, or remaining in his hands. These accounts must clearly distinguish between the trust property and his own individual assets; for the two should never be mingled in the accounts nor in use; they should show all receipts and payments, and should at all times be open to the inspection, and produced at the demand of the beneficiary.¹

¹ A failure to keep full or accurate accounts raises all presumptions against the trustee; it may subject him to pecuniary loss by rendering him liable to pay interest, or chargeable with moneys received and not duly accounted for: See *Pearse v. Green*, 1 Jacob & W. 135; *Freeman v. Fairlee*, 3 Mer. 40, 42; *White v. Lady Lincoln*, 8 Ves. 363; *Lord Chedworth v. Edwards*, 8 Ves. 46; *Lupton v. White*, 15 Ves. 432, 440; *Ottley v. Gilby*, 8 Beav. 602; *Horton v. Brocklehurst*, 29 Beav. 504; *McDonnell v. White*, 11 H. L. Cas. 570; *Cramer v. Bird*, L. R. 6 Eq. 143; *Talbot v. Marshfield*, L. R. 3 Ch. 622; *Clark v. Moody*, 17 Mass. 145, 148; *Cooley v. Betts*, 24 Wend. 203; *Lockwood v. Thorne*, 11 N. Y. 170; 62 Am. Dec. 81; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Miller v. Simonton*, 5 S. C. 20.^b

(^b) See, generally, *Hopkinson v. Burghley*, L. R. 2 Ch. 447; *McCarthy v. McCarthy*, 74 Ala. 546; *Alexander v. Steele*, 84 Ala. 332, 4 South. 281; *Topping v. Windly*, 99 N. C. 4, 5 S. E. 14; *Libbett v. Maultsby*, 71 N. C. 345; *Martin v. Wilbourne*, 66 N. C. 321; *Christy v. Christy*, 176 Pa. St. 421, 35 Atl. 245; *Mintz v. Brock*, 193 Pa. St. 294, 44 Atl. 417; *McCulloch v. Tomkins*, 62 N. J. Eq. 262, 49 Atl. 474; *In re Morton's Est.*, 201 Pa. St. 269, 50 Atl. 933; *In re Scott's Est.*, 202 Pa. St. 380, 51 Atl. 1023; *Frethey v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839; *Averill v. Barber*, 24 App. Div. 53, 49 N. Y. Supp. 123; *Appeal of Glover*, 167 Mass. 280, 45 N. E. 744 (as to the right to reopen the account); *Royal v. Royal*, 30 Oreg. 448, 47 Pac. 828, 48 Pac. 695; *Gray v. Ward*, (Tenn. Ch. App.) 52 S. W. 1028; *Green v. Brooks*, 81 Cal. 328, 22 Pac. 849 (the right to compel an accounting does not depend on fraud; it is merely to determine what has been

received, and what expended, so as to determine whether the *cestui* is entitled to payment); *Weaver v. Fisher*, 110 Ill. 146; *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972; *Loud v. Winchester*, 52 Mich. 174, 17 N. W. 784; *In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495 (where his accounts have been kept in a negligent manner, the presumption will be against him in the settlement); *Elmer v. Loper*, 25 N. J. Eq. 475 (where the account shows improper dealings, the trustee will not be allowed compensation); *In re Gaston*, 35 N. J. Eq. 60; *Landis v. Scott*, 32 Pa. St. 495 (failure to keep an account compels the trustee to prove the non-receipt of money he should have received). As to what the account should show, see *Monroe v. Holmes*, 13 Allen 109; *Dodd v. Winship*, 133 Mass. 359; *Morrill v. Morrill*, 1 Allen 132 (need not account to a court for land not in the jurisdiction); *Clark v. Black-*

§ 1064. 3. The Duty to Obey Directions of the Court.—Wherever there is any *bona fide* doubt as to the true meaning and intent of provisions of the instrument creating the trust, or as to the particular course which he ought to pursue, the trustee is always entitled to maintain a suit in equity, at the expense of the trust estate, and obtain a judicial construction of the instrument, and directions as to his own conduct.^a Such directions he must, of course, faithfully obey, and if he does so, he will be relieved from all responsibility therefor. Wherever any suit or proceeding is instituted by the beneficiary or other person interested, and the court by its decree or order therein directs anything to be done or omitted by the trustee, such directions are imperative, and must be implicitly obeyed. A refusal or neglect to obey may render the trustee liable to summary punishment, as for a contempt, by fine and imprisonment.¹

¹ Several of these cases are examples of such applications, or of when applications are or are not necessary: In *re Shaw's Trusts*, L. R. 12 Eq. 124; In *re Strutt's Trusts*, L. R. 16 Eq. 629; In *re Potts's Estate*, L. R. 16 Eq. 631, and note; In *re T—*, L. R. 15 Ch. Div. 78; *Middleton v. Chichester*, L. R. 6 Ch. 152; *Evans v. Bear*, L. R. 10 Ch. 76; *Iles v. Martin*, 69 Ind. 114; *James v. Cowing*, 82 N. Y. 449; *Williams v. Dwinelle*, 51 Cal. 442, 446.^b Among the

ington, 110 Mass. 369. As a general rule, where the omission of the trustee to account is due to mere negligence, without any actual intent to defraud, simple interest alone is allowed the *cestui que trust* on the trust funds; but if the omission is willful, compound interest is allowed: *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *State v. Howarth*, 48 Conn. 207. As to the duty to produce documents and accounts for the inspection of the *cestui*, see In *re Tiltott*, L. R. [1892] 1 Ch. 86, *Ames Cas. on Trusts* 468; *Wynne v. Humbertson*, 27 Beav. 421 ("the rule is, that where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken

by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defense in any litigation against himself, must be produced to the *cestui que trust*"); see In *re Dartnall*, [1895] 1 Ch. 474. For the interest necessary to entitle one to an accounting, see *Hartman's Appeal*, 90 Pa. St. 203; In *re Dority*, 40 App. Div. 236, 57 N. Y. Supp. 1073; In *re Wagoner's Estate*, 190 Pa. St. 513, 42 Atl. 955. As to accounting by *quasi* trustees, see § 1421.

(a) Quoted in *Lake View M. & M. Co. v. Hannon*, 93 Ala. 87, 9 South. 539. This section is cited in *Page v. Marston*, 94 Me. 342, 47 Atl. 529.

(b) See, also, *Greeley v. Nashua*, 62

§ 1065. 4. The Duty to Restore the Trust Property at the End of the Trust.—Finally, when the trust is ended, and the authority of the trustee as such ceases, it is his duty to restore the property to the persons who are then entitled to it either by the terms of the instrument or by operation of legal rules. To accomplish this object, he is bound to make such conveyances as the parties may require, in order to vest the title in them.¹

instances where a suit for a judicial construction is proper is that of a will creating trusts, or giving property in trust: See *ante*, vol. 1, § 352, note 1. This particular subject is more fully examined in a subsequent section.^c

¹ The trustee *may*, under some circumstances, demand a release of the trust from those to whom he transfers the estate: *King v. Mullins*, 1 Drew. 308; *Goodson v. Ellison*, 3 Russ. 583; *Hampshire v. Bradley*, 2 Coll. C. C. 34; *Whitmarsh v. Robertson*, 1 Younge & C. 715; *Holford v. Phipps*, 3 Beav. 434; *Yeates v. Roberts*, 7 De Gex, M. & G. 227; 3 Drew. 170; *Cramer v. Bird*, L. R. 6 Eq. 143; *Stokes's Appeals*, 80 Pa. St. 337; *Pennock v. Lyons*, 118 Mass. 92 (a lease executed by trustees in ignorance of the fact that the *cestui que trust* had died, and the trust thereby ended, is voidable only).^a

N. H. 166; *Fairbanks v. Belknap*, 135 Mass. 181; *Floyd v. Forbes*, 71 Cal. 588, 12 Pac. 726; *Walrond v. Walrond*, 29 Beav. 586 (failure to comply with order to pay money may result in liability for *compound interest*). See, as to right to apply to the court for instructions, *Stapylton v. Neeley*, (Fla.) 32 South. 868; *Read v. Citizens' St. R. Co.*, 110 Tenn. 316, 75 S. W. 1056; see, also, *Bryan v. McCann*, (W. Va.) 47 S. E. 143.

(c) See §§ 1155–1157.

(a) *Saunders v. Nevil*, 2 Vern. 428 (the estate must be conveyed according to the terms of the trust); *Watts v. Turner*, 1 R. & M. 634. It would seem that the trustee could be compelled to make such conveyance, or do such acts, as regards the property, as he could do for himself in case he had the entire estate: *Dawkins v. Penrhyn*, 4 App. Cas. 51 (it seems he could be compelled to bar an estate tail, and enlarge it to a

fee-simple, for the benefit of the *cestui*); see *Turner v. Buck*, 22 *Viner's Abridgment* 21, pl. 5, where the court seems to have been misled by the mere fact that the *cestui* was a volunteer. The right to compel a conveyance upon the impossibility of a condition being performed, upon which depended a limitation over, seems well recognized: *In re Widow's Trusts*, L. R. 11 Eq. 408 (woman presumed past childbearing at fifty-three years and nine months); *Davidson v. Kempton*, L. R. 18 Ch. Div. 213 (same, fifty-four years); *In re White*, [1901] 1 Ch. 570 (same, fifty-six years, three months). *In Towle v. Delano*, 144 Mass. 95, 10 N. E. 769, the court refused to follow the case of *In re Widdow's Trusts*, *supra*, though the age of the woman was the same. See, also, *Bearden v. White*, (Tenn. Ch. App.) 42 S. W. 476; *In re Radcliffe*, [1892] 1 Ch. 227; *Inches v. Hill*, 106 Mass.

§ 1066. II. To Use Care and Diligence.—The second branch of the trustee's obligation is to use care and diligence in the discharge of his functions. This duty is very comprehensive; it extends through the entire range of his conduct; it is entirely independent of the question of good faith, for he will be liable for its failure even when no wrongful intent nor violation of good faith is charged upon him. He may be liable for its neglect by being held answerable for property actually lost through want of care or prudence, and also for moneys which he might have received if he had exercised due care, prudence, and judgment in his investments and other dealings with the trust estate. This head embraces the protection of trust property, the delegation of authority to third persons and to co-trustees, the amount of care and diligence requisite, and the important subject of making investments, which will be considered in the order here indicated.

§ 1067. 1. The Duty of Protecting the Trust Property.—The trustee is bound to protect the trust property in every

575 (a *cestui* obtained a conveyance of his portion of the estate).

As to the right of the *cestui* to call for a conveyance, generally, see *Onslow v. Wallis*, 1 Hall & Twells 513; *In re Lashmar* [1891] 1 Ch. 258; *Woolley v. Preston*, 82 Ky. 415; *Paine v. Forsaith*, 86 Me. 357, 30 Atl. 11; *Reid v. Gordon*, 35 Md. 174; *Lemen v. McComas*, 63 Md. 153; *Gunn v. Brown*, 63 Md. 96; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Archer v. American Water Works*, 50 N. J. Eq. 33, 24 Atl. 508; *Mathews v. McPherson*, 65 N. C. 189 (the principle recognized but a conveyance refused, as the *cestui's* right was not complete); *Aubert's Appeal*, 109 Pa. St. 447, 1 Atl. 336; *Fisher v. Wister*, 154 Pa. St. 65, 25 Atl. 1009; *Nightingale v. Nightingale*, 13 R. I. 113; *Whelan v. Reilly*, 3 W. Va. 597; *Chamberlain v. Maynes*, 108 Pa.

St. 39, 36 Atl. 410; *In re Barber*, 36 Misc. Rep. 433, 73 N. Y. Supp. 749; *Armistead's Ex'rs v. Hart*, 97 Va. 316, 33 S. E. 616; *Ordway v. Gardner*, 107 Wis. 74, 82 N. W. 696; *Thom's Ex'rs v. Thom*, 95 Va. 413, 28 S. E. 583; *Cherry v. Richardson*, 120 Ala. 242, 24 South. 570; *Webster v. Bush*, 19 Ky. Law Rep. 565, 39 S. W. 411, 42 S. W. 1124; *Adams v. Adams*, 21 Ky. Law Rep. 1756, 56 S. W. 151. For the right of a *cestui* to obtain a conveyance of specific property, instead of allowing the trustee or executor to sell, or manage it, and pay over the proceeds, see *In re Browne's Will*, 27 Beav. 324, *Ames Cas. on Trusts* 458; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *McDonald v. O'Hara*, 144 N. Y. 566, 39 N. E. 642; and see *ante*, § 991, note c.

reasonable manner during the continuance of the trust.¹ He must therefore with due diligence obtain possession of the trust property, and must then retain it securely under his own control. He cannot divest himself of the trust by conveying or assigning the property away to third persons, unless the trust itself is for the very purpose of a sale or other disposition; and even then he can only dispose of the property in pursuance of the trust, and to carry out its objects.² As a mode of obtaining secure possession, the

¹ The following cases are cited simply as illustrations of this duty, and as examples of acts which have been held to be or not to be violations of it: *Wiles v. Gresham*, 5 De Gex, M. & G. 770; *Lloyd v. Attwood*, 3 De Gex & J. 614; *Harper v. Hayes*, 2 De Gex, F. & J. 542; *Case v. James*, 3 De Gex, F. & J. 256; *Turquand v. Marshall*, L. R. 6 Eq. 112; *Taylor v. Cartwright*, L. R. 14 Eq. 167; *Ex parte Dressler*, L. R. 9 Ch. Div. 252; *Butler v. Carter*, L. R. 5 Eq. 276; *Talbot v. Marshfield*, L. R. 3 Ch. 622; *Dance v. Goldingham*, L. R. 8 Ch. 902; *Tolson v. Sheard*, L. R. 5 Ch. Div. 19; *In re T—*, L. R. 15 Ch. Div. 78; *Ex parte Culley*, L. R. 9 Ch. Div. 307; *Goddard v. Brown*, 12 R. I. 31; *Pool v. Dial*, 10 S. C. 440; *Vose v. Trustees etc.*, 2 Woods, 647; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716; *Gilmore v. Tuttle*, 32 N. J. Eq. 611; ^a *Russell v. Peyton*, 4 Ill. App. 473; *Morrow v. Saline Co. Comm'rs*, 21 Kan. 484; *Adair v. Brimmer*, 74 N. Y. 539; *Foscue v. Lyon*, 55 Ala. 440; *Wasson v. Garrett*, 58 Tenn. 477; *Mansfield v. Alwood*, 84 Ill. 497; *Sharp v. Goodwin*, 51 Cal. 219; *Gettins v. Scudder*, 71 Ill. 86.^b

² The trustee is, of course, liable for any loss occasioned by his undue neglect to obtain possession of the property or to retain it securely: See *Salway v. Salway*, 2 Russ. & M. 215; *Butler v. Carter*, L. R. 5 Eq. 276; *Youde v. Cloud*, L. R. 18 Eq. 634; *Ex parte Ogle*, L. R. 8 Ch. 711.

(a) *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

(b) This section is cited in *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 386. See, also, *Tarver v. Torrance*, 81 Ga. 261, 12 Am. St. Rep. 311, 6 S. E. 177 (liable for loss of trust funds stolen from his person). The court will not authorize the trust fund to be carried beyond its jurisdiction without requiring security for its protection: *Cochran v. Fillans*, 20 S. C. 237; *McCullough v. McCullough*, 44 N. J. Eq. 313, 14 Atl. 123, and reporter's note on foreign investment of trust funds; *Hughes v. Edwards*, [1892] A. C.

583; *In re Morley*, [1895] 2 Ch. 738; *Lehman v. Robertson*, 84 Ala. 489, 4 South. 728 (not liable for loss by robbery); *Cornwell v. Deck*, 8 Hun 122 (administrator liable for money stolen from a trunk, when negligently kept); *Stitzer v. Whittaker*, (Nebr.) 91 N. W. 713; *Miller v. Miller*, 148 Mo. 113, 49 S. W. 852. In general, see *Bryan v. McCann*, (W. Va.) 47 S. E. 143; *Bourquin v. Bourquin*, (Ga.) 47 S. E. 639 (trustee is bound to exercise the diligence of a prudent man to prevent the trust property from being sold for taxes).

trustee must with all reasonable diligence collect debts and demands, and the amounts due on choses in action, when required to do so by the terms of the trust instrument, or by the nature and objects of the trust, and he is liable for losses resulting from his neglect or unreasonable delay in this matter.³ Trust moneys may be deposited for a reasonable time in a bank having good credit, if the deposit is made to the credit of the trust estate, and not in the trustee's individual name and account; and the trustee does not become liable for a loss occasioned by a failure of the bank under these circumstances.⁴ He is liable, however, for

³ The trustee's duties and liabilities concerning investments, and his permitting funds to remain invested in certain kinds of securities, are stated in subsequent paragraphs: §§ 1071-1074. The nature of the trust will generally determine whether notes, stocks, and other things in action should be converted into money. If the trust instrument, in terms, gives to a beneficiary the income arising from certain specified choses in action, the form of the investment would thus be declared, and no duty would generally arise to convert such securities into money: See *Wiles v. Gresham*, 2 Drew. 258; 5 De Gex, M. & G. 770; *Grove v. Price*, 26 Beav. 103; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *Ex parte Ogle*, L. R. 8 Ch. 711; *Bacot v. Heyward*, 5 S. C. 441 (compromising a debt); *Mansfield v. Alwood*, 84 Ill. 497 (collecting rents and profits); *Dockery v. French*, 73 N. C. 420 (receiving payments in Confederate money); *Moore v. Mitchell*, 2 Woods, 483 (ditto).^c

⁴ *Rowth v. Howell*, 3 Ves. 565; *Swinfen v. Swinfen*, 29 Beav. 211; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716 (bonds placed in a bank as a special deposit and stolen); *Crane v. Moses*, 13 S. C. 561.^d

(c) See, also, *Billings v. Brogden*, 38 Ch. Div. 546; *Leonard's Appeal*, 95 Pa. St. 196; *Mill's Adm'r v. Talley's Adm'r*, 83 Va. 361, 5 S. E. 368; *Lawson v. Copeland*, 2 Br. Ch. Cas. 156, *Ames Cas. on Trusts* 492 (failure to collect a debt); *Munden v. Bailey*, 70 Ala. 63 (administrator not collecting a note); *State v. Gregory*, 88 Ind. 110; *Hunt v. Gontrum*, 80 Md. 64, 30 Atl. 620 (accepting notes instead of money); *Booker v. Armstrong*, 93 Mo. 49, 4 S. W. 727 (failure to sell and realize on security); *Harrington v. Keteltas*, 92 N. Y. 40 (executor fail-

ing to collect debt); *Wilson v. Linberger*, 88 N. C. 416; *Torrence v. Davidson*, 92 N. C. 437, 53 Am. Rep. 419 (administrator not bound to sue on a debt if it would probably occasion loss to the estate); *Rowe v. Bentley*, 29 Gratt. 756; *Lovett v. Thomas*, 81 Va. 245 (not bound to sue for debt where it is probable the debtor could not pay it); *Venable v. Cody*, 68 Ga. 171 (receiving payment in Confederate money); approved in *McCook v. Harp*, 81 Ga. 229, 7 South. 174; *Pool v. Dial*, 10 S. C. 440 (compromise).

(d) *Munnerlyn v. Augusta Bank*,

a loss resulting from a failure of the bank or of a broker, when funds which ought to have been invested are left remaining on deposit, or when the deposit is in the trustee's individual account mingled with his own funds.⁵ For wrongful payments made to third persons, or to a *cestui que trust*, the trustee is generally chargeable.⁶

⁵ *Challen v. Shippam*, 4 Hare, 555; *Johnson v. Newton*, 11 Hare, 160; *Swinfen v. Swinfen*, 29 Beav. 211; *Rehden v. Wesley*, 29 Beav. 213; *Matthews v. Brise*, 6 Beav. 239; *Moyle v. Moyle*, 2 Russ. & M. 710; *Salway v. Salway*, 2 Russ. & M. 215.^e As to mingling trust funds with his own, see *post*, § 1076.

⁶ Each case must, to a great extent, stand upon its own circumstances. Where a payment made in good faith, and with the exercise of reasonable care and prudence, turns out to be wrong, the trustee may not be obliged to make the amount good for the benefit of the estate. The following cases are mere examples: *Forshaw v. Higginson*, 8 De Gex, M. & G. 827; *Aveline v. Melhuish*, 2 De Gex, J. & S. 288; *Darke v. Williamson*, 25 Beav. 622; *Ward v. Ward*, 2 H. L. Cas. 777, 784; *Gunnell v. Whitear*, L. R. 10 Eq. 664; *Hayes v. Oatley*, L. R. 14 Eq. 1; *Taylor v. Cartwright*, L. R. 14 Eq. 167; *Ex parte Ogle*, L. R.

88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554; *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739 (quoting the text and stating that "the question in all such cases is, was the trustee reasonably prudent in making or continuing the deposit?"); *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *People v. Faulkner*, 107 N. Y. 477, 14 N. E. 415; *In re Law's Estate*, 144 Pa. St. 499, 22 Atl. 831, 14 L. R. A. 103; *Officer v. Officer*, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365 and note; *Knight v. Plymouth*, 1 Dick. 120 (trustee may remit to a distance through a broker).

(^e) See *Cann v. Cann*, 33 Weekly Rep. 40, Ames Cas. on Trusts 481 (a deposit of fourteen months not allowed); *Ashbury v. Beasley*, 17 Weekly Rep. 638 (the amount being large may affect the time it may be left on deposit); *Thompson v. Clydesdale Bank*, [1893] A. C. 282; *Barney v. Saunders*, 16 How. 535, 14 L. ed. 1047 (if the deposit amounts to a

loan the trustees are liable); *In re Arguello*, 97 Cal. 196, 31 Pac. 937, Ames Cas. on Trusts 482 (deposit in name of trustee individually); *Ricks v. Broyles*, 78 Ga. 610, 6 Am. St. Rep. 280, 3 S. E. 772 (general deposit is a loan and not allowed); *State v. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753, 6 N. E. 926; *Naltner v. Dolan*, 108 Ind. 504, 58 Am. Rep. 61, 8 N. E. 289; *State v. Gooch*, 97 N. C. 186, 2 Am. St. Rep. 284; *Summers v. Reynolds*, 95 N. C. 404; *Woodley v. Holley*, 111 N. C. 380, 16 S. E. 419 (amount left on deposit for three years); *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, 12 N. W. 465, 13 N. W. 274; *Appeal of Baer*, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609 (deposit for a definite time not allowed); *Frankenfield's Appeal*, 127 Pa. St. 369 (same); *Booth v. Wilkinson*, 78 Wis. 652, 23 Am. St. Rep. 443, 47 N. W. 1128 (administrator).

§ 1068. 2. The Duty not to Delegate his Authority.—The office of a trustee is one of personal confidence, and cannot be delegated. A trustee, therefore, unless expressly authorized by the instrument of trust, cannot delegate, or transfer, or intrust, in whole or in part, his powers of discretion and management to any associate, subordinate, or assistant who takes his place and assumes his responsibility. If he does so, he remains liable to the beneficiary, and is chargeable for all acts and omissions of his delegate, and with all losses, whether occasioned by the latter's fraud, neglect, want of good faith, or other cause.¹ This rule does not prohibit a

8 Ch. 711; *In re Englefield etc. Co.*, L. R. 8 Ch. Div. 388; *In re Cull's Trusts*, L. R. 20 Eq. 561; *Talbot v. Marshfield*, L. R. 3 Ch. 622; *Haydel v. Hurck*, 5 Mo. App. 267; *Singleton v. Lowndes*, 9 S. C. 465; *Wasson v. Garrett*, 58 Tenn. 477; *Draper v. Stone*, 71 Me. 175.^f

¹ *Ex parte Rigley*, 19 Ves. 463; *Adams v. Clifton*, 1 Russ. 297; *Salway v. Salway*, 4 Russ. 60; 2 Russ. & M. 215; *Eaves v. Hickson*, 30 Beav. 136; *Turner v. Corney*, 5 Beav. 515, 517; *Ghost v. Waller*, 9 Beav. 497; *Griffiths v. Porter*, 25 Beav. 236; *Rowland v. Witherden*, 3 Macn. & G. 568; *Bostock v. Floyer*, L. R. 1 Eq. 26; *Berger v. Duff*, 4 Johns. Ch. 368; *Hawley v. James*, 5 Paige, 318; *Pearson v. Jamison*, 1 McLean, 197; *Vose v. Trustees etc.*, 2 Woods, 647; *Seely v. Hills*, 49 Wis. 473.^a

(f) See, also, *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171 (a stipulation between a savings bank and a depositor that his deposit may be paid to any one presenting his book does not relieve the bank from the duty of exercising reasonable care); *Judy v. Farmers', etc., Bank*, 81 Mo. 404 (bank deposit).

(a) *Anonymous*, 3 Swanston 79, n (a), *Ames Cas. on Trusts* 508 (even though the *cestui* consented); *Mortimer v. Latimer*, 11 Jurist 721, *Ames Cas. on Trusts* 508; *Cooke v. Crawford*, 13 Simons 91, *Ames Cas. on Trusts* 509 (though the trust deed read, to A, B, & C and the survivors or survivor of them, or the heirs of such survivor, it does not give a right to assign the trust); *Fry v. Tapson*, 28 Ch. Div. 268; *Robinson v. Harkin*, [1896] 2 Ch. 415 (trustee liable for

loss occasioned by employment of improper broker); *Gosling v. Gaskell*, [1897] A. C. 575; *Wyman v. Pater-son*, [1900] A. C. 271 (liable for loss from bankruptcy of agent employed); *Saunders v. Webber*, 39 Cal. 287; *Grover v. Hale*, 107 Ill. 638 (sale in the absence of the trustee held void); *Spurlock v. Sproule*, 72 Mo. 503 (same); *Powell v. Tuttle*, 3 N. Y. 396 (only one of several commissioners present); *Fuller v. O'Neil*, 69 Tex. 349, 5 Am. St. Rep. 59, 6 S. W. 181 (a sale of land under a trust deed in the nature of a mortgage, not conducted by the trustee in person, held void); *Smith v. Lowther*, 35 W. Va. 300, 13 South. 999; see *contra*, *Johns v. Sergeant*, 45 Miss. 332; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263, 6 South. 840; *Dunton v. Sharpe*, 70 Miss. 850.

trustee from employing agents. He may act through agents in his administrative operations whenever such a mode of dealing is in accordance with the ordinary course of business.²

§ 1069. 3. The Duty not to Surrender Entire Control to a Co-trustee.—As a trustee cannot delegate his authority to a subordinate, so on the same principle he cannot idly yield or surrender the entire control of the trust property and exercise of the trust functions to his co-trustees, when he is associated in the trust with others. A trustee is not liable under all circumstances for every act or default of his co-trustees; but still, in general, where there are several trustees, the beneficiary is entitled to that security and pro-

²For example, he may employ a steward or manager of the estate for all matters strictly ministerial; he can, of course, employ clerks, book-keepers, and the like; he can deposit trust moneys in a responsible bank, and direct clerks who collect sums to deposit them therein; he can remit moneys by bills drawn on and by responsible parties, etc. If he act in such manner according to the customary modes of doing business, in good faith and with reasonable prudence, he will not be responsible for the loss of trust funds occurring through such dealings: *Wren v. Kirton*, 11 Ves. 377; *Massey v. Banner*, 1 Jacob & W. 241; *Clough v. Bond*, 3 Mylne & C. 490; *Joy v. Campbell*, 1 Schoales & L. 328, 341; *Darke v. Martyn*, 1 Beav. 525; *Hawley v. James*, 5 Paige, 318, 487; *Sinclair v. Jackson*, 8 Cow. 543; *Abbot v. Rubber Co.*, 33 Barb. 578; *Leggett v. Hunter*, 19 N. Y. 445; *Blight v. Schenck*, 10 Pa. St. 285; 51 Am. Dec. 478; *Lewis v. Reed*, 11 Ind. 239; *Telford v. Barney*, 1 Iowa, 575, 591.^b

12 South. 800; *Taylor v. Dickinson*, 15 Iowa 483 (the trust deed may provide that any one of several trustees may act); *Bradford v. Monks*, 132 Mass. 405 (deed may impliedly provide that the trust may be assigned); *Fish v. Carter*, 48 Hun 64.

See *ante*, § 1062.

(b) In *re Belchier*, Ambler 218, Ames Cas. on Trusts 516 (an assignee in bankruptcy had employed a broker to sell tobacco and he died insolvent without having paid over the proceeds of the sale; the court said: "This court has laid down a rule with regard to trustees, so as not to strike a terror into mankind acting

for the benefit of others, and not for their own"); *Speight v. Gaunt*, 22 Ch. Div. 727, on appeal, 9 App. Cas. (H. L.) 1; compare *Fry v. Tapson*, 28 Ch. Div. 268; see, also, *Keim v. Lindley*, (N. J.) 30 Atl. 1063; *Bohlen's Estate*, 75 Pa. St. 304; *Field v. Field*, [1894] 1 Ch. 425 (where necessary the trustee may allow title deeds to remain with his solicitor); *Jobson v. Palmer*, [1893] 1 Ch. 71; *Anderson v. Roberts*, 147 Mo. 486, 48 S. W. 847 (a valuable case); *Gates v. Dudgeon*, 173 N. Y. 426, 92 Am. St. Rep. 608, 66 N. E. 116. See *ante*, § 1062.

tection which result from the care, oversight, and co-operation of all the trustees. If, therefore, a trustee virtually abandons his active functions, neglects to interpose in the management, and leaves the whole control to his co-trustees, he will be liable for losses occasioned by their wrongful acts or neglects.¹

§ 1070. 4. The Amount of Care and Diligence Required.—The principle is well settled that trustees are bound to exercise care and prudence in the execution of their trust, in the same degree that men of common prudence ordinarily exercise in their own affairs. A trustee, in other words, must use the same care, skill, diligence, and prudence in his management of the trust and his dealings with the trust property which a man of ordinary care, skill, and prudence would use in his own transactions and with his own property under like circumstances; and the trustee is answerable for all losses, deficiencies, and injuries which are occasioned by his affirmative or negative violation of this obligation.¹ The law does not cast upon the trustee an extraordinary duty, nor demand an extraordinary care, nor hold him liable for *mere* error of judgment, much less does it make him an insurer of the property.* If he has exercised the care and

§ 1069, ¹ Clough v. Bond, 3 Mylne & C. 490, 497; Burrows v. Walls, 5 De Gex, M. & G. 233; Styles v. Guy, 1 Macn. & G. 422; Paddon v. Richardson, 7 De Gex, M. & G. 563; Thompson v. Finch, 8 De Gex, M. & G. 560, 563, 564; Bates v. Underhill, 3 Redf. 365; Gray v. Reamer, 11 Bush, 113; Spencer v. Spencer, 11 Paige, 299; Clark v. Clark, 8 Paige, 152; 35 Am. Dec. 676; Monell v. Monell, 5 Johns. Ch. 283; 9 Am. Dec. 298; Banks v. Wilkes, 3 Sand. Ch. 99; Pim v. Downing, 11 Serg. & R. 66; Jones's Appeal, 8 Watts & S. 143, 147; 42 Am. Dec. 282; Wayman v. Jones, 4 Md. Ch. 500; Ringgold v. Ringgold, 1 Har. & G. 11; 18 Am. Dec. 250; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. 157; Royall's Adm'r v. McKenzie, 25 Ala. 363; State v. Guilford, 15 Ohio, 593.^a For the relations between co-trustees and their liabilities in general, see *post*, §§ 1081, 1082.

§ 1070, ¹ This doctrine was so fully and ably examined in the very recent case of Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, that I shall quote from it at some length. The action was brought by a receiver representing the depositors

§ 1069, (a) See, also, Earle v. Earle, 93 N. Y. 113; Hinson v. Williamson, 74 Ala. 180.

§ 1070, (a) The text is cited to this effect in Ripley v. McGavie, 120 Iowa 52, 94 N. W. 452.

judgment of ordinary prudent men in their own affairs, he will not be chargeable for his mere errors of judgment, nor for accidental injuries and losses. This rule concerning the extent and limits of the trustee's duty to use care,

against a portion of the directors of a savings bank. The bank was located in New York City, and did a very small business. Up to January, 1873, its average deposits were about seventy thousand dollars, and its income had been less than its expenses. In May, 1873, the bank, by order of the board of directors, bought a lot for twenty-nine thousand dollars, paying ten thousand dollars of this price in cash; it then erected a building on this lot, costing twenty-seven thousand dollars, and gave a mortgage thereon for thirty thousand five hundred dollars. All this was done with the avowed object of increasing the apparent credit of the bank and thereby its business. Two years after, the bank failed. This lot and building, and other property amounting only to one thousand dollars, constituted the entire assets of the bank. In other words, all the assets except one thousand dollars were swallowed up in the lot and building, and this was all swept away by a foreclosure of the mortgage. Before the purchase of the lot, the bank had occupied leased rooms; and its total assets were several thousand dollars less than its debts, which fact was known to the directors when they made the purchase. The charter gave the directors power to purchase a lot for a banking-house. Held, that the transaction was not a mere error of judgment, and that the directors were personally liable. In regard to the position of directors, the court held that the relation of the directors to the bank was that of agent to a principal; the relation of the directors to the depositors was that of trustee and *cestui que trust*. On the general doctrine concerning the duty of trustees, the court said, per Earl, J. (p. 70): "If the trustees act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith, within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. . . . When one deposits money in a savings bank, or takes stock in a corporation, he expects, and has the right to expect, that the trustees or directors will exercise ordinary care and prudence in the trusts committed to them,—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied: First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; 19 Am. Rep. 181. There is a classification of negligence to be found in the books, not always of practical value, and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence, intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is, that they can only be held responsible in this action for the consequences of their gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning,—as something nearly approaching fraud or bad faith,—I cannot yield to this

diligence, and prudence applies to all his transactions in connection with the trust, and all his dealings with the trust property, by which the interests of the beneficiary can be affected. If some of the particular rules concerning

claim; and if there are any authorities upholding the claim, I emphatically dissent from them. It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests, and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case." He then quotes from *Scott v. Depeyster*, 1 Edw. Ch. 513, 543, 53 Am. Dec. 624, *Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9, *Litchfield v. White*, 3 Sandf. 545, and *Charitable Corporation v. Sutton*, 2 Atk. 405, all of which directly sustain his position, and continues: "In the Scotch case of *Liquidators of the Western Bank v. Douglas*, 11 Ses. Cas. S. 3d series, 112, it is said: 'Whatever the duties [of trustees and directors] are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such a duty, *the want of reasonable and ordinary fidelity and care*, will impose liability for loss thereby occasioned.' In *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, Judge Sharswood said: 'They [the directors] can only be regarded as mandataries, — persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, — but no more'; and added that the directors 'are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body.' As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance."

The language of some able decisions may, when carelessly read, be misleading. They speak of "gross" negligence as a measure of a trustee's liability, but at the same time define "gross" negligence as merely being the want of ordinary care. Thus in the Scotch case quoted above, "gross negligence" is made to be synonymous with "the want of reasonable and ordinary care and fidelity." A few subsequent cases have taken a portion of this rule — the gross negligence — apparently without adverting to the definition thus given of the term: *Sper-*

the making and retaining of investments seem to be more stringent, they will be found, upon closer examination, to be applications of the same general doctrine, varied only

ing's Appeal, 71 Pa. St. 11, referred to by Mr. Justice Earl, may be regarded as an illustration. It may be difficult, perhaps, to reconcile the different passages of Judge Sharswood's opinion in this case. So far as it holds the trustee liable only for gross negligence, using that word in any other sense than the want of ordinary care, it is unsupported by authority. The English courts have abandoned the three grades of gross, ordinary, and slight negligence. The modern English decisions have entirely abrogated the doctrine so often laid down in books, that an uncompensated mandatary or other bailee is only bound to use slight care, and is only liable for gross neglect; they hold that such mandatary or bailee *may* be bound to use great care, and is always obliged to use all the care and skill which he actually possesses: See *Wilson v. Brett*, 11 Mees. & W. 113, 115, per Rolfe, B.; *Hinton v. Dibbin*, 2 Q. B. 646, 661, per Lord Denman; *Wyld v. Pickford*, 8 Mees. & W. 443, 461, 462, per Parke, B.; *Grill v. Central Iron etc. Co.*, L. R. I. Com. P. 600, 612, 614, per Willes and Montague Smith, JJ. On every consideration of principle, as well as upon authority, the same doctrine must apply to trustees. The case of *Turquand v. Marshall*, L. R. 4 Ch. 376, gives no support whatever to the broad doctrine as laid down by Judge Sharswood. The decision of the court is simply that on the bill framed upon charges of misrepresentation against the directors, relief cannot be granted for their negligence. Lord Hatherley does not discuss the general duties of directors, much less those of trustees; his *dictum* concerning the liability of the defendants for their dealings (p. 386) is based wholly upon the terms of their "deed of settlement" and the powers which it gave them in this particular case. The decision is not an authority upon the liability in general of trustees or directors for care and diligence. In the often-quoted case of *Clough v. Bond*, 3 Mylne & C. 490, 496, Lord Cottenham states the rule in a very clear manner. He is speaking of the duty with reference to the safety and security of trust funds; but the same doctrine clearly applies to all dealings by a trustee with the affairs of the trust which may endanger the safety of the estate. "It will be found to be the result of all the best authorities upon the subject, that although a personal representative, acting strictly within the line of his duty, and *exercising reasonable care and diligence*, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet *if that line of duty be not strictly pursued*, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."

While the general rule is thus settled, the courts constantly reiterate the truth that in its application each case must stand upon its own circumstances. The following citations are necessarily given as mere illustrations; in some,

by the nature and situation of the subject-matter. It results from the duty that a trustee *may* be held accountable for more property than that which actually came into his

trustees have violated their duty; in others, they have erred (if at all) only in judgment:^b *Kekewich v. Marker*, 3 Macn. & G. 311 (discretion expressly given to the trustees; and see *ante*, cases under § 1062); *In re Beloved Wilkes's Charity*, 3 Macn. & G. 440 (ditto); *Barnett v. Sheffield*, 1 De Gex, M. & G. 371, 379; *Manser v. Dix*, 8 De Gex, M. & G. 703, 712; *Forshaw v. Higginson*, 8 De Gex, M. & G. 827, 832; *Baud v. Fardell*, 7 De Gex, M. & G. 628; *Harper v. Hayes*, 2 De Gex, F. & J. 542; *Dance v. Goldingham*, L. R. 8 Ch. 902; *Youde v. Cloud*, L. R. 18 Eq. 634; *Vyse v. Foster*, L. R. 8 Ch. 309; *In re Englefield etc. Co.*, L. R. 8 Ch. Div. 388; *Massey v. Banner*, 1 Jacob & W. 241, 247; *Charitable Corp'n v. Sutton*, 2 Atk. 400, 405; *Overend v. Gibb*, L. R. 5 H. L. 480,

(^b) This section is cited generally in *Kessler & Co. v. Ensley Co.*, 129 Fed. 397. See, also, *Bacon v. Bacon*, 5 Ves. 331; *In re Grindey*, [1898] 2 Ch. 593 (see for the effect of statute allowing exemption from liability where the acts are *honest* and *reasonable*); *In re Lord Clifford's Estate*, [1900] 2 Ch. 707; *Lowson v. Copeland*, 2 Brown Ch. Cas. 156, *Ames Cas. on Trusts* 493 (liable for not recovering a debt); *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972 (trustees must discharge their duties to the best of their skill and ability, "with such care and diligence as men fit to be intrusted with such matters may fairly be expected to put forth in their own business of equal importance"; the court cites the text, as authority for the statement); see *Knight v. Plymouth*, 1 Dick. 120 (where money was transmitted through an agent); *Stewart v. Madden*, 153 Pa. St. 445, 34 Am. St. Rep. 713, 25 Atl. 803 (the discretion of a trustee will be controlled by the court, as it is only a "legal discretion"); *Belding v. Archer*, 131 N. C. 287, 42 S. E. 800; *Callaway v. Hubner*, (Md.) 58 Atl. 362; *Thayer v. Dewey*, (Mass.) 69 N. E. 1074; *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844, 42 S. W. 9 (administrator not liable for depreciation

for delaying sale at the request of the beneficiary, and under the advice of counsel); *Hitchcock v. Cosper*, (Ind. App.) 69 N. E. 1029; *Elliott v. Carter*, 9 Gratt. 541 (the court says, "Where they [trustees] have intended to discharge their duties fairly, I think they should be treated with tenderness, and due caution taken not to hold him liable upon slight or uncertain grounds, lest, by a different policy, men of integrity and who would be actuated by the proper views, may be deterred from taking upon themselves an office so necessary in the concerns of life, from fear of the anxiety, trouble and risk which it involves"); approved and quoted in *Hoke v. Hoke*, 12 W. Va. 427. For cases in which the trustee was held to act reasonably in not attempting to collect a debt, see *Bowen v. Montgomery*, 48 Ala. 353; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; and if he acted unreasonably in suing, he is allowed no costs incurred; *Anderson v. Piercy*, 20 W. Va. 282. See, in general, *In re Benson*, [1899] 1 Ch. 39; *Hogg v. Hoag*, 107 Fed. 807; *Hughes v. Williams*, 99 Va. 312, 38 S. E. 138; *Phillips v. Burton*, 21 Ky. Law Rep. 720, 52 S. W. 1064 (valuable case as to the rate of interest payable).

possession. He may be charged with rents, profits, interest, income, proceeds of sales, and the like, which he never in fact received, but which he might and should have received

484, 494; *Pool v. Dial*, 10 S. C. 440; *Luigi v. Luchesi*, 12 Nev. 306; *Bacot v. Heyward*, 5 S. C. 441; *Carpenter v. Carpenter*, 12 R. I. 544; 34 Am. Rep. 716; *Gilmore v. Tuttle*, 32 N. J. Eq. 611; *Russell v. Peyton*, 4 Ill. App. 473; *Haydel v. Hurek*, 5 Mo. App. 267; *Morrow v. Saline Co. Comm'rs*, 21 Kan. 484; *Adair v. Brimmer*, 74 N. Y. 539; *King v. Talbot*, 40 N. Y. 76; 50 Barb. 453; *Foscue v. Lyon*, 55 Ala. 440; *Clark v. Anderson*, 13 Bush, 111; *Mansfield v. Alwood*, 84 Ill. 497; *Gettins v. Scudder*, 71 Ill. 86; *Bowker v. Pierce*, 130 Mass. 262; *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; 3 R. I. 9; *Scott v. Depeyster*, 1 Edw. Ch. 513, 543; *Litchfield v. White*, 3 Sand. 545; *Ackerman v. Emott*, 4 Barb. 626, 645, 646; *Ringgold v. Ringgold*, 1 Har. & G. 11, 25; 18 Am. Dec. 250.^d See also especially, on that branch of the rule which frees trustees from liability for mere errors of judgment, *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Miller v. Proctor*, 20 Ohio St. 442; *Godbold v. Branch Bank*, 11 Ala. 191; 46 Am. Dec. 211; *Finlay v. Merriman*, 39 Tex. 56, 62; *Salter v. Salter*, 6 Bush, 624, 638; *Cross v. Petree*, 10 B. Mon. 413; *Ellig v. Naglee*, 9 Cal. 683, 695; *Thompson v. Brown*, 4 Johns. Ch. 619, 627; *Vanderheyden v. Young*, 11 Johns. 150, 157; *Griffith v. Follett*, 20 Barb. 620, 634; *Smith v. Rathbun*, 22 Hun, 150.^e

(c) *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

(d) Also *Speight v. Gaunt*, 22 Ch. Div. 727; on appeal, 9 App. Cas. (H. L.) 1; *Fry v. Tapon*, 28 Ch. Div. 268; *Learoyd v. Whiteley*, 12 App. Cas. (H. L.) 727, affirming 33 Ch. Div. 347; *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665; *Matter of Cornell*, 110 N. Y. 358, 18 N. E. 142; *Shurtleff v. Rile*, 140 Mass. 213, 40 N. E. 407; *McCartin v. Traphagen*, 43 N. J. Eq. 340, 11 Atl. 156; *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676, 19 Atl. 502; *Parsley's Adm'r v. Martin*, 77 Va. 376, 46 Am. Rep. 733; *Pate v. Oliver*, 104 N. C. 466, 10 S. E. 709; *Pope v. Mathews*, 18 S. C. 444; *Crumpler v. Deens*, 85 Ala. 149, 4 South. 826; *Boaz v. Milliken*, 83 Ky. 634; *Loud v. Winchester*, 64 Mich. 23, 30 N. W. 896; *Dundas v. Chrisman*, 25 Nebr. 495, 41 N. W. 449. The fact that the trustee, by the terms of the

instrument, is exempted from liability except for willful and intentional breaches of trust does not excuse negligence in the selection of investments for the trust funds: *Tuttle v. Gilmore*, 36 N. J. Eq. 617; see *Hackey v. Western*, [1898] 1 Ch. 351; *In re Raybould*, [1900] 1 Ch. 199 (the *reasonable* acts of a trustee in managing the estate may, by injuring the property of others, give rise to a right of action against the estate through the trustee, on the ground that the trustee has a right to be indemnified, or exonerated); *Robinson v. Harkin*, [1896] 2 Ch. 415; *Stokes v. France*, [1898] 1 Ch. 212.

(e) *Head v. Gould*, [1898] 2 Ch. 250; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Pleasanton's Appeal*, 99 Pa. St. 362; *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Taft v. Smith*, (Mass.) 70 N. E. 1031.

by the exercise of due and reasonable care, diligence, and prudence in his modes of dealing.² A trustee who pays the wrong party will generally be liable to pay over again to those who are really entitled.³

§ 1071. 5. The Duty as to Investments.—The general obligation under consideration finds its most striking and important application in the matter of the investment of trust funds. It is the trustee's duty to use diligence in investing the trust property so that it may produce as much income as possible, and also to use care and prudence in investing it in such securities as will render its loss highly improbable, even if not virtually impossible. From these somewhat antagonistic duties arise two corresponding liabilities. If the trustee suffers moneys to lie idle in his hands, producing no income, when by a proper investment

² *Mansfield v. Alwood*, 84 Ill. 497; *Ellig v. Naglee*, 9 Cal. 684.

³ Where a trustee, acting in good faith, and even deceived by forged documents, pays trust funds to the wrong party, it is held that he must pay over again the amount, with interest, to those who are entitled: *Ashby v. Blackwell*, 2 Eden, 299, 302; *Eaves v. Hickson*, 30 Beav. 136; *Sporle v. Barnaby*, 10 Jur., N. S., 1142; *Haydel v. Hurck*, 5 Mo. App. 267; and where, by mistake, he pays capital to life tenants, instead of investing it and paying the income, he must make it good, but is entitled to be recouped out of their life interest in fixing the amount of the deficiency: *Barratt v. Wyatt*, 30 Beav. 442; *Davies v. Hodgson*, 25 Beav. 177; *Griffiths v. Porter*, 25 Beav. 236.^f Where an infant *cestui que trust* falsely represents himself to be of age, and thereby procures payment by the trustee of the amount payable on his becoming of age, he cannot compel the trustee to pay over again when he attains twenty-one: *Overton v. Banister*, 3 Hare, 503; a *cestui que trust* who is overpaid must refund: *Livesey v. Livesey*, 3 Russ. 287; as to paying the wrong person, see also *ante*, cases under § 1067.

(^f) *Bate v. Hooper*, 5 De G. M. & G. 338 (it was held that the life tenant could not be compelled to refund a voluntary overpayment after thirty years); *Crocker v. Dillon*, 133 Mass. 91; and one *cestui* may recover an improper payment made to another: *Dixon v. Dixon*, L. R. 9 Ch. Div. 587; therefore, a trustee, having paid certain *cestuis*, and having a claim

against the trust estate for reimbursements, can recover from those having received payment in order to protect those not yet paid: *Wells-Stone Mercantile Co. v. Aultman, Miller & Co.*, 9 N. Dak. 520, 84 N. W. 375. This result would seem proper on the principle of *Wetmore v. Porter*, *ante*, § 1048, note.

an income might have been obtained, and this continues for an unreasonably long time, he will be liable for the amount of income which he might and ought to have made by an investment, and will be charged with such amount by the court in the settlement of his accounts. On the other hand, if he has made an investment in improper securities, contrary to the settled rules of equity on the subject, and the principal has been wholly or partially lost through insolvency or depreciation of value, or has failed to produce income, he will be held personally responsible for the loss or deficiency. If, however, an investment is made with the exercise of reasonable care, diligence, and business prudence, in the form, manner, and securities approved of by the rules of equity, a trustee will not be liable for losses which may occur through the destruction or depreciation of values.¹ The general duty involves

¹ Robinson v. Robinson, 1 De Gex, M. & G. 247, 254-257 (where trustees simply neglect to invest moneys, they are chargeable only with the principal sum and lawful *interest* thereon); Att'y-Gen. v. Alford, 4 De Gex, M. & G. 843 (ditto); Ex parte Geaves, 8 De Gex, M. & G. 291; Lockhart v. Reilly, 1 De Gex & J. 464; Lloyd v. Attwood, 3 De Gex & J. 614; Shepherd v. Moulds, 4 Hare, 500, 503, 504; Phillipson v. Gatty, 7 Hare, 516; Clough v. Bond, 3 Mylne & C. 490, 496, 497; Mayor of Berwick v. Murray, 7 De Gex, M. & G. 497, 519; Burdick v. Garrick, L. R. 5 Ch. 233, 241; Blogg v. Johnson, L. R. 2 Ch. 225, 228; Brown v. Gellatly, L. R. 2 Ch. 751; Stewart v. Sanderson, L. R. 10 Eq. 26; Pickard v. Anderson, L. R. 13 Eq. 608 (consent of beneficiary); In re T—, L. R. 15 Ch. Div. 78; Ex parte Norris, L. R. 4 Ch. 280; Stone v. Stone, L. R. 5 Ch. 74; Budge v. Gummow, L. R. 7 Ch. 719; In re British etc. Co., L. R. 14 Ch. Div. 335; Barney v. Saunders, 16 How. 535, 542, 543; Kimball v. Reding, 31 N. H. 352; 64 Am. Dec. 333; Frey v. Frey, 17 N. J. Eq. 71, 72, 74; Schieffelin v. Stewart, 1 Johns. Ch. 620; 7 Am. Dec. 507; Baker v. Disbrow, 18 Hun, 29; Brown v. French, 125 Mass. 410; 28 Am. Rep. 254; Adair v. Brimmer, 74 N. Y. 539; In re Foster's Will, 15 Hun, 387; Roosevelt v. Roosevelt, 6 Abb. N. C. 447; Bowman v. Pinkham, 71 Me. 295; Nancrede v. Voorhis, 32 N. J. Eq. 524; Gilmore v. Tuttle, 32 N. J. Eq. 611; Clark v. Anderson, 13 Bush, 111; Dockery v. French, 73 N. C. 420; Moore v. Mitchell, 2 Woods, 483; Kirby v. Goodykoontz, 26 Gratt. 298 (in the three preceding cases the investment was made in confederate securities); Bowker v. Pierce, 130 Mass. 262; Sherman v. Parish, 53 N. Y. 483 (acquiescence of the beneficiary); Ormiston v. Olcott,

(a) Tuttle v. Gilmore, 36 N. J. Eq. 617.

two distinct elements, which will be separately examined,—the necessity of making investments, and the proper kinds of securities in which the investments may be made.

§ 1072. *The Necessity of Making Investments.*—It is the trustee's imperative duty to render the trust property as productive as possible consistent with its *security* and with the demands of ordinary business prudence and judgment. The rule is general, therefore, that if he permits the money to remain in his own hands, unproductive, for a period which, under the circumstances, is unreasonable, then he will be personally chargeable with the lawful interest which might and should have been obtained by the exercise of reasonable care and diligence; and if the principal fund should be wholly or partially lost in consequence of such unreasonable delay, he will be compelled to make up the deficiency. Even when the instrument creating the trust prescribes a particular mode of investment,—as, for example, it directs that all the personal property should be converted into cash, and the proceeds invested in the purchase of land,—the trustee cannot be justified in suffering the cash to lie idle and unproductive for an unreasonable length of time.¹

84 N. Y. 339; *Wiggins v. Howard*, 83 N. Y. 613; *Chesterman v. Eyland*, 81 N. Y. 398.^b

¹ *Robinson v. Robinson*, 1 De Gex, M. & G. 247; *Att'y-Gen. v. Alford*, 4 De Gex, M. & G. 843; *Baud v. Fardell*, 7 De Gex, M. & G. 628; *Paddon v. Richardson*, 7 De Gex, M. & G. 563; *Ex parte Geaves*, 8 De Gex, M. & G. 291; *Bate v. Hooper*, 5 De Gex, M. & G. 338; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *In re British etc. Co.*, L. R. 14 Ch. Div. 335; *Gilman v. Gilman*, 2 Lans. 1a; and see other cases in the last preceding note. If the trustee per-

(b) *Hume v. Lopes*, [1892] A. C. 112 (a statute allowing a trustee to invest "any trust funds in his hands" in certain securities, extends to trust funds already invested, as well as to cash in hand); see *In re Campbell*, [1893] 3 Ch. 468; *In re Somerset*, [1894] 1 Ch. 231 (as to the effect of statute on improper investment); *In re Chapman*, [1896] 2 Ch. 763 (if

the will authorizes investment in realty, it is not improper to allow existing mortgage on realty to stand); *In re Gouldby's Est.*, 201 Pa. St. 491, 51 Atl. 315. See, also, *In re Smith*, [1896] 1 Ch. 71; *Isler v. Brock*, 134 N. C. 428, 46 S. E. 951 (liability for interest).

(a) *Cavender v. Cavender*, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. ed. 212;

§ 1073. **Kinds of Investments — When Particular Securities are Expressly Authorized.**— There are two cases to be considered: 1. When the instrument creating the trust expressly authorizes investment in particular securities, or directs particular modes of investment; 2. When the instrument is wholly silent with respect to the mode of investment, and the matter is left to the judgment of the trustee. In the first case, when the instrument itself directs the mode and nature of the investment, and designates the securities, the trustee is bound to follow these directions with scrupulous care, and if any loss of trust property is the result of his obedience, he is not at all responsible. A departure from the directions will entail liability for the losses which may be occasioned thereby. Even when a general discretion in the choice of securities is expressly given, it must be exercised with reasonable care and business prudence.¹

mits trust moneys to remain on deposit in a bank or in the hands of a third person for an unreasonable time, he is responsible for any loss: *Lupton v. White*, 15 Ves. 432; and see *ante*, § 1067, and cases cited.^b Or if he delays unnecessarily in collecting a demand and it is thereby lost: *Grove v. Price*, 26 Beav. 103; *Ellig v. Naglee*, 9 Cal. 683.

¹ *Mortimore v. Mortimore*, 4 De Gex & J. 472; *Baud v. Fardell*, 7 De Gex, M. & G. 628; *Paddon v. Richardson*, 7 De Gex, M. & G. 563; *In re Langdale's Trust*, L. R. 10 Eq. 39; *Stewart v. Sanderson*, L. R. 10 Eq. 26; *Pickard v. Anderson*, L. R. 13 Eq. 608 (investing on mere personal security with consent of the beneficiary); *Bethell v. Abraham*, L. R. 17 Eq. 24 (even when trustees are clothed with discretion they cannot invest in foreign funds or railway stocks); *Lewis v. Nobbs*, L. R. 8 Ch. Div. 591 (where trustees are expressly authorized to vary the trust funds and "to invest the same in any other funds or securities"); *In re Chennell*, L. R. 8 Ch. Div. 492; *In re Wedderburn's Trusts*, L. R. 9 Ch. Div. 112; *In re Peyton*, L. R. 7 Eq. 463; *Clark v. St. Louis etc. R. R.*, 58 How. Pr. 21; *Foscue v. Lyon*, 55 Ala. 440; *Bowman v. Pinkham*, 71 Me. 295 (a trustee expressly authorized to invest as he shall think fit cannot buy land on credit, and bind the estate by his note given as trustee); *Gilmore v. Tuttle*, 32 N. J. Eq. 611 (a trustee clothed

Lent v. Howard, 89 N. Y. 170; *Nunn v. Nunn*, 66 Ala. 35; *Smith v. Hall*, 20 R. I. 170, 37 Atl. 698; *In re Muller*, 31 App. Div. 80, 52 N. Y. Supp. 565; *Calkins v. Bump*, 120 Mich. 335, 79 N. W. 491; *Hayes v. Applegate*, 101 Ky. 22, 39 S. W. 436 (distinguish-

ing *Fritsch v. Klansing*, 11 Ky. Law Rep. 788, 13 S. W. 241).

(b) *Perpetual Ex. & F. Ass'n of Australia, Lim. v. Swan*, [1898] A. C. 763 (deposit in bank on interest is not allowed though statute provides that trustees may employ bankers).

§ 1074. **The Same. When No Directions are Given.**—Where the instrument of trust is silent as to the mode of investment, the rules governing the action of trustees may appear to be somewhat arbitrary, but are in reality based upon the clearest principles of justice and expediency. The law does not give to trustees the same freedom of choice in investments which may be exercised by prudent business men in their own affairs. A business man of even more than average caution may, and often does, assume intentional risks in the investment of his own property; for the sake of obtaining a greater than ordinary income, he will often invest in such a manner that the risk of ultimate loss

with discretion is liable for loss arising from his investment in second mortgages);^a *Nancrede v. Voorhis*, 32 N. J. Eq. 524 (ditto); *Adair v. Brimmer*, 74 N. Y. 539; *Denike v. Harris*, 84 N. Y. 89.^b

A trustee cannot loan on mere personal security, unless authorized: *Walker v. Symonds*, 3 Swanst. 1, 63, 80; *Darke v. Martyn*, 1 Beav. 525; *Styles v. Guy*, 1 Macn. & G. 422;^c but may do so when authorized: *Paddon v. Richardson*, 7 De Gex, M. & G. 563; *Denike v. Harris*, 84 N. Y. 89; but even then he cannot lend to a co-trustee, unless *expressly* authorized: —*v. Walker*, 5 Russ. 7; and giving a trustee discretion as to investment does not authorize a loan on mere personal security: *Pocock v. Reddington*, 5 Ves. 794. Investment in corporation stock is not allowed unless expressly authorized: *Trafford v. Boehm*, 3 Atk. 440, 444; *Howe v. Earl of Dartmouth*, 7 Ves. 137, 150; where trustees invest in mortgages they are responsible for the value of the land and the sufficiency of the security at the time of the investment: *Phillipson v. Gatty*, 7 Hare, 516; but not for a subsequent depreciation: *Nancrede v. Voorhis*, 32 N. J. Eq. 524.

(a) *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

(b) *Whitehead v. Whitehead*, 85 Va. 870, 9 S. E. 10; *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560 (direction to invest in landed securities does not authorize a purchase of land); *Dodd v. Evans*, [1901] 1 Ch. 916; *In re De Pothonier*, [1900] 2 Ch. 529; *In re Laing's Settlement*, [1899] 1 Ch. 593; *In re Smith*, [1896] 2 Ch. 590; *In re Tucker*, [1894] 1 Ch. 724; *Clark v. Clark*, 23 Misc. 272, 50 N. Y. Supp. 1041; *In re Hall*, 48 App. Div. 488, 62 N. Y. Supp. 888; *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956;

Appeal of Davis, 183 Mass. 499, 67 N. E. 604; *In re Hart's Estate*, 203 Pa. St. 480, 53 Atl. 364; *In re Allis's Estate*, (Wis.) 101 N. W. 365 (where instrument gives full discretion as to investments). Courts have refused to sanction a change of investment not authorized by the instrument of trust on the ground that it will be to the advantage of the beneficiaries: *In re Tollemache*, [1903] 1 Ch. 457, 955.

(c) *Judge of Probate v. Mathes*, 60 N. H. 433; *Baer's Appeal*, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609.

is considerable, and such speculative use of his property would not be regarded as illegitimate nor as deserving of any censure. For example, he may invest in the stocks of companies which promise, and with good fortune may pay, large dividends, but which also may utterly fail. No such risk is permitted to the trustee. In the management and investment of trust property for the benefit of the *cestui que trust*, the law, while requiring some income, regards the security of the fund invested and the certainty of a moderate *regular* income as of paramount — of absolutely essential — importance when compared with the amount of the income. It permits the trustee to assume no risks in his investment other than those which are inseparable from every species of property. Absolute freedom from risk is impossible. The most stable forms of property *may* lose their value; lands may depreciate; even nations may become bankrupt. From these risks which inhere in every kind of ownership the law does not pretend to save the beneficiary; but from risks growing out of the uncertainty of speculative investments the law does protect him by making the trustee personally responsible for all trust funds invested by him in such a manner. It is the settled rule of equity, in the absence of express directions in the instrument creating the trust, or of statutory permission, that trustees or executors cannot invest trust property upon any mere personal security, nor upon the stocks, bonds, or other securities of private business corporations.¹ Where no directions are given by the instrument of trust, the well-settled rule of the English courts of equity is, that the

¹ Clough v. Bond, 3 Mylne & C. 490, 496, 497; Powell v. Evans, 5 Ves. 839; Tebbs v. Carpenter, 1 Madd. 290; Ex parte Geaves, 8 De Gex, M. & G. 291; Paddon v. Richardson, 7 De Gex, M. & G. 563;^a and see cases cited in last preceding note; King v. King, 3 Johns. Ch. 552.

(a) Hutton v. Annan, [1898] A. C. 289; White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; In re Reed or Harmon's Estate, 45

App. Div. 196, 61 N. Y. Supp. 50; Birmingham v. Wilcox, 120 Cal. 467, 52 Pac. 822.

trustee should invest trust funds, and can only escape personal risk and liability by investing, in real estate securities, or in the public, governmental securities of the British government.² In the United States, while the rules are certainly not so stringent and invariable as in England, and while different regulations may prevail to some extent in different states, based partly upon statutory legislation, and partly upon the policy of encouraging local enterprises, the same fundamental principle of requiring permanent investments in real estate or governmental securities is generally recognized by the courts,—at least, all speculative risks are forbidden.³ Investments in first mortgages of

² Investment in municipal bonds or in the governmental stocks, bonds, or funds of foreign countries, or in the stocks or bonds of corporations, is never *directed* by the court, nor permitted in the absence of authority given by the instrument of trust: *Howe v. Earl of Dartmouth*, 7 Ves. 137, 151; *Hume v. Richardson*, 4 De Gex, F. & J. 29; *Baud v. Fardell*, 7 De Gex, M. & G. 628; *Dimes v. Scott*, 4 Russ. 195; *Holland v. Hughes*, 16 Ves. 111; *Raby v. Ridehalgh*, 7 De Gex, M. & G. 104; *Robinson v. Robinson*, 1 De Gex, M. & G. 247, 263; *Mortimore v. Mortimore*, 4 De Gex & J. 472; *Mant v. Leith*, 15 Beav. 524; *Harris v. Harris*, 29 Beav. 107; *In re Colne Valley etc. R'y*, 1 De Gex, F. & J. 53; *Bethell v. Abraham*, L. R. 17 Eq. 24; *In re Rehoboth Chapel*, L. R. 19 Eq. 180; *In re Chennell*, L. R. 8 Ch. Div. 492; *In re Wedderburn's Trusts*, L. R. 9 Ch. Div. 112; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *Budge v. Gummow*, L. R. 7 Ch. 719.^b

³ The action of the American courts can best be illustrated by the facts of a few very recent and instructive decisions. In *Adair v. Brimmer*, 74 N. Y. 539, the subject was examined in a most able and exhaustive manner, and trustees were sternly held up to their duty. A testator had given an enormous estate to three trustees, with power to sell lands, in their discretion, and to invest the proceeds. Among the lands was a large tract of undeveloped coal-land in Pennsylvania, of which the testator owned one undivided third, the other two thirds being owned by M. and N., and the entire tract being worth from one million to one million four hundred thousand dollars. The trustees conveyed their one third to M. and N. nominally for the price of two hundred and fifty thousand dollars. The sale was

(b) Several special rules have been established concerning real estate securities, as to the amount which may be loaned on property of certain classes, the care required in ascertaining the value of the property, and the like: See *Godfrey v. Faulkner*, 23

Ch. Div. 483; *Fry v. Tapson*, 28 Ch. Div. 268; *Learoyd v. Whiteley*, 12 App. Cas. (H. L.) 727, affirming 33 Ch. Div. 347; *Olive v. Westerman*, 34 Ch. Div. 70; *Webb v. Jonas*, 39 Ch. Div. 660; *Chapman v. Browne*, [1902] 1 Ch. 785.

improved land are universally favored, and the trustee is not liable for any subsequent depreciation of value if the original security was sufficient. Indeed, investments of this form are generally required to be made by public officials of trust moneys paid into court. Investments in second or other subsequent mortgages would be at the trustee's own peril. Trustees may always invest in the govern-

really made to enable M. and N. to organize a mining company, and the land was immediately conveyed by them to the company. Stock of this company was issued, and the trustees took such stock at its par value to the amount of two hundred and fifty thousand dollars as the consideration for the sale of the land. The company went on to develop the coal mines, and was compelled to borrow money, and to that end it issued its bonds for several hundred thousand dollars, which the stockholders were obliged to take *pro rata*, and the trustees thus took a large amount of said bonds as security for money advanced by them to the company. The stock and the bonds became worthless, so that the coal-land had in fact been totally lost to the trust estate. In their final accounting the trustees claimed that they were entitled to be credited with the two hundred and fifty thousand dollars in the stock, and with the amount of the company's bonds which they had taken. The court held that the trustees had grossly violated their duty. They had no right to sell the land for such a speculative purpose; the power given them in the will to sell only authorized them to sell for the purpose of carrying out the general objects of the trust, and of making the property certainly productive for the beneficiaries. Furthermore, they had no authority to invest the proceeds in such securities as the company's stock and bonds. They were to be charged with the market value of the land at the time of the sale, and with interest thereon at six per cent computed with *annual rests*. The trustees having set up acquiescence by the beneficiaries in defense, it was further held that an acquiescence or assent of the beneficiaries, so as to relieve the trustees, could only avail when given after a full knowledge of all the facts, and a full understanding of all the beneficiaries' own rights in the matter; any assent given in the absence of such full knowledge and understanding was of no effect. *King v. Talbot*, 40 N. Y. 76, 50 Barb. 453, is also a very instructive case. Trustees held funds given by a will, in trust, to apply the interest to the maintenance, etc., of the beneficiaries during their minority, and on their coming of age the principal and all accumulated interest were to be transferred to them absolutely. The trustees invested the principal moneys in certain securities, and on the beneficiaries coming of age, the trustees offered to deliver to them these same securities, which the beneficiaries refused to accept. There was no allegation that the trustees had acted in bad faith, and the only question was, whether the investments were proper and such as the beneficiaries were bound to accept in discharge of the trustees' obligation. The court of appeals held the following propositions: Where trustees hold funds for investment for the benefit of *cestuis que trustent* who are to be

mental securities of the state under whose jurisdiction they are, and in those of the United States; and perhaps an investment in the public securities of other states of the Union, of which the credit is firmly established, may be permitted; but to any greater extent than this, investments in foreign securities are a violation of the trustee's duty. In some of the states, statutes permit investments in the munic-

supported out of the income thereof, the law, by its general principles, imposes on the trustees the duty of placing the funds in a position of security, of seeing that they produce interest, and of so keeping them that they may always be subject to future recall for the benefit of the *cestuis que trustent*. In a trust of this kind, it is not in accordance with the nature of the trust, nor a compliance with the requirements of ordinary prudence, for the trustee to place the principal of the fund in a condition in which it is necessarily exposed to the hazards of loss or gain, and in which, *by the very terms of the investment*, the principal sum is not to be returned at all. The investment by such a trustee in the stocks of canal, railroad, bank, insurance, and other such private corporations is a violation of his trust duty. Held, therefore, where, in such a trust, the trustee had invested the principal of the fund in stocks of the Delaware and Hudson Canal Co., the New York and Harlem R. R. Co., the New York and New Haven R. R. Co., the Saratoga and Washington R. R. Co., and the Bank of Commerce, the beneficiaries were not bound to accept such investments, but could compel the trustees to pay over the principal fund in cash, charged with interest at six per cent per annum, computed with *annual rests*. It may be remarked that all these companies were at the time in good, and some of them in very high, credit. Woodruff, J., said that in such a case, where there were different kinds of investments, the beneficiaries were not restricted to accepting *all*, or rejecting *all*, but might accept some, and reject others, at their pleasure. Four judges were of opinion that, in the absence of statute, trustees holding funds for investment, without special directions, were bound to invest either in governmental or in real estate securities, according to the well-settled rule of equity in England; that any other investment would render the trustees personally liable in case of loss or depreciation. Three judges were of opinion that so stringent a *general* rule could not be regarded as a part of our law. The opinion of Mr. Justice Woodruff in this case upholds, in a most admirable manner, the high morality of equity in determining and enforcing the obligations of trustees towards their beneficiaries: *Gilman v. Gilman*, 2 Lans. 1. Large amounts of money were given by will to the executors as trustees, and they were directed by the will to invest it in United States stocks, or state, city, or town bonds, or in bonds and mortgages. They did not obey these instructions. They kept on hand, for years, large amounts on deposit in their individual names, and these deposits they frequently used in their own business; but all the sums thus used they returned to the estate, and charged themselves with interest thereon during the time they were using the same. They did not charge themselves with any interest

ipal bonds of cities, counties, and towns of the state within whose jurisdiction the trustee acts. Wherever the principles of equity jurisprudence have been fully accepted by the courts, trustees are not allowed to invest in the stocks, bonds, and other securities of private corporations,—certainly not without a statutory permission. Such unauthorized investments do not *ipso facto* render the trustees per-

on the large amounts remaining idle in bank. In excuse for not investing in the United States securities, they set up that the beneficiaries were opposed to any investments therein. Held, that this last allegation was no excuse; if they had invested in United States securities, even against the consent of the beneficiaries, they would have been fully justified; and, at all events, there were other good securities, state and municipal, in which they might have invested according to the directions of the will. They were charged with interest on all balances remaining in their hands after a reasonable time, viz., on all balances remaining on hand six months after allowing thirty days more for procuring investments. Held further, that they would ordinarily be chargeable with compound interest on the trust funds which they had used in their own private business; but as none had been lost, and they had charged themselves with interest thereon, the court would not enforce this liability. (This was a mistaken leniency, since the beneficiaries were clearly entitled to the *profits* of the business made by the use of the trust funds.) Also, that while trustees and executors are entitled to be allowed for all sums reasonably expended in protecting the estate or in maintaining or defending litigations reasonably necessary for its protection, these defendants were not entitled to be reimbursed for their expenses in unsuccessfully resisting an application to compel them to account, and in resisting proceedings for contempt instituted against them for their neglect to obey an order to account: *Chesterman v. Eyland*, 81 N. Y. 398 (money paid into court and invested by officer of the court in a sufficient real estate mortgage; the officer not liable, although by a great depreciation of value, the land turned out insufficient and part of the fund was lost); *Denike v. Harris*, 84 N. Y. 89; reversing 23 Hun, 213 (trust money loaned on the borrower's own promise, without any further security, according to express directions of a will); *Ormiston v. Olcott*, 84 N. Y. 339 (as a general rule, investments of trust moneys in foreign securities, or in a manner which takes the fund beyond the reach of the court, as in mortgages on foreign lands, etc., is improper, and a trustee making such investment does so at his own peril. This rule is not absolutely without exception; it may give way under very special and imperative circumstances. An investment in mortgage on lands in another state, sustained under the peculiar circumstances as being the only mode by which the property could be saved);^c

(c) Followed in *Denton v. Sanford*, 103 N. Y. 607, 9 N. E. 490; see, also, *McCullough v. McCullough*, 44 N. J. Eq. 313, and note, 14 Atl. 123.

sonally liable, where no loss ensues; but if any loss results, they must make it good. Where, however, the trust provides for a transfer of the property to the beneficiaries, they are not bound to accept such unauthorized securities from the trustees, even though these securities are not at all depreciated in value. It should be carefully observed, in this connection, that if the beneficiary is *sui juris* and

Sherman v. Parish, 55 N. Y. 483 (a married woman who is a *cestui que trust* may consent to an unauthorized investment so as to bar any action against her trustee); *Wiggins v. Howard*, 83 N. Y. 613; *Foscoe v. Lyon*, 55 Ala. 440 (investment in mortgages on real estate is proper; a trustee directed to invest in stocks cannot compel the beneficiary to accept land or chattels); *Nancrede v. Voorhis*, 32 N. J. Eq. 524 (a trustee invests in second mortgages at his own peril, but is not liable for depreciation in value of land when investment is made in first mortgages); *Gilmore v. Tuttle*, 32 N. J. Eq. 611 (trustee is liable for loss resulting from his investment in second mortgages);^d *Clark v. Anderson*, 13 Bush, 111 (a trustee is chargeable for all loss resulting from a change of investment made after the beneficiary had become of age and entitled to the control of the estate, also for funds invested in second-mortgage bonds of a railroad, but not for loss from an unexpected depreciation of real estate, where the investment was originally proper); *Patteson v. Horsley*, 29 Gratt. 263 (a trustee is liable for loss from investment in Confederate securities); *Dockery v. French*, 73 N. C. 420 (ditto); *Moore v. Mitchell*, 2 Woods, 483 (ditto); *Kirby v. Goodykoontz*, 26 Gratt. 298 (ditto);^e *Tucker v. State*, 72 Ind. 242 (an investment in the stock of corporations is improper, and made at the trustee's own peril); *Bowker v. Pierce*, 130 Mass. 262 (a trustee who, in good faith and in the exercise of a sound discretion, retains an investment in railroad stock, when it is gradually falling in value, is not responsible for the depreciation, although the stock becomes worthless. This decision certainly does not represent the true doctrine of equity. It is directly opposed to the rule as settled, not only in England, but by the overwhelming weight of the highest American authority); see also *Barney v. Saunders*, 16 How. 535; *Kimball v. Reding*, 31 N. H. 352; 64 Am. Dec. 333 (a very instructive case); *Lovell v. Minot*, 20 Pick. 116; 32 Am. Dec. 206; *Harvard College v. Amory*, 9 Pick. 446; *Smith v. Smith*, 4 Johns. Ch. 281, 445; *Thompson v. Brown*, 4 Johns. Ch. 619, 628; *Ackerman v. Emott*, 4 Barb. 626; *Worrell's Appeal*, 9 Pa. St. 508; *Swoyer's Appeal*, 5 Pa. St. 377; *Twaddell's Appeal*, 5 Pa. St. 15; *Murray v. Feinour*, 2 Md. Ch. 418, 419; *Evans v. Iglehart*, 6 Gill & J. 171, 192; *Ellig v. Naglee*, 9 Cal. 683.^f

(d) *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

(e) *Contra*, *Douglass v. Stephenson*, 75 Va. 747; *Waller's Adm'rs v. Catlett's Ex'rs*, 83 Va. 200, 2 S. E. 280.

(f) See, generally, *Gilbert v. Kolb*, 85 Md. 627, 37 Atl. 423; *In re Westfield*, 32 App. Div. 324, 53 N. Y. Supp. 25; *Stone v. Clay*, 19 Ky. Law Rep. 2029, 45 S. W. 80; *Aydelott v. Breed-*

competent to bind himself, his consent to the irregular investment would be a justification of the trustee's action, and a waiver of all claim against him for resulting loss.⁴

§ 1075. III. To Act with Good Faith. 1. The Duty not to Deal with Trust Property for his Own Advantage.—Absolute and most scrupulous good faith is the very essence of the trustee's obligation. The first and principal duty arising from this fiduciary relation is to act in all matters of the trust wholly for the benefit of the beneficiary. The trustee is not permitted to manage the affairs of the trust, or to deal with the trust property, so as to gain any advantage, directly or indirectly, for himself, beyond his lawful compensation. The equitable rules which govern the *personal* dealings between trustees and all other fiduciaries and their beneficiaries — their contracts, purchases, gifts, and the like — have already been examined, and this branch of their

⁴ A married woman is competent to bind herself in this manner when a beneficiary: *Sherman v. Parish*, 53 N. Y. 483.£

ing, 22 Ky. Law Rep. 1146, 64 S. W. 916; *Calloway v. Calloway*, 19 Ky. Law Rep. 870, 39 S. W. 241; *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192; *Mathewson v. Davis*, 191 Ill. 391, 61 N. E. 68. See, also, as to speculative risks, *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, 48 N. E. 128; *English v. McIntyre*, 29 App. Div. 439, 51 N. Y. Supp. 697; *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 53 Am. St. Rep. 64, 16 South. 126 (investment in corporation stock not allowed). Many cases are cited in *Lamar v. Micou*, 112 U. S. 452, 465, 5 Sup. Ct. Rep. 221, 26 L. ed. 774, which also holds investment in Confederate bonds unlawful (p. 476). See, also, *Opie v. Castleman*, 32 Fed. 511 (Confederate money); *Crabb v. Young*, 92 N. Y. 56; *Porter v. Woodruff*, 36 N. J. Eq. 174, 185; *McCoy v. Harwitz*, 62 Md. 183; *Cogbill v. Boyd*,

77 Va. 450; *Simmons v. Oliver*, 74 Wis. 633, 43 N. W. 561; *Tuttle v. Gilmore*, 36 N. J. Eq. 617 (investments in second mortgages, no circumstances being shown to justify a resort to such hazardous securities, or investments made without instituting proper inquiries as to the value of the securities, are not excused by a clause in the instrument creating the trust exempting the trustee from liability except for "willful and intentional breaches of trust"); *Dickinson's Appeal*, 152 Mass. 184, 25 N. E. 99 (investment in railroad stocks allowed in Massachusetts, but not when the enterprise is hazardous); *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758 (no limitation in Rhode Island to any particular class of securities).

(£) See, also, in general, *Etting v. Marx*, 4 Fed. 673, 4 Hughes 312.

general obligation to use good faith needs no further discussion.¹ It is equally imperative upon the trustee, in his dealings with trust property, not to use it in his own private business, not to make any incidental profits for himself in its management, and not to acquire any pecuniary gains from his fiduciary position. The beneficiary is entitled to claim all advantages actually gained, and to hold the trustee chargeable for all losses in any way happening, from a violation of this duty.²

¹ See ante, §§ 955-965.

² Thus if a trustee or other fiduciary buys up a debt or encumbrance against the estate at less than its full amount, he cannot retain the benefit of the discount, but can only credit himself with the sum actually paid: *Pooley v. Quilter*, 2 De Gex & J. 327; 4 Drew. 184; *Fosbrooke v. Balguy*, 1 Mylne & K. 226; see ante, § 959.^a Using trust money in the trustee's own business, in trade or mercantile adventures, in stock speculations, in buying and selling land, and the like, is a breach of trust: *Docker v. Sones*, 2 Mylne & K. 655; *Willett v. Blanford*, 1 Hare, 253; *Heathcote v. Hulme*, 1 Jacob & W. 122; *Moons v. De Bernales*, 1 Russ. 301; *San Diego v. San Diego* etc. R. R., 44 Cal. 106, 112-116; *Page v. Naglee*, 6 Cal. 241; *Gunter v. Janes*, 9 Cal. 643, 660-662; *Commonwealth v. McAlister*, 28 Pa. St. 480.

The penalty for a violation of this duty may be imposed in any form necessary to a complete indemnification of the beneficiary. Where the trustee has used trust funds in his own business, in trade, speculation, has made profits, acquired property, and the like, the beneficiary may, if he elect, claim and secure the advantage, profits, property, etc., for his own benefit. If the gains, profits, or acquisitions of such dealings cannot be ascertained with certainty, the trustee may be held liable to pay extra interest, and even compound interest. The beneficiary is not, however, permitted to claim both profits and interest; he is required to elect between the two. Finally, if the trustee uses trust funds for such improper purposes, and loses them in any manner, he will be obliged to make up the loss to an extent sufficient to give the beneficiary complete indemnity, not only for the principal, but also for the income or interest which ought to have been made by the exercise of good faith and ordinary business prudence. These conclusions are illustrated by the cases above cited, and also by those following: *Robinson v. Robinson*, 1 De Gex, M. & G. 247, 256, 257; *Ex parte Geaves*, 8 De Gex, M. & G. 291; *Lloyd v. Attwood*, 3 De Gex & J. 614; *General Exch. Bank v. Horner*, L. R. 9 Eq. 480; *Whitney v. Smith*, L. R. 4 Ch. 513 (a trustee who

(a) The text is cited in *White v. Sherman*, 168 Ill. 589, 611, 61 Am. St. Rep. 132, 144, 48 N. E. 128; see, also, *Baugh's Ex'rs v. Walker*, 77 Va. 99; *Powell v. Powell*, 80 Ala. 11;

Petrie v. Badenoch, 102 Mich. 45, 47 Am. St. Rep. 503, 60 N. W. 449; *Kroegher v. Calivada Colonization Co.*, 56 C. C. A. 257, 119 Fed. 641.

§ 1076. 2. The Duty not to Mingle Trust Funds with his Own Funds.^a—This second important duty of good faith includes not only the intentional use of trust funds in the trustee's own business: it prohibits the mixing the two funds together in one amount, the depositing trust moneys in his own personal account with his own moneys in bank, borrowing trust funds or going through the form of borrowing for his own use, mingling receipts and payments of trust moneys and his own moneys in his books of account, and all similar modes of combining or failing to distinguish

also acted as solicitor in a transfer of certain trust property cannot be charged with profits which he made as acting solicitor); *Ellis v. Parker*, L. R. 7 Ch. 104; *Parker v. McKenna*, L. R. 10 Ch. 96; *Albion etc. Co. v. Martin*, L. R. 1 Ch. Div. 580; *In re Imperial Land Co.*, L. R. 4 Ch. Div. 566; *Land Credit Co. v. Lord Fermoy*, L. R. 8 Eq. 7; *Williams v. Powell*, 15 Beav. 461; *Sweet v. Jeffries*, 67 Mo. 420; *Vason v. Beall*, 58 Ga. 500; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Roberts v. Moseley*, 64 Mo. 507; *Fulton v. Whitney*, 66 N. Y. 548; 5 Hun, 16; *Fast v. McPherson*, 98 Ill. 496; *Coltrane v. Worrell*, 30 Gratt. 434; *Morrow v. Saline Co. Comm'rs*, 21 Kan. 484; *Heath v. Waters*, 40 Mich. 457; *Malone v. Kelley*, 54 Ala. 532 (both profits and interest not permitted); *Baker v. Disbrow*, 18 Hun, 29; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141, 148, 149; *Staats v. Bergen*, 17 N. J. Eq. 554, 562, 563; *Trull v. Trull*, 13 Allen, 407; *Marsh v. Renton*, 99 Mass. 132, 135; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; 7 Am. Dec. 507; *Gilman v. Gilman*, 2 Lans. 1; *Diffenderffer v. Winder*, 3 Gill. & J. 311; *Chapman v. Porter*, 69 N. Y. 276; *Barnes v. Brown*, 80 N. Y. 527, 535; *Duncomb v. N. Y. etc. R. R.*, 84 N. Y. 190; *Davis v. Rock Creek etc. Co.*, 55 Cal. 359; 36 Am. Rep. 40; *Chamberlain v. Pacific Wool etc. Co.*, 54 Cal. 103; and see cases in the two following notes.^b

(b) See, also, *Bowen v. Richardson*, 133 Mass. 296; *Hazard v. Durant*, 14 R. I. 25; *Deegan v. Capner*, 44 N. J. Eq. 339, 15 Atl. 819; *Haberman's Appeal*, 101 Pa. St. 329; *Dorsey v. Banks*, 70 Md. 508, 17 Atl. 272; *Burwell v. Burwell's Guardian*, 78 Va. 574; *Carr v. Askew*, 94 N. C. 194; *Dowling v. Feeley*, 72 Ga. 557; *Powell v. Powell*, 80 Ala. 11; *State v. Roeper*, 82 Mo. 57; *Baker's Appeal*, 120 Pa. St. 33, 13 Atl. 487; *Marshall v. Carson*, 38 N. J. Eq. 250, 48 Am. Rep. 319; and see the various questions in regard to profits and in-

terest discussed at length in *Cruce v. Cruce*, 81 Mo. 676. See *post*, §§ 1079–1080.

(a) This section is cited to the effect that a trustee mingling trust funds with his own is liable for compound interest, in *Bemmerly v. Woodward*, 124 Cal. 568, 57 Pac. 561; to the effect that he is liable for principal and interest in *In re Hodge's Estate*, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663; and, generally, in *White v. Sherman*, 168 Ill. 589, 604, 61 Am. St. Rep. 132, 138, 48 N. E. 128.

between the two funds. The trustee may not thus mingle trust moneys with his own, even though he eventually accounts for the whole, and nothing is lost. The rule is designed to protect the trustee from temptation, from the hazard of loss, and of being a possible defaulter. When a trustee does mingle trust moneys with his own, the right and lien of the beneficiary attach to this entire combined fund as security for all that actually belongs to the trust estate. A violation of this duty subjects the trustee to the following liabilities: 1. If the mingling is followed by actual loss, accidental or otherwise, the trustee must make good the principal sum lost, together with interest, and perhaps with compound interest; 2. Where there has been no positive loss, but the whole funds, principal, profits, and proceeds, are in the trustee's hands in their mingled condition, the burden of proof rests upon him of showing most conclusively what portion is his, and whatever of the mixed fund, including both profits and principal, he cannot thus show to be his own, even though it be the whole mass, will be awarded to the beneficiary. The beneficiary is always entitled to claim and receive the *actual profits* when they can be ascertained; 3. If it is difficult to distinguish the funds so as to tell the amount of profits or proceeds which is the beneficiary's share, the court may not only require the trustee to restore the principal which he has appropriated, but in place of the profits may compel him to pay interest compounded, with rests annual or semi-annual, or even more frequent, as the extent of his bad faith may seem to demand; 4. Even if the trustee voluntarily accounts for and restores all the principal that he has mingled with his own, the court will at all events charge him with interest thereon.¹

¹It should be observed that the trustee is liable for trust money lost while mingled with his own, or while being used in his own business, no matter how or by what cause the loss occurs. He may have used the utmost care and prudence in conducting the business, and the loss may have been the result of unforeseen, inevitable accident,—he is still liable, since he is

§ 1077. 3. The Duty not to Accept Any Position or Enter into Any Relation, or do Any Act Inconsistent with the Interests of the Beneficiary.^a— This rule is of wide application, and extends to every variety of circumstances. It rests upon the principle that as long as the confidential relation lasts the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original *cestui que trust*. The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations, as well as to technical trustees. The most important phase of this rule is that which forbids trustees and all other fiduciaries from dealing in their own behalf with respect to

engaged in a positive violation of duty: *Lupton v. White*, 15 Ves. 432; *Heathcote v. Hulme*, 1 Jacob & W. 122; *Mason v. Morley*, 34 Beav. 471, 475; *Frith v. Cartland*, 2 Hem. & M. 417; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *Ernest v. Croysdill*, 2 De Gex, F. & J. 175; *Ex parte Geaves*, 8 De Gex, M. & G. 291; *Cook v. Addison*, L. R. 7 Eq. 466, 470 ("it is a well-established doctrine in this court that if a trustee or agent mixes and confuses the property which he holds in a fiduciary character with his own property, so as that they cannot be separated with perfect accuracy, he is liable for the whole"); *Woodruff v. Boyden*, 3 Abb. N. C. 29; *Malone v. Kelley*, 54 Ala. 532; *Davis v. Coburn*, 128 Mass. 377; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Case v. Abeel*, 1 Paige, 392; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Mumford v. Murray*, 6 Johns. Ch. 1; *Kip v. Bank of New York*, 10 Johns. 63; *Comm. v. McAlister*, 28 Pa. St. 480; *Gunter v. James*, 9 Cal. 643, 660-662 (a very instructive case); *Livingston v. Wells*, 8 S. C. 347.^b

(b) See, also, *Nat. Bank v. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693; *Matter of Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Roberts's Appeal*, 92 Pa. St. 407; *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77; *Page v. Holman*, 82 Ky. 573; *Asay v. Allen*, 124 Ill. 391, 16 N. E. 865; *Brazel v. Fair*, 26 S. C. 370, 2 S. E. 293 (trustee uses trust funds to erect improvements on his own land); *Naltner v. Dolan*, 108 Ind. 504, 58 Am. Rep. 61, 8 N. E. 289. In like manner, it has been held that

it is a breach of trust for a trustee to mingle several trust funds together: *Vaughn v. Rhode Island M. & T. Co.*, 24 R. I. 350, 53 Atl. 125.

(a) This section is cited in *Nabours v. McCord*, (Tex. Civ. App.) 75 S. W. 827; *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90 (transaction is voidable only); *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 135, 23 Atl. 708.

matters involved in the trust, and this prohibition operates irrespectively of the good faith or bad faith of such dealing. It is therefore a gross violation of his duty for any trustee or director, acting in his fiduciary capacity, to enter into any contract with himself connected with the trust or its management; such a contract is voidable, and may be defeated or set aside at the suit of the beneficiary. If, however, the trustee's act, in violation of this rule, is not done in bad faith, and the beneficiary has received any benefit therefrom, it cannot be avoided without a restoration to the trustee of what has thus been received.¹ As another appli-

¹ Since the applications of this duty to corporation directors and officers are very important and frequent, it will be proper to make a brief quotation from one or two very recent cases. In *Duncomb v. New York etc. R. R.*, 84 N. Y. 190, 198, the court said: "It is not intended to deny or question the rule that, whether a director of a corporation is to be called a trustee or not in a strict sense, there can be no doubt that his character is fiduciary, and that he falls within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon such party to deal on his own behalf in respect to any matter involving such confidence. Nor is it at all questioned that, in such cases, the right of the beneficiary or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly: *Davoue v. Fanning*, 2 Johns. Ch. 260. But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus the beneficiary may avoid the act of the trustee, but cannot do so without restoring what he has received: *York Co. v. Mackenzie*, 8 Brown Parl. C. 42. To cling to the fruits of the trustee's dealing while seeking to avoid his act, to take the benefit of his loan and yet avoid and reverse its security, would be grossly inequitable and unjust." The court held that the rule does not apply where a trustee or director simply takes collateral security for a debt justly due to him, or for a liability justly incurred by him. See also *Barnes v. Brown*, 80 N. Y. 527, 535, per Earl, J. The following cases illustrate the general duty in its various applications: *Aberdeen R'y v. Blaikie*, 1 Macq. 461; *Lloyd v. Attwood*, 3 De

(b) **Contracts Between a Corporation and One of its Directors.**—Much of the apparent confusion in judicial *dicta* upon this important subject may be cleared up by a reference to the

two classes of cases of transactions presumptively invalid between persons in fiduciary relations, described *ante*, § 957; viz., the first class, where "the two parties consciously and in-

cation of the general doctrine, a trustee is bound to communicate to his beneficiary any knowledge or information he may have obtained affecting the beneficiary's interests

Gex & J. 614 (trustees bound to give full information); Imperial etc. Ass'n v. Coleman, L. R. 6 Ch. 558; Flanagan v. Great West. R'y, L. R. 7 Eq. 116, 123; Albion etc. Co. v. Martin, L. R. 1 Ch. Div. 580; Twin Lick Oil Co. v.

tentionally deal and negotiate with each other," and the second class, where the trustee or agent, "purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary." In the second class of cases the transaction is voidable at the option of the beneficiary; in the first class, it may be upheld if the trustee or agent successfully discharges the burden of proof as to its fairness. In the case of corporations, which can only act through agents, there is often some difficulty in determining which of these two rules is applicable to a given transaction; viz., in solving the question of fact, whether the director or officer was acting in the transaction as agent or representative of the corporation, as well as on his own behalf, in which case the second rule should apply, and the transaction should be absolutely voidable; or whether the corporation was *effectively* represented in the transaction by other agents, so that it may be said to have taken part therein "knowingly," and thus the director or officer has merely the burden of proving the fairness and good faith of his contract. In general, see *In re George Newman & Co.*, [1895] 1 Ch. 675; *Alexander v. Automatic Telephone Co.*, [1900] 2 Ch. 56, reversing [1899] 2 Ch. 302 (directors obtaining secret benefits); *Shaw v. Holland*, [1900] 2 Ch. 305 (purchasing shares of the company at an under value); *Wardell v. Railroad Co.*, 103 U. S. 651, 26 L. ed. 509; *Thomas v. Brownsville, etc.*,

R. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. ed. 1018; *Jackson v. McLean*, 36 Fed. 213; *Jesup v. Illinois Cent. R. R. Co.*, 43 Fed. 483; *Barr v. Pittsburgh Plate-Glass Co.*, 57 Fed. 86, 6 C. C. A. 260, 17 U. S. App. 124 (contract valid if fair); *Schnittger v. Old Home Consol. Min. Co.*, (Cal.) 78 Pac. 9 (loan by directors to corporation is voidable merely); *Smith v. Los Angeles, etc.*, Ass'n, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53 (director who is personally interested in the passage of a resolution by the board of directors disqualified from voting thereon); *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 135, 23 Atl. 708 (same; contract so made is voidable); *St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055 (director may loan on security to a solvent corporation); *Jackson v. McLean*, 100 Mo. 130, 13 S. W. 393; *Coombs v. Barker*, (Mont.) 79 Pac. 1; *Hodge v. United States Steel Corp.*, (N. J. Eq.) 54 Atl. 1; *Bird Iron & Coal Co. v. Humes*, 157 Pa. St. 278, 37 Am. St. Rep. 727, 27 Atl. 750 (secret profits); *Attala Iron Ore Co. v. Virginia Iron, C. & C. Co.*, (Tenn.) 77 S. W. 774 (directors organize and contract with new corporation; such contract voidable, whether favorable or not, on seasonable application of directors and stockholders of first corporation); *Singer v. Salt Lake City Copper Mfg. Co.*, 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024 (director may loan on security to a solvent corporation); *Griffith v. Blackwater B. & L. Co.*, 46 W. Va. 56, 33 S. E. 125. A director

so far as they are embraced in or depend upon the trust or confidential relation.^c

§ 1078. 4. The Duty not to Sell Trust Property to Himself nor to Buy from Himself.— This particular duty has already been fully discussed. It has been shown that where a trustee deals directly with his beneficiary by way of purchase or sale, the transaction is presumptively invalid; and that where a trustee with authority to sell directly or indirectly purchases the property for himself behind his beneficiary's back, or where a trustee with authority to buy purchases the property in such a manner from himself, in each case the transaction may be avoided by the beneficiary, unless he has ratified it with full knowledge of all the facts.¹

Marbury, 91 U. S. 587; *Risley v. Indianapolis etc. R. R.*, 62 N. Y. 240; *Hoyle v. Plattsburgh etc. R. R.*, 54 N. Y. 314, 328; 13 Am. Rep. 595; *Butts v. Wood*, 37 N. Y. 317; *Smith v. Lansing*, 22 N. Y. 520, 531; *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Fulton v. Whitney*, 66 N. Y. 548; *N. Y. Central Ins. Co. v. Nat. Protect. Ins. Co.*, 14 N. Y. 85; *St. James's Church v. Church of the Redeemer*, 45 Barb. 356; *Davis v. Rock Creek etc. Co.*, 55 Cal. 359; 36 Am. Rep. 40; *Chamberlain v. Pacific Wool etc. Co.*, 54 Cal. 103; *San Diego v. San Diego etc. R. R.*, 44 Cal. 106, 112-116; *Stewart v. Lehigh Val. R. R.*, 38 N. J. L. 505; *Gardner v. Butler*, 30 N. J. Eq. 702; *Sweet v. Jeffries*, 67 Mo. 420; *Roberts v. Moseley*, 64 Mo. 507; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Fast v. McPherson*, 98 Ill. 496; *Morrow v. Saline Co. Comm'rs*, 21 Kan. 484.

¹ See *ante*, §§ 958-965, 1049-1052. See also *In re Bloye's Trust*, 1 Macn. & G. 488; *Knight v. Marjoribanks*, 2 Macn. & G. 10; *Hickley v. Hickley*, L. R. 2 Ch. Div. 190; *Ellis v. Barker*, L. R. 7 Ch. 104; *Boerum v. Schenck*, 41 N. Y. 182 (when a trustee to sell has himself purchased the trust property, the mere receipt and acceptance of the proceeds by the beneficiary is not such a ratification as will prevent him from avoiding the sale); *Munn v.*

is not allowed to purchase property which he knows the corporation will need and then make a profit by selling to the corporation: *Miller v. Consolidated, etc., Co.*, 110 Fed. 480; *Lagarde v. Anniston, etc., Co.*, 126 Ala. 496, 28 South. 199; *Seacoast R. Co. v. Wood*, (N. J. Eq.) 56 Atl. 337; *De Bardeleben v. Bessemer Land & Imp. Co.*, (Ala.) 37 South. 511 (president taking lease in his own name holds as trustee); nor to keep sums secretly paid to influence

his action by one dealing with the corporation: *Scott v. Farmers & Merchants' Nat. Bank*, (Tex.) 75 S. W. 7 (conveyance made to president in consideration of railroad extending its line); *Rutland, etc., Co. v. Bates*, 68 Vt. 579, 54 Am. St. Rep. 904, 35 Atl. 480; nor to be secretly interested in contracts with the corporation: *D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 288, 70 S. W. 809.

(c) See §§ 902-904; § 1063.

§ 1079. IV. Breach of Trust, and Liability therefor.—It might be supposed that the term “breach of trust” was confined to willful and fraudulent acts which have a *quasi* criminal character, even if they have not been made actual crimes by statute. The term has, however, a broader and more technical meaning. It is well settled that every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.^a The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described: of carrying out the trust according to its terms, of care and diligence

Berges, 70 Ill. 604; Bush v. Sherman, 80 Ill. 160; Star Fire Ins. Co. v. Palmer, 41 N. Y. Sup. Ct. 267; Spencer's Appeal, 80 Pa. St. 317; Tatum v. McLellan, 50 Miss. 1; Union Slate Co. v. Tilton, 69 Me. 244; James v. James, 55 Ala. 525; Higgins v. Curtiss, 82 Ill. 28; Ferguson v. Lowery, 54 Ala. 510; 25 Am. Rep. 718.^a

§ 1078, (a) Morse v. Hill, 136 Mass. 60 (the purchase may be avoided by a part of the beneficiaries); Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 17 Am. St. Rep. 149, 42 N. W. 259 (corporation trustees); Williams v. Scott, [1900] A. C. 499 (though the beneficiary consented); Silkstone and Haigh Moore Coal Co. v. Edey, [1900] 1 Ch. 167; Hoyt v. Latham, 143 U. S. 553, 12 Sup. Ct. 568, 36 L. ed. 259 (the *cestui* may ratify the sale); Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. Rep. 418, 36 L. ed. 134 (such sale is voidable and may be ratified); Creveling v. Fritts, 34 N. J. Eq. 134 (but a sale to a third party, and a subsequent purchase from him, protects the trustee); Board of Trustees v. Blair, 45 W. Va. 812, 32 S. E. 203 (same); but see Williams v. Scott, *supra*; Davoue v. Fanning, 2 Johns. Ch. 252 (a sale to one to hold in trust for the trustee's wife is within the rule); Lingke v. Wilkinson, 57 N. Y. 445 (the court upheld a sale

to the trustee's son on the ground that it was not intended for the benefit of the trustee); Yeackel v. Litchfield, 13 Allen 417, 90 Am. Dec. 207 (the sale cannot be attacked, at law, by a stranger). See as to the effect of a sale to a third party, and a subsequent sale to the trustee, Williams v. Scott, *supra*; Frazier v. Jeakins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575; Broder v. Conklin, 121 Cal. 282, 53 Pac. 699 (voidable); Hamilton v. Dooley, 15 Utah 280, 49 Pac. 769 (trustee not allowed to purchase at judicial sale); Shelby v. Creighton, 65 Nebr. 485, 91 N. W. 369 (*cestui* has option to take benefit of purchase or to treat the sale as valid, but his decision must be made within a reasonable time); St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256.

§ 1079, (a) The text is quoted in Duckett v. National Mechanics' Bank, 86 Md. 400, 403, 63 Am. St. Rep. 513, 516, 38 Atl. 983, 39 L. R. A. 84.

in protecting and investing the trust property, and of using perfect good faith. This broad conception of breach of trust, and the liabilities created thereby, are not confined to trustees regularly and legally appointed; they extend to all persons who are acting trustees, or who intermeddle with trust property.^{1 b} In order that a trustee may be personally liable for a breach of trust, he must be *sui juris*.²

§ 1080. Nature and Extent of the Liability.— It has already been shown that a beneficiary may always claim and reach the trust property through all its changes of form while in the hand of the trustee, and that he may also follow it into the possession and apparent ownership of third persons, until it has been transferred to a *bona fide* purchaser for valuable consideration and without notice; and that a court of equity will furnish him with all the incidental remedies

¹ Rackham v. Siddall, 1 Maen. & G. 607; Lord v. Wightwick, 4 De Gex, M. & G. 803; Life Ass'n of Scotland v. Siddal, 3 De Gex, F. & J. 58; Pearce v. Pearce, 22 Beav. 248; Hennessey v. Bray, 33 Beav. 96.

² Where the common-law disabilities of coverture prevail, a married woman does not become personally liable for her breach of trust: Underwood v. Stevens, 1 Mer. 712, 717; Cresswell v. Dewell, 4 Giff. 460; Wainford v. Heyl, L. R. 20 Eq. 321; although her separate estate might be liable under some circumstances: See Brewer v. Swirles, 2 Smale & G. 219; Fletcher v. Green, 33 Beav. 426; as to wrongful investments made with her consent, see Cocker v. Quayle, 1 Russ. & M. 525; Kellaway v. Johnson, 5 Beav. 319. An infant is not, in general, liable for a breach of trust: Whitmore v. Weld, 1 Vern. 326, 328; Hindmarsh v. Southgate, 3 Russ. 324; unless it was intentional and fraudulent: Cory v. Gertcken, 2 Madd. 40; Wright v. Snowe, 2 De Gex & S. 321.^c

(b) This section is cited in Duckett v. Bank, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807. See, also, Oceanic Steam Nav. Co. v. Sutherland, L. R. 16 Ch. Div. 236 (a breach of trust though beneficial to the estate was not condoned by the court). A breach of trust is not generally excused because committed at the request of the beneficiary; see Griffith v. Hughes, [1892] 3 Ch. 105; Bolton v. Curre, [1895] 1 Ch. 545; Williams v. Scott, [1900] A. C. 499. An in-

vestment, unintentionally improper, is a breach for which the trustee is liable: Stokes v. Prance, [1898] 1 Ch. 212. That the words "willful and intentional breaches of trust" may include mere acts of negligence, see Tuttle v. Gilmore, 36 N. J. Eq. 617; see, also, Elliott v. Carter, 9 Gratt. 541, and *ante*, § 1070.

(c) See *ante*, § 987. It has been held that a trustee may limit and qualify the character in which he is to be held answerable, and where it plainly appears that he did not intend to bind himself personally the courts

necessary to enforce his claim and to render it effective.¹ In addition to this claim of the beneficiary upon the trust estate as long as it exists, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act. The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt.² It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court.^b The amount of the liability is always sufficient for the complete indemnification and compensation of the beneficiary.³

¹ See *ante*, §§ 1048-1058.

² *Vernon v. Vawdry*, 2 Atk. 119; *Adey v. Arnold*, 2 De Gex, M. & G. 432; *Lockhart v. Reilly*, 1 De Gex & J. 464; *Obee v. Bishop*, 1 De Gex, F. & J. 137; *Ex parte Blencowe*, L. R. 1 Ch. 393; *Holland v. Holland*, L. R. 4 Ch. 449; *Wynch v. Grant*, 2 Drew. 312; *Benbury v. Benbury*, 2 Dev. & B. Eq. 235, 238. The distinction between specialty debts and simple contract debts in the settlement of estates being generally abolished in this country, the liability of the trustee may properly be described as an equitable contract liability or debt,—that is, an equitable liability of the same nature as that arising from breach of contract.

³ The general doctrines concerning the trustee's liability for profits, for interest simple or compound, and for the funds lost or misapplied, have been stated in the foregoing paragraphs. For a more detailed discussion of these rules, especially as to interest, the reader must be referred to the various treatises upon trusts. As to the liability of the trustee's estate after his death, and the defense of the statute of limitations, see *Devaynes v. Robinson*, 24 Beav. 86; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *Wood v. Weightman*, L. R. 13 Eq. 434; *Taylor v. Cartwright*, L. R. 14 Eq. 167; *Burdick v. Garrick*,

will treat the transaction according to the plainly expressed intention of the parties: *Glenn v. Allison*, 58 Md. 527; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y. 127, 20 Am. Rep. 111; *Perry v. Board of Missions of the P. E. Church*, 102 N. Y. 99, 6 N. E. 116.

(a) *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

(b) Quoted in *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647. Cited to the effect that the statute of limitations is not a defense in *Duckett v. Bank*, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84. See § 419.

§ 1081. *Liability among Co-trustees.*—I do not now speak of the liability *for* the acts or defaults of a co-trustee, but assume that co-trustees have concurred in a breach of trust. The rule is firmly settled that where a breach of trust has affected two or more or all of co-trustees with a common liability, they are liable jointly and severally; each is liable for the whole loss sustained or the whole amount due, and

L. R. 5 Ch. 233; *Stone v. Stone*, L. R. 5 Ch. 74; *Dixon v. Dixon*, L. R. 9 Ch. Div. 587; *Pinson v. Gilbert*, 57 Ala. 35; *Rowe v. Bentley*, 29 Gratt. 756. As to the liability in general, see *Robinson v. Robinson*, 1 De Gex, M. & G. 247 (for interest); *Att'y-Gen. v. Alford*, 4 De Gex, M. & G. 843 (ditto); *Cosser v. Radford*, 1 De Gex, J. & S. 585; *Bostock v. Floyer*, L. R. 1 Eq. 26 (liable for fraud of his attorney); *Sutton v. Wilders*, L. R. 12 Eq. 373 (ditto); *Hopgood v. Parkin*, L. R. 11 Eq. 74 (liable for the negligence of his attorney); *In re Grabowski's Settlement*, L. R. 6 Eq. 12 (for compound interest); *Cook v. Addison*, L. R. 7 Eq. 466; *Beaty v. Curson*, L. R. 7 Eq. 194; *Jacubs v. Rylance*, L. R. 17 Eq. 341; *Livingston v. Wells*, 8 S. C. 347; *Leedon v. Lombaert*, 80 Pa. St. 381; *Brown v. Lambert's Adm'r*, 33 Gratt. 256; and see cases cited under the last preceding paragraphs.^d

(c) See, also, *Richardson v. Hutchins*, 68 Tex. 81, 3 S. W. 276.

(d) *In re Barclay*, [1899] 1 Ch. 674; *Nunn v. Nunn*, 66 Ala. 35; *Atkinson v. Ward*, 47 Ark. 533, 2 S. W. 77; *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180; *In re Schofield's Estate*, 99 Ill. 513; *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560; *McKim v. Hibbard*, 142 Mass. 422, 8 N. E. 152; *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20; *Bartlett v. Fitz*, 59 N. H. 502 (not liable for interest for non-investment); *Stothoff v. Reed*, 32 N. J. Eq. 213; *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665; *Gray v. Thompson*, 1 Johns. Ch. 82; *Rundle v. Allison*, 34 N. Y. 180.

Simple Interest was charged against the trustee in the following cases: *In re Davis*, [1902] 2 Ch. 314 (by English rule, five per cent interest, though that is much above the mercantile rate, charged on funds invested in trade or speculative transactions; or, at option of the beneficiary, the profits made on the in-

vestment); *Eppinger v. Canepa*, 20 Fla. 262 (failure to pay into court); *Offutt v. Divine's Ex'rs*, (Ky.) 53 S. W. 816; *Gott v. State*, 44 Md. 319; *Crosby v. Merriam*, 31 Minn. 342, 17 N. W. 950 (guardian chargeable with legal rate for non-investment); *Ames v. Scudder*, 83 Mo. 189, 11 Mo. App. 168 (negligent non-investment); *Aldridge v. McClelland*, 36 N. J. Eq. 288 (funds used for trustee's benefit); *In re Myers*, 131 N. Y. 409, 30 N. E. 135 (six per cent for using the trust funds); *In re Barnes*, 4 Misc. Rep. 136, 23 N. Y. Supp. 600 (six per cent for non-investment); *Skipp v. Hettrick*, 63 N. C. 329 (keeping funds mingled with his own); *In re Whitecar's Estate*, 147 Pa. St. 368, 23 Atl. 575 (one per cent in addition to what the fund had drawn from the negligent deposit); *McCloskey v. Gleason*, 56 Vt. 264, 38 Am. Rep. 770 (the highest legal rate charged, for mingling the fund with that of the trustee); *Coghill v. Bird*, 79 Va. 1 (an im-

a decree obtained against them jointly may be enforced against any one of them.¹ Wherever two or more co-trustees are thus jointly and severally liable in the same amount for a breach of trust which is not purely tortious in its nature,—as where it consists in a failure to carry out the directions of the trust, or a failure to make proper investments, or other like acts of omission or commission which

¹ *Wilson v. Moore*, 1 Mylne & K. 126; *Lyse v. Kingdon*, 1 Coll. C. C. 184, 188; *Att'y-Gen. v. Wilson*, Craig & P. 1, 28; *Lawrence v. Bowle*, 2 Phill. Ch. 140; *Fletcher v. Green*, 33 Beav. 426; *Rehden v. Wesley*, 29 Beav. 213, 215; *Burrows v. Walls*, 5 De Gex, M. & G. 233; *Wiles v. Gresham*, 5 De Gex, M. & G. 770; *Ex parte Geaves*, 8 De Gex, M. & G. 291; *Lockhart v. Reilly*, 1 De Gex & J. 464; *Case v. James*, 3 De Gex, F. & J. 256; *Turquand v. Marshall*, L. R. 6 Eq. 112; *Sculthorpe v. Tipper*, L. R. 13 Eq. 232; *Ashhurst v. Mason*, L. R. 20 Eq. 225; *Ex parte Norris*, L. R. 4 Ch. 280; *Budge v. Gummow*, L. R. 7 Ch. 719; *Ellis v. Barker*, L. R. 7 Ch. 104; *Evans v. Bear*, L. R. 10 Ch. 76; *Butler v. Butler*, L. R. 5 Ch. Div. 554; 7 Ch. Div. 116; *In re Englefield etc. Co.*, L. R. 8 Ch. Div. 388; *Land Credit Co. v. Lord Fermoy*, L. R. 8 Eq. 7, 11, 13; 5 Ch. 763; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *Weetjen v. Vibbard*, 5 Hun, 265; *Heath v. Waters*, 40 Mich. 457 (where one trustee deals with another person, whom he knows to be also a trustee, in such a manner as amounts to a breach of the latter's trust, both

provident investment at ten per cent was repudiated by the *cestui*: held, the trustee liable at the rate of six per cent only); *In re Thurston*, 57 Wis. 104, 15 N. W. 126 (non-fraudulent failure to invest).

Compound Interest: *Price v. Peterson*, 38 Ark. 494 ("It is usual, and quite necessary, sometimes, in equity, to inflict compound interest upon trustees, not so much for punishment, but that the beneficiaries may receive that which, in justice, they should, and which they most probably would have received if the trustee had been reasonably attentive and faithful"); *In re Thompson's Estate*, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508 (using the fund for his own profit); *Hough v. Harvey*, 71 Ill. 72 (six per cent for mere failure to invest); *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203 (six per cent); *Page v. Holman*, 82 Ky. 573 (trustee using for his own

business); *Elliott v. Sparrell*, 114 Mass. 404; *Perrin v. Lepper*, 72 Mich. 454, 40 N. W. 859 (fraudulent appropriation to the use of trustee); *Crowder v. Shakelford*, 35 Miss. 321 (using the fund); *McKnight v. Walsh*, 24 N. J. Eq. 498; *Salisbury v. Colt*, 27 N. J. Eq. 492 (failure to invest funds); *Cook v. Lowry*, 95 N. Y. 103 (trustee using the funds); *Roberts' Appeal*, 92 Pa. St. 407; *Reed v. Timmins*, 52 Tex. 84 (trustee using *res*); *In re Hodges Estate*, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663 (trustee mingling with his own funds); *Jones v. Ward*, 10 Yerg. 160 (statute providing for the payment of annual interest means compounding interest).

That the liability of a trustee may be limited by the instrument creating the trust, but that a strict rule of construction will be applied against such limitation, see *Tuttle v. Gilmore*, 36 N. J. Eq. 617.

are not fraudulent, or do not involve a willful breach of good faith,—a right of contribution exists among themselves; and if one of them has paid the amount of liability, he may enforce a contribution from the others, in a suit brought for that purpose. In such cases, upon the general principles of equity pleading, all the trustees who are liable should be joined as defendants in a suit brought by the beneficiary; the contribution, however, cannot be *enforced* in that suit.² Where, on the other hand, the breach of trust

are affected with an equitable liability); see also, on the general subject of the trustees' liability: *Townley v. Sherborne*, Bridg. 35; *Brice v. Stokes*, 11 Ves. 319; 2 Lead. Cas. Eq., 4th Am. ed., 1738, 1748, 1791, and notes of the English and American editors.

²This rule is sometimes laid down in the broadest terms, as though the right of contribution was universal, existing in every instance of liability among co-trustees for any breach of trust. This is certainly erroneous, since the distinction mentioned in the text is clearly made by the decisions. The general language of judicial opinions in stating the rule should always be interpreted by the facts of the case before the court. It has also been said that the defaulting trustees should all be joined as defendants in a suit by the beneficiary, in order that the contribution among them might be settled and enforced by the one decree. This view is not sustained by the decisions. Many of the authorities which recognize the right of contribution declare in the most positive manner that it cannot be enforced among the defendants in the suit brought against them by the beneficiary. The true reason for making them all parties is, that they may be bound by the decree which fixes the amount of the liability for which they must contribute: See *Perry on Trusts*, secs. 848, 876. The leading case on the subject of contribution is *Lingard v. Bromley*, 1 Ves. & B. 114, 117. Two trustees were sued, and a decree was obtained against them jointly for not conveying certain property. The master of rolls said: "Where damages are recovered against several defendants guilty of a tort, a court of justice will not enforce a contribution among them; but here is nothing but the non-performance of a civil obligation. The trustees were bound to convey; a loss was occasioned by their not conveying, and they were bound to make good that loss. The liability, therefore, was not at all *ex delicto*." He goes on to show that there was not the slightest fraud in the defendants' default, and they were entitled to a contribution. The whole reasoning indicates the ground upon which the right of contribution is placed to be the absence of any tortious character in the defendants' breach of trust. In *Sherman v. Parish*, 53 N. Y. 483, 489, defendant was sued for an alleged breach of trust in not making proper investments. The court held that the fault, if any, was entirely that of the defendants' co-trustee, who was not made a party defendant, and that the defendant was not at all liable. *Folger, J.*, added: "It is quite clear that if defendant had been held to answer in the first instance to the plaintiff, he should have recompense from the estate of the

concurrent in by several co-trustees is tortious in its nature, as where it is actually fraudulent, or consists in an intentional misappropriation of trust funds to the trustee's own use, or in any other willful violation of good faith, or perhaps in gross and culpable negligence occasioning a loss, there is no right of contribution among the trustees; the beneficiary may, at his election, sue one or more of the wrong-doers without joining all who are liable.³

active trustee, contribution from that of the co-trustee equally in fault, and be enabled to pursue and recover the fund in the securities in which it has been put." He goes on to say that the other co-trustee was a necessary party, and seems to intimate as the reason, that the court might by its decree in the same suit adjust the rights, and enforce the contribution between the defendants themselves. This whole statement is an *obiter dictum*; but the rule which it lays down concerning the right of contribution is undoubtedly correct when confined to such cases as the one then before the court. The conclusion which the learned judge reaches, that the contribution would be enforced by the decree in the suit brought by the beneficiary, is certainly not supported by the *decisions* which he cites. See also *Coppard v. Allen*, 2 De Gex, J. & S. 173, 177, per Turner, L. J.; *Fletcher v. Green*, 33 Beav. 513, 515 (while admitting the right of contribution, expressly holds that "the equities of the defendants as between themselves cannot be determined in this suit" brought by the *cestui que trust*); *Att'y-Gen. v. Daugars*, 33 Beav. 621, 624 (same rule); *Perry v. Knott*, 4 Beav. 179, 180 (holds that all the defaulting trustees should be made parties, not because contribution could be enforced in this suit, for it could not; "but if they were all present, the amount due would be settled in the presence of all, and in a subsequent suit for contribution, the amount would already have been conclusively decided"); *Pitt v. Bonner*, 1 Younge & C. Ch. 670 (a contribution as to costs for the defendants was decreed by consent of the parties on motion in the same suit); *Wilson v. Goodman*, 4 Hare, 54; *Munch v. Cockerell*, 8 Sim. 219 (all the defaulting trustees are, in general, necessary parties defendant in a suit for a breach of trust); *Priestman v. Tindall*, 24 Beav. 244; *Baynard v. Woolley*, 20 Beav. 583; *Birks v. Micklethwait*, 33 Beav. 409.^a

³ In *Att'y-Gen. v. Wilson*, Craig & P. 1, 28, a suit was brought against a portion of a body of trustees, who had been guilty of a willful misappropriation of trust funds, and of gross negligence in the management of the trust estate. The objection was urged with great earnestness that all the wrong-doing trustees should have been made defendants, and that the suit could not be sustained against a part of them only. Lord Cottenham laid down the rule in the following emphatic manner, and his conclusions are founded upon plain and settled principles: "It was then urged that all

(a) See, also, *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Robinson v. Harkin*, [1896] 2 Ch. 415 (as between the trustees statute of limitations

does not begin to run until the claim of the *cestui que trust* is established against one of them); *Jackson v. Dickinson*, [1903] 1 Ch. 947.

§ 1082. **Liability for Co-trustees.**—The general theory of equity is, that each one of several trustees has the same rights as the others with respect to the possession, control, and management of the trust property. It follows as a necessary consequence of this conception, and the general rule is well settled, that each trustee is generally liable only for his own conduct in dealing with the affairs of the trust; he is not responsible for the acts or defaults—the intentional or negligent breaches of trust—of a co-trustee, in which he has not joined or concurred, or to which he has not consented, or which he has not aided or made possible by his own negligence.¹ * Where a trustee who is not really

the governing body, at least all who took any part in these transactions, ought to be co-defendants. Upon this point, also, Lord Hardwicke's authority in the *Charitable Corporation Case*, 2 Atk. 400, 406, is of the highest value. It was urged that, as the injury had arisen from the misconduct of many, each ought to be answerable for so much only as his particular misconduct had occasioned; but Lord Hardwicke said: 'If this doctrine should prevail, it is indeed laying the ax to the root of the tree. But if upon inquiry there should appear to be supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty; nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person guilty of it be either in a private or a public capacity.' In cases of this kind, where the liability arises from the wrongful act of the parties; each is liable for all the consequences, *and there is no contribution between them*, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the act complained of; nor would any one derive any advantage from their being all made defendants, because, as the decree would be general against all found to be guilty of the charge, it might be executed against any of them. It is evident that Lord Hardwicke, in the case of the *Charitable Corporation*, considered that each defendant would be liable for each transaction in which he had been a party." He also cites *Att'y-Gen. v. Brown*, 1 Swanst. 265, decided by Lord Eldon as sustaining his conclusion. The same distinction was recognized and followed, and declared to be the well-settled rule, in *Cunningham v. Pell*, 5 Paige, 607, per Walworth, C.; and in *Heath v. Erie R. R. Co.*, 8 Blatch. 347; *Smith v. Rathbun*, 22 Hun, 150.^b

¹ *Townley v. Sherborne*, Bridg. 35; *Brice v. Stokes*, 11 Ves. 319; 2 Lead. Cas. Eq., 4th Am. ed., 1738, 1748-1790, 1791-1805; the English and American

(b) This note is cited in *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807. See, also, citing the text, *Wilkinson v. Dodd*, 40 N. J. Eq. 123, 3 Atl. 360.

(a) See *Estate of Fesmire*, 134 Pa. St. 67, 19 Atl. 502, 19 Am. St. Rep. 676. It has been held that one trustee cannot sue a co-trustee for possession. This is merely an applica-

an acting one joins merely for the sake of conformity with his co-trustees who are acting, in receipts given for money, he is not liable with respect to such money to the beneficiary.² The foregoing statement of the general doctrine shows that a trustee is not absolutely and under all circumstances free from liability with respect to his co-trustees. A trustee is responsible for the willful or negligent wrongful acts or omissions — breaches of trust — of his co-trustee to which

authorities are collected in the editor's notes; *Derbishire v. Home*, 3 De Gex, M. & G. 80 (not liable for moneys which come into the hands of a co-trustee); *Paddon v. Richardson*, 7 De Gex, M. & G. 563 (money having been loaned to a co-trustee in pursuance of express directions of the trust, the omission of the other trustee to compel its repayment did not render that other trustee liable for its loss, in the absence of any misconduct on his part); *Barnard v. Bagshaw*, 3 De Gex, J. & S. 355 (trustees are not liable for moneys which a co-trustee gets into his possession without their consent or knowledge and by a fraud upon them); *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. 763; reversing 8 Eq. 7 (a director is not liable for a breach of trust by the other directors of which he had no knowledge); *Cargill v. Bower*, L. R. 10 Ch. Div. 502, 514 (a director of a company is not liable for a fraud committed by his co-directors unless he has either authorized it or tacitly permitted it); *Williams v. Nixon*, 2 Beav. 472; *Att'y-Gen. v. Holland*, 2 Younge & C. 683; *Kip v. Deniston*, 4 Johns. 23; and see *Mendes v. Guedalla*, 2 Johns. & H. 259; *Cottam v. East. Cos. R'y*, 1 Johns. & H. 243; *Trutch v. Lamprell*, 20 Beav. 116; *Baynard v. Woolley*, 20 Beav. 583; *Griffiths v. Porter*, 25 Beav. 236; *Eager v. Barnes*, 31 Beav. 579. It seems to be settled in New York that where persons are at once executors and trustees, the liability of one for the acts of the other is the same as in the case of executors; that each is liable only for his own acts, and cannot be made responsible for the default of another, unless he in some manner aided or concurred therein:^b *Ormiston v. Olcott*, 84 N. Y. 339, 346; citing *Sutherland v. Brush*, 7 Johns. Ch. 17, 22; 11 Am. Dec. 383; *Monell v. Monell*, 5 Johns. Ch. 283; 9 Am. Dec. 298; *Manahan v. Gibbons*, 19 Johns. 427; *Kip v. Deniston*, 4 Johns. 23; *Banks v. Wilkes*, 3 Sand. Ch. 99; and disapproving of *Bates v. Underhill*, 3 Redf. 365.

² *Brice v. Stokes*, 11 Ves. 319, 324; *Walker v. Symonds*, 3 Swanst. 1, 63; *Gray v. Reamer*, 11 Bush, 113; *Sinclair v. Jackson*, 8 Cow. 543; *Peter v. Beverly*, 10 Pet. 531, 562; 1 How. 134; *Taylor v. Benham*, 5 How. 233. But he must prove affirmatively that he acted only for the sake of conformity; and even then he will be liable if he negligently permit his co-trustee to retain the trust money for his own uses, or to deal with it in violation of the trust: *Brice v. Stokes*, *supra*; *Ingle v. Partridge*, 32 Beav. 661.

tion of the legal rule as to joint tenants and tenants in common: *Goldschmidt v. Maier*, 140 Cal. xvii, 73 Pac. 984.

(b) As to executors, etc., see *Nanz v. Oakley*, 120 N. Y. 84, 24 N. E. 306, 9 L. R. A. 223; *Tompkins v. Tompkins*, 18 S. C. 1.

he consented, or which by his own negligence he made it possible for his co-trustee to commit. Every trustee is, of course, liable for the defaults of his co-trustee in which he has joined or concurred, but his liability then arises from his *own* actual breaches of trust, and not from those of his fellow-trustee. "With respect to the liability of a trustee for the acts of a co-trustee, there are three modes in which he may become liable according to the ordinary rules of the court: 1. Where one trustee receives trust money and *hands it over* to a co-trustee without securing its due application; 2. Where he permits a co-trustee to receive trust money without making due inquiry as to his dealing with it; 3. Where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the necessary steps to obtain restitution." It thus appears that the consent to a co-trustee's breach of trust need not be express. It may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss.^{3c} In applying this general rule, some of

³ See *ante*, § 1069, as to negligent surrender of entire control to a co-trustee: *Wilkins v. Hogg*, 8 Jur., N. S., 25; *French v. Hobson*, 9 Ves. 103; *Brice v. Stokes*, 11 Ves. 319, 324; *Hovey v. Blakeman*, 4 Ves. 596; *Sadler v. Hobbs*, 2 Brown Ch. 114; *Boardman v. Mosman*, 1 Brown Ch. 68; *Joy v. Campbell*, 1 Schoales & L. 328, 341; *Broadhurst v. Balguy*, 1 Younge & C. 16; *Hanbury v. Kirkland*, 3 Sim. 265; *Mucklow v. Fuller*, Jacob, 198; *Booth v. Booth*, 1 Beav. 125; *Styles v. Guy*, 1 Macn. & G. 422, 430; *Burrows v. Walls*, 5 De Gex, M. & G. 233; *Thompson v. Finch*, 8 De Gex, M. & G. 560, 563, 564; 22 Beav. 316; *Ex parte Geaves*, 8 De Gex, M. & G. 291; *Csse v. James*, 3 De Gex, F. & J. 256; *Mendes v. Guedalla*, 2 Johns. & H. 259; *Evans v. Bear*, L. R. 10 Ch. 76; *Lewis v. Nobbs*, L. R. 8 Ch. Div. 591, 594; *Spencer v. Spencer*, 11 Paige, 299; *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676; *Monell v. Monell*, 5 Johns. Ch. 283, 296; 9 Am. Dec. 298; *Elmendorf v. Lansing*, 4 Johns. Ch. 562; *Banks v. Wilkes*, 3 Sand. Ch. 99; *Mesick v. Mesick*, 7 Barb. 120; *Smith v. Rathbun*, 22 Hun, 150; *Bates v. Underhill*, 3 Redf. 365; *Schenck v. Schenck*, 2 N. J. Eq. 174; *Irwin's Appeal*, 35 Pa. St. 294; *Ducommun's Appeal*, 17 Pa. St. 268; *Jones's Appeal*, 8 Watts & S. 141, 147; 42 Am. Dec. 282; *Pim v. Downing*, 11 Serg. & R. 66; *Wayman v. Jones*, 4 Md. Ch. 500; *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250;

(c) See *Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. 676, 12 Am. St. Rep. 764, 4 L. R. A. 529.

the American decisions do not hold trustees to quite so rigid a responsibility for mere omissions to interfere with the wrongful acts of their fellows as is done by the English cases; but there does not appear to be any substantial difference in the modes of formulating the doctrine by the courts of the two countries.

§ 1083. The Beneficiary Acquiescing or Concurring.—A beneficiary who, subsequently to a breach of trust, acquiesces in it, cannot maintain a suit for relief against those who would otherwise have been liable. The acquiescence, in order to produce this effect, must take place with full information by the beneficiary of all the facts, and with full knowledge of his legal rights arising from those facts; in short, it must have all the requisites of an acquiescence heretofore described, to defeat the liability of a defaulting fiduciary.¹ Although, in general, lapse of time is not a defense to the beneficiary's right of action, yet a great delay after

Latrobe v. Tiernan, 2 Md. Ch. 474; *Maccubbin v. Cromwell's Ex'rs*, 7 Gill & J. 157; *Worth v. McAden*, 1 Dev. & B. Eq. 199; *Graham v. Davidson*, 2 Dev. & B. Eq. 155; *Taylor v. Roberts*, 3 Ala. 83, 86; *Royall's Adm'r v. McKenzie*, 25 Ala. 363; *Hall v. Carter*, 8 Ga. 388; *State v. Guilford*, 15 Ohio, 593; *Edmonds v. Crenshaw*, 14 Pet. 166.

¹ See *ante*, §§ 964, 965; *Walker v. Symonds*, 3 Swanst. 1, 64; *Wedderburn v. Wedderburn*, 4 Mylne & C. 41; *Munch v. Cockerrell*, 5 Mylne & C. 178; *Cockerrell v. Cholmeley*, 1 Russ. & M. 418, 425; *Strange v. Fooks*, 4 Giff. 408; *Burrows v. Walls*, 5 De Gex, M. & G. 233; *Life Ass'n v. Siddal*, 3 De Gex, F. & J. 58, 74; *Farrant v. Blanchford*, 1 De Gex, J. & S. 107, 119, 120; *Aveline v. Melhuish*, 2 De Gex, J. & S. 288; *Zambaco v. Cassavetti*, L. R. 11 Eq. 439; *Sleeman v. Wilson*, L. R. 13 Eq. 36; *Jones v. Higgins*, L. R. 2 Eq. 538; *Clark v. Clark*, 8 Paige, 152; 35 Am. Dec. 676; *Banks v. Wilkes*, 3 Sand. Ch. 99; *Monell v. Monell*, 5 Johns. Ch. 233; 9 Am. Dec. 298; *Jones's Appeal*, 8 Watts & S. 141, 147; 42 Am. Dec. 282; *Pim v. Downing*, 11 Serg. & R. 66; *Wayman v. Jones*, 4 Md. Ch. 500; *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250; *State v. Guilford*, 15 Ohio, 593; *Royall's Adm'r v. McKenzie*, 25 Ala. 363. As to delay, see *Bright v. Legerton*, 2 De Gex, F. & J. 606; *Hodgson v. Bibby*, 32 Beav. 221; *Clanricarde v. Henning*, 30 Beav. 175; *Browne v. Cross*, 14 Beav. 105; *Obee v. Bishop*, 1 De Gex, F. & J. 137; *Scott v. Haddock*, 11 Ga. 258.

Acquiescence, assent, release, and like acts, in order to be operative, must be made by a *cestui que trust* who is *sui juris*. If a trustee relies upon a release or discharge given by the beneficiary, it is incumbent upon the trustee to show that he gave the *cestui que trust* full information as to all his rights; and it is, in fact, a part of the trustee's general duty to impart knowledge of

knowledge of the breach of trust may be a bar. If a *cestui que trust* is a party to, or concurs in, or even assents to, a breach of trust by the trustee, he debars himself thereby of all claim for relief.^{2 b}

§ 1084. Third. The Trustee's Compensation and Allowances. — It is the well-settled doctrine of the English equity that the trustee's office is, as a rule of law, wholly gratuitous. In the absence of a provision for compensation contained in the instrument creating the trust, he is not entitled to make any charge for his services, trouble, or loss of time, even though great advantage had resulted therefrom to the beneficiaries.¹ Where the trustee is also an attorney, and acts as

his own legal rights to the beneficiary:^a *March v. Russell*, 3 Mylne & C. 31; *Lloyd v. Attwood*, 3 De Gex & J. 614; *Aveline v. Melhuish*, 2 De Gex, J. & S. 288; *Farrant v. Blanchford*, 1 De Gex, J. & S. 107, 119, 120; *Williams v. Reed*, 3 Mason, 405; *Bond v. Bond*, 7 Allen, 1; *Negley v. Lindsay*, 67 Pa. St. 217; 5 Am. Rep. 427; *Cumberland Coal Co. v. Sherman*, 20 Md. 117.

² Mere knowledge, however, of a breach of trust is not an assent, much less a concurrence: *Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 1, 64; *March v. Russell*, 3 Mylne & C. 31; *Life Ass'n etc. v. Siddal*, 3 De Gex, F. & J. 58, 61; *Phipps v. Lovegrove*, L. R. 16 Eq. 80; *Town of Verona v. Peckham*, 66 Barb. 103. Where there are several beneficiaries, and one of them takes a part in a breach of trust, whereby a loss is occasioned, his interest in the trust property may be reached, retained, and applied to make good the loss for the benefit of the other beneficiaries; and this equity extends, not only to the interest while in the hands of the wrong-doing *cestui que trust*, but also to those claiming it under or through him: *Woodyatt v. Gresley*, 8 Sim. 180; *Priddy v. Rose*, 3 Mer. 86; *Williams v. Allen*, 32 Beav. 650; and see *Jacobs v. Rylance*, L. R. 17 Eq. 341; *Butler v. Carter*, L. R. 5 Eq. 276. If third persons are parties to a breach of trust, they are equally liable with the trustee: *Dixon v. Dixon*, L. R. 9 Ch. Div. 587; *Rolfe v. Gregory*, 11 Jur., N. S., 98; *Bridgman v. Gill*, 24 Beav. 302.

¹ Even a settled account which contained items of such charges would be set aside: *Robinson v. Pett*, 3 P. Wms. 249; 2 Lead. Cas. Eq., 4th Am. ed., 512, 514-537, note of English editor; *Ayliffe v. Murray*, 2 Atk. 58; *Barrett v. Hartley*, L. R. 2 Eq. 789; the court will sometimes, however, make an allowance for compensation in special cases: *Forster v. Ridley*, 4 De Gex, J. & S. 452;

(a) See *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 560; *Wilson v. Maryland L. Ins. Co.*, 60 Md. 150. The author's note is cited in *White v. Sherman*, 168 Ill. 589, 606, 61 Am. St. Rep. 132, 140, 48 N. E. 128.

(b) See, also, in general, *McCoy v. Poor*, 56 Md. 197 (lashes); *Pope v. Farnsworth*, 146 Mass. 339, 16 N. E. 262; *Butterfield v. Cowing*, 112 N. Y. 486, 20 N. E. 369.

such on behalf of the estate, he is even not entitled to full costs or attorney's fees as against the *cestui que trust*, but can only be allowed for costs actually out of pocket, or disbursements.² The testator, or other person who creates a trust, may expressly provide for a salary or compensation of any form to be paid to the trustee, and such provision will be binding, and will be followed by the courts.³ This stringent, and certainly unwise, rule of the English equity has not been followed in the United States. With very few, if any, exceptions among the various states, trustees, as well as executors and administrators, are allowed compensation for their services; in most of the states the right to the compensation and the amount of it have been fixed by statu-

Marshall v. Holloway, 2 Swanst. 432; and see Douglas v. Archbutt, 2 De Gex & J. 148; Bainbrigge v. Blair, 8 Beav. 588.

² Cradock v. Piper, 1 Macn. & G. 664; New v. Jones, 1 Macn. & G. 668, note; Broughton v. Broughton, 5 De Gex, M. & G. 160; Gomley v. Wood, 3 Jones & L. 678, 688; Mayer v. Galluchat, 6 Rich. Eq. 1.^a This rule is applied also where the legal business is done by the trustee's partner, who is not himself a trustee: Lincoln v. Windsor, 9 Hare, 158; Christophers v. White, 10 Beav. 523; Lyon v. Baker, 5 De Gex & S. 622. With regard to trustee's costs, see also King v. King, 1 De Gex & J. 663; In re Woodburn's Will, 1 De Gex & J. 332; Ex parte Tomlinson, 3 De Gex, F. & J. 745; Smith v. Dresser, L. R. 1 Eq. 651; In re Whitton's Trusts, L. R. 8 Eq. 352; Bowyer v. Griffin, L. R. 9 Eq. 340; In re Elliot's Trusts, L. R. 15 Eq. 194; Ex parte Angerstein, L. R. 9 Ch. 479; Walters v. Woodbridge, L. R. 7 Ch. Div. 504.^b

³ Webb v. Earl of Shaftesbury, 7 Ves. 480; Baker v. Martin, 8 Sim. 25. A contract for compensation between the trustee and the *cestui que trust* may be valid; but is treated as any other agreement by which a trustee obtains an advantage from its beneficiary, — the most perfect good faith is required: Moore v. Frowd, 3 Mylne & C. 45, 48; Douglas v. Archbutt, 2 De Gex & J. 148.^c

(a) See Clarkson v. Robinson, [1900] 2 Ch. 722; In re White, [1898] 2 Ch. 217; Stone v. Lickorish, [1891] 2 Ch. 363; In re Doody, [1893] 1 Ch. 129; Kentucky Nat. Bank v. Stone, 93 Ky. 623, 20 S. W. 1040 ("the temptation to earn fees as counsel was liable to warp his judgment, and is more than human nature ought to be required to meet in the execution of so important a trust"); Gamble v. Gibson, 59 Mo.

585; see Morgan v. Hannas, 49 N. Y. 667. But, as in other cases, the trust deed may allow compensation: See Bennett v. Bennett, [1893] 2 Ch. 413; In re Webb, [1894] 1 Ch. 73; or if a trustee is appointed receiver he is entitled to compensation: In re Bignell, [1892] 1 Ch. 59. See note (e), *infra*, for the general American rule.

(b) In re Dunn, [1904] 1 Ch. 648.

(c) Bowker v. Pierce, 130 Mass. 262.

tory legislation. Where the instrument creating the trust provides that the trustee shall have a compensation for his services, such provision will be enforced. If the instrument declares the rate of compensation, it must be followed; if it establishes no rate, the trustee is entitled to a reasonable amount, which will be ascertained by means of a judicial investigation, as to the value of his services.⁴ Where no provision is made by the creator of the trust, the trustee is allowed the amount fixed by statute, or in the absence of statute, the amount determined by the court to be reasonable and just.⁵

⁴ In the Matter of Schell, 53 N. Y. 263, 265; Meacham v. Sternes, 9 Paige, 398; Wagstaff v. Lowerre, 23 Barb. 209.^d

⁵ In the note of the American editor to Robinson v. Pett, 2 Lead. Cas. Eq., 4th Am. ed., 512, 538-600, the statutes of the various states and the decisions thereon are collected; see also Perry on Trusts, sec. 918. A person who is both executor and trustee is not entitled to commissions by way of compensation in both capacities on the same fund for the same time: Hall v. Hall, 78 N. Y. 535.^e A trustee who commits a breach of trust is not entitled to commissions: Singleton v. Lowndes, 9 S. C. 465.^f

(^d) The English rule is followed in Illinois: Cook v. Gilmore, 133 Ill. 139, 24 N. E. 524; Buckingham v. Morrison, 136 Ill. 437, 27 N. E. 65; and was in Delaware, State v. Platt, 4 Harr. 154; but see Laws of Delaware, [1893] p. 712, allowing commission in the discretion of the court.

(^e) That a trustee who is also a lawyer is entitled to extra compensation for his professional services to the estate, see Perkins' Appeal, 108 Pa. St. 314, 56 Am. Rep. 208; Turnbull v. Pomeroy, 140 Mass. 117, 3 N. E. 15; Jenkins v. Whyte, 62 Md. 427; Shirley v. Shattuck, 28 Miss. 13; but see Cobb v. Fant, 36 S. C. 1, 14 S. E. 959. See, also, to the same effect, but that no extra compensation will be allowed for skill in the *general* management of the estate, whereby the value is greatly increased, Grimbail v. Cruse, 70 Ala. 534. As to extra compensation generally, see Vaughton

v. Noble, 30 Beav. 34 (a trustee cannot receive a gift from the *cestui*); Pinckard v. Pinckard, 24 Ala. 250 (administrators); Abell v. Brady, 79 Md. 94, 28 Atl. 817; Ellis v. Ellis, 12 Pick. 178; Turnbull v. Pomeroy, 140 Mass. 117, 3 N. E. 15; May v. May, 109 Mass. 252 (guardian); Loud v. Winchester, 52 Mich. 174, 17 N. W. 784; Lent v. Howard, 89 N. Y. 169 (trustee not entitled to receive).

(^f) In re Hodges' Estate, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663; Hanna v. Clark, 204 Pa. St. 145, 53 Atl. 757; see, also, Topping v. Windley, 99 N. C. 4, 5 S. E. 14 (failure to keep accounts); Pollard v. Lathrop, 12 Colo. 171, 20 Pac. 251; Brooks v. Jackson, 125 Mass. 307; but see In re Fitzgerald, 57 Wis. 508, 15 N. W. 794; that commissions will not be refused because of mistakes of judgment on the part of the *trustees*, whereby the estate has suffered loss, or has

§ 1085. **Allowances for Expenses and Outlays.**—In addition to his compensation in this country, and without any compensation in England, the trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in

been rendered insolvent, see *Merkel's Estate*, 131 Pa. St. 584, 18 Atl. 931; *Fahnestock's Appeal*, 104 Pa. St. 46. That trustees who have been grossly negligent are not entitled to commissions, see *Ward v. Shire*, 23 Ky. Law Rep. 1279, 65 S. W. 8. The following cases are added as illustrating the application of the general principles, though some of the cases are from jurisdictions where the matter is regulated partly by statutes; many of the statutes fix a maximum rate and allow the amount, not exceeding the limit, to be determined by the court: *Griffin v. Pringle*, 56 Ala. 486 (reasonable compensation, and trustee has a lien on the property for the payment); *Biscoe v. State*, 23 Ark. 592 (refusing to allow extra compensation, above the amount fixed in the deed); *Moore v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583; *Clark v. Platt*, 30 Conn. 282; *Babcock v. Hubbard*, 56 Conn. 284, 15 Atl. 791 (see, also, for trustee as attorney, and fees for his services); *Muscogee Lumber Co. v. Hyer*, 18 Fla. 698, 43 Am. Rep. 332 (allowing a reasonable compensation); *Guignon v. Union Trust Co.*, 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556; *Premier Steel Co. v. Yandes*, 139 Ind. 307, 38 N. E. 849 (one not having a beneficial interest, and not intending to serve gratuitously is entitled to the reasonable value of his services); *In re Gloyd's Estate*, 93 Iowa 303, 61 N. W. 975; *Fleming v. Wilson*, 6 Bush 610;

Ten Broeck v. Fidelity Co., 88 Ky. 242, 10 S. W. 798 (if the trustee has waived his right to charge for services, by indicating he intended to serve gratuitously, his administrator cannot recover for them); *Jenkins v. Whyte*, 62 Md. 427 (discretion of lower court, in allowing compensation, not interfered with); *Ahell v. Brady*, 79 Md. 94, 28 Atl. 817; *Dixon v. Homer*, 2 Met. 420 (commission on the net income); *Barrell v. Jay*, 16 Mass. 221; *Blake v. Pegram*, 101 Mass. 592 (where one is both executor and trustee he is not entitled to compensation in both capacities); *Urann v. Coates*, 117 Mass. 41; *Parker v. Hill*, (Mass.) 69 N. E. 336 (trustee is entitled to such compensation as the court may allow, but it must be reasonable and just); *Kemp v. Foster*, 22 Mo. App. 643; *Niolon v. McDonald*, 71 Miss. 337, 13 South. 870; *Gordon v. West*, 8 N. H. 444 (executor-trustee); *Tuttle v. Robinson*, 33 N. H. 104 (same); *Johnson v. Lawrence*, 95 N. Y. 154 (see as to when a trustee and executor may not charge double commission); *Davis' Appeal*, 100 Pa. St. 201; *In re Vastine's Estate*, 190 Pa. St. 443, 42 Atl. 1038; *Hazard v. Coyle*, (R. I.) 58 Atl. 987 (assumpsit cannot be maintained for compensation); *Hubbard v. Fisher*, 25 Vt. 539 (the trustee entitled to reasonable compensation, in the absence of statute); *Hoke v. Hoke*, 12 W. Va. 427.

the absence of any such directions, all expenses reasonably necessary for the security, protection, and preservation of the trust property, or for the prevention of a failure of the trust. He is also entitled to be indemnified in respect of all personal liabilities incurred by himself for any of these purposes.¹ Where a trustee properly advances money for any of the above-mentioned objects, so that he is entitled to reimbursement, he also has a lien as security for the

¹ He is thus entitled to be allowed for proper disbursements occasioned by the necessary employment of attorneys, agents, etc.: *Macnamara v. Jones*, 2 Dick. 587; "Every trustee is entitled to the necessary and proper expenses incurred in protecting the property committed to his care. If they have a right to protect the property from immediate and direct injury, they must have the same right, where the injury threatened is indirect but probable": *Bright v. North*, 2 Phill. Ch. 216, 220, per Lord Cottenham; *Worrall v. Harford*, 8 Ves. 4, 8; *Phené v. Gillan*, 5 Hare 1, 9; *Douglas v. Archbutt*, 2 De Gex & J. 148; *Benett v. Wyndham*, 4 De Gex, F. & J. 259 (indemnity against liability); *Duncan v. Findlater*, 6 Clark & F. 894; *Heriot's Hospital v. Ross*, 12 Clark & F. 507; *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686; L. R. 1 H. L. 93; *Jervis v. Wolferstan*, L. R. 18 Eq. 18; *Ellig v. Naglee*, 9 Cal. 683; *Beatty v. Clark*, 20 Cal. 11, 30; *New v. Nicoll*, 73 N. Y. 127; 29 Am. Rep. 111.^a

(a) *Stott v. Milne*, 25 Ch. Div. 710; *In re Beddoe*, [1893] 1 Ch. 547; *Rawley v. Ginnever*, [1897] 2 Ch. 503; *Trustees v. Greenough*, 105 U. S. 527, 26 L. ed. 1157; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, 29 L. ed. 940; *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583; *Stewart v. Fellows*, 128 Ill. 480, 20 N. E. 657; *Niolon v. McDonald*, 71 Miss. 337, 13 South. 370; *Thomson v. Smith*, 64 N. H. 412, 13 Atl. 639; *Reynolds v. Cridge*, 131 Pa. St. 189, 18 Atl. 1010; *Bourquin v. Bourquin*, (Ga.) 47 S. E. 639.

Trustee's Right to Indemnity.—"A party who is *sui juris* and beneficially entitled to shares which he cannot disclaim is personally bound, in the absence of contract to the contrary, to indemnify the registered holder against calls upon them. It is immaterial whether the beneficial owner

originally created the trust by which the registered holder was plainly affected, or accepted a transfer of the beneficial ownership with knowledge of the trust": *Hardoon v. Belilos*, [1901] App. Cas. 118, relying on *Balsh v. Hyham*, 2 P. Wms. 453; *Phené v. Gillan*, 5 Hare 1; *Ex parte Chippendale*, 4 De Gex, M. & G. 19. "Where a trustee seeks indemnity against liabilities arising from the mere fact of ownership, he need not prove any request from his *cestui que trust* to incur such liability": *Hardoon v. Belilos*, [1901] App. Cas. 118, citing *Castellan v. Hobson*, L. R. 10 Eq. 47; *Loring v. Davis*, 32 Ch. Div. 634; *James v. May*, L. R. 6 H. L. 328. For an exception to the rule of indemnity, in case of trustees of clubs, see *Wise v. Perpetual Trustee Co.*, [1903] App. Cas. 139 (Priv. Coun.).

claim, either upon the *corpus* of the trust property, or upon the income, as the case may be; but for moneys improperly paid there is no lien. Although in general a creditor who advances money to a trustee obtains only the personal liability of the trustee, and has no demand enforceable against the estate, yet if the expenditure is authorized, and the loan is necessary, the trustee may, at the time of procuring the advance, whether money or services, by an express agreement with the creditor, make the demand a charge upon the estate, and thus create a lien in favor of the creditor; or the trustee may so deal with the estate in the first instance as to acquire a lien in his own favor, and may then assign such lien to the creditor.^{2 b} It is hardly necessary to add that

² In *New v. Nicoll*, 73 N. Y. 127, 130, 131, 29 Am. Rep. 111, the court held, per Earl, J.: "The general rule undoubtedly is, that a trustee cannot charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure, and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure." It was further held that where there was no original agreement giving a lien to the creditor, and no assignment by the trustee of his own lien, so that the creditor merely relied upon the trustee's personal liability, a lien upon the estate in favor of the creditor could not be created by the trustee's mere subsequent promise. In *Ellig v. Naglee*, 9 Cal. 683, it was held that where the trustee makes advances out of his own funds to the beneficiary, with the understanding that he should be repaid out of the rents and profits, he obtains a lien upon the future income, but not upon the *corpus* of the trust property; and the same is true of necessary advances made under like circumstances for the protection of the estate. *Beatty v. Clark*, 20 Cal. 11, 30, shows what payments made by a trustee out of his own funds, and what advances made to him by third persons, can be an equitable lien upon the trust property, namely, if the payment by himself, or the loan by the creditor, was not expressly authorized by the trust instrument, such payment or loan must be necessary for the preservation of the property, or to prevent a failure of the trusts: *Noyes v. Blakeman*, 6 N. Y. 567; 3 Sand. 531; *Randall v. Dusenbury*,

(b) Cited to this effect in *Gates v. McClenahan*, (Iowa) 100 N. W. 479.

the foregoing rules concerning compensation, allowances, and liens do not apply to trustees *in invitum*. Since their paramount duty is to convey the property at once to the

63 N. Y. 645; 7 Jones & S. 174; Stanton v. King, 8 Hun, 4; Worrall v. Harford, 8 Ves. 4, 8; Morison v. Morison, 7 De Gex, M. & G. 214; Ex parte Chippendale, 4 De Gex, M. & G. 19; McNeillie v. Acton, 4 De Gex, M. & G. 744; Francia v. Francis, 5 De Gex, M. & G. 108; Leedham v. Chawner, 4 Kay & J. 458; Ex parte Rogers, 8 De Gex, M. & G. 271; Tennant v. Trenchard, L. R. 4 Ch. 537; In re Leslie's Trusts, L. R. 2 Ch. Div. 185. Notwithstanding these authorities, it seems to be held in Taylor v. Clark, 56 Ga. 309, that a trustee has no power to create a lien upon the estate nor upon the crops, for supplies furnished necessary to produce such crops; and in Steele v. Steele's Adm'r, 64 Ala. 438, 38 Am. Rep. 15, that a trustee cannot create a lien in favor of a creditor without *express* authority given. See also, with respect to the general subject of liens, Starr v. Moulton, 97 Ill. 525; Robinson v. Hersey, 60 Me. 225; Bradbury v. Birchmore, 117 Mass. 569, 580-582; Rensselaer etc. R. R. v. Miller, 47 Vt. 146; Williams v. Smith, 10 R. I. 280, 283; Ryder v. Sisson, 7 R. I. 341; Ferry v. Laible, 27 N. J. Eq. 146; Kearney v. Kearney, 17 N. J. Eq. 59.^c As to the effect of a statute giving a creditor an action at law for services rendered to the trust estate, see Askew v. Myrick, 54 Ala. 30.

(c) Dickinson v. Conniff, 65 Ala. 581; Foxworth v. White, 72 Ala. 224; Blackshear v. Burke, 74 Ala. 239; Johnson v. Leman, 131 Ill. 609, 19 Am. St. Rep. 63, 23 N. E. 435, 7 L. R. A. 656; Curran v. Abbott, 141 Ind. 492, 50 Am. St. Rep. 337, 40 N. E. 1091 (guardian).

Trustee's Power to Bind the Estate.—

The general rule is, that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate: Worrall v. Harford, 8 Ves. 4, Ames' Cas. on Trusts 415; Hall v. Lover, 1 Hare 571; Strickland v. Symans, 26 Ch. Div. 245, Ames' Cas. on Trusts 418; In re Pumfrey, 22 Ch. Div. 255; Janes v. Dawson, 19 Ala. 672; Delaware R. R. Co. v. Gilbert, 44 Hun 202; Adams v. Mackey, 6 Rich. Eq. 75. In England, it is held that if the settlor has specifically dedicated a part of

the trust estate for particular trade purposes, and the personal security of the trustee fails, the creditor may come against the specified property. In In re Johnson, 15 Ch. Div. 548, Ames' Cas. on Trusts 426, it is said, the creditor had a right to say, "I had the personal liability of the man I trusted, and I have also a right to be in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade;" Ex parte Garland, 10 Ves. 110; Fairland v. Percy, L. R. 3 P. & D. 217, Ames' Cas. on Trusts 423; see, also, Owen v. Delamere, L. R. 15 Eq. 134; Ex parte Edmands, 4 De Gex, F. & J. 488; Mason v. Pomeroy, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771; Laible v. Ferry, 32 N. J. Eq. 791; Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493. In such cases the right of the creditor, against the estate, can only extend to that property which the settlor intended to be used for the par-

beneficial owner, they are clearly not entitled to be reimbursed for expenditures made, much less to be allowed compensation, while they are violating this obligation.

ticular purpose: *Burwell v. Mandeville*, 2 How. 560, 11 L. ed. 378; *Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955; *Jones v. Walker*, 103 U. S. 444, 26 L. ed. 404; *Cook v. Administrator*, 3 Fed. 69; *State v. Hunter*, 56 Ark. 159, 19 S. W. 496; *Wilson v. Fridenberg*, 21 Fla. 386; *Bacon v. Pomeroy*, 104 Mass. 577; *Laible v. Ferry*, 32 N. J. Eq. 791; *Stewart v. Robinson*, 115 N. Y. 336, 22 N. E. 160, 163, 4 L. R. A. 410; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Davis v. Christian*, 15 Gratt. 11. The distinction made in England, as to the "dedication to particular trade purposes", is not always maintained in the United States; but the rights of the creditor to reach the trust property, directly, are based on analogous reasoning; it is said "where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery": *Norton v. Phelps*, 54 Miss. 467, *Ames' Cas. on Trusts* 421. It is clear, on the weight of authority, that, as the creditor's right in such case depends on the trustee's claim for reimbursement or exoneration, there can be no right against the *res* if the trustee is in default, or for any reason is not entitled to proceed against the estate in person: *Wilson v. Fridenberg*, 21 Fla. 386;

Greenfield v. Vason, 74 Ga. 126 (the declaration should set forth the deed, showing what powers the trustee had); *Clopton v. Gholson*, 53 Miss. 466 (but the creditor must proceed, as in any case of subrogation, by first exhausting his remedy against the trustee); *Bushong v. Taylor*, 82 Mo. 660; *Adams v. Mackey*, 6 Rich. Eq. 75; *Owens v. Mitchell*, 38 Tex. 589. This general rule has been intentionally departed from in at least one jurisdiction; the court saying: "But if this modern principle is to be understood as maintaining that, where the trustee, in this class of trusts, is in arrears to the trust estate, the creditor who has furnished articles for the use and benefit of the trust estate, and which are necessary and proper for it, is not entitled to payment, unless the trust estate is in debt to the trustee, so that the creditor may be subrogated to his rights—equity making that party responsible, at once, on whom the burden must ultimately fall, we are compelled to withhold from it our assent": *Wylly v. Collins*, 9 Ga. 223. In the case of *Manderson's Appeal*, 113 Pa. St. 631, 6 Atl. 893, the court indulged in analogous reasoning, where allowing a claim for professional services, rendered at the request of a defaulting trustee; the court said: "It was the trust estate, and not the trustee individually, that was benefited by appellant's well-directed and successful services; and because it is both reasonable and just that they should be paid out of the trust fund . . . there is no reason why the absconding trustee's sins, either of omission or commission, should be visited on a

§ 1086. Fourth. Removal and Appointment of Trustees.—The power of courts of equity over the removal and appointment of trustees, independently of any statutory authority, or any directions in the instrument of trust, is well established.¹ This power is confined to cases of actual express

¹ For the details of this subject the reader must be referred to treatises upon trusts and trustees. The power is somewhat discretionary, and each case must largely depend upon its own circumstances. The settled doctrines of equity are fairly summed up in sections 2279–2289 of the Civil Code of California, which are copied from the corresponding sections 1208–1215 of the proposed New York Civil Code. These provisions are as follows: “Sec. 2279: A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful. Sec. 2280: A trust cannot be revoked after its acceptance, except by the consent of all the beneficiaries, unless a power of revocation is reserved in the instrument of trust. Sec. 2281: The office of a trustee is vacated by his death, or by his discharge. Sec. 2282: A trustee can be discharged from his trust only as follows: By the extinction of the trust; by the completion of his duties under the trust; by such means as may be prescribed by the declaration of trust; by the consent of the beneficiary, if he had capacity to contract; by the judgment of a competent tribunal, in a direct proceeding for that purpose, that he is of unsound mind; or by the superior court [i. e., by a court of general equity jurisdiction]. Sec. 2283: The court may remove any trustee who has violated or is unfit to execute the trust; or may accept the resignation of a trustee. Sec. 2287: The court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practicable method of appointment. Sec. 2288: On the death, renunciation, or discharge of one of several co-trustees, the trust survives to the others. Sec. 2289: When a trust exists without any appointed trustee, or where all the trustees renounce, die, or are discharged, the court must appoint another trustee. The court may, in its discretion, appoint the original number or any less number of trustees.”

creditor of any class, who at the instance of the trustee, having authority to employ him, has rendered necessary and beneficial services to the trust, and has not yet been compensated therefor.” In thus placing the creditor's right upon a *quasi-contractual* basis the court seems moved by the spirit of an earlier Pennsylvania case — *Mathews v. Stephenson*, 6 Pa. St. 496, stating “The stock of the beneficiaries was repaired and removed by these debts contracted; they got the benefit of them, and the trust property ought to be liable”; *Clop-*

ton v. Gholson, 53 Miss. 466, while not a case of a defaulting trustee, is based on the same reasoning; but, as shown by the cases cited, authority is against such reasoning. As to creating a lien against the *res*, generally, see *Satterwhite v. Beall*, 28 Ga. 525 (statutory); *Blodgett v. American Nat. Bank*, 49 Conn. 9; *Jackson v. Pool*, 73 Ga. 801; *Stanton v. King*, 8 Hun 4; *Fowler v. Mutual Life Ins. Co.*, 28 Hun 195; *Mathews v. Stephenson*, 6 Pa. St. 496. In *Willis v. Sharp*, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493, and many of

trusts. It cannot, in the nature of things, extend to implied trustees, or trustees *in invitum*; nor does it apply to those persons who stand in fiduciary relations, and are for some purposes treated as trustees. A court of equity may remove a trustee on his own application when he wishes to be discharged; and it may and will remove a trustee who has permanently changed his residence to another country, or has absconded, or has been guilty of some breach of trust, or violation of duty, or has become insolvent, or is incapable, through age or other infirmity, of performing the trust duties. The exercise of this function by a court of equity belongs to what is called its *sound judicial discretion*, and is not controlled by positive rules, except that the discretion must not be abused.²

² *People v. Norton*, 9 N. Y. 176; *In re Cohn*, 78 N. Y. 248; *Preston v. Wilcox*, 38 Mich. 578; *In re Bernstein*, 3 Redf. 20 (resignation); *North Carolina R. R. v. Wilson*, 81 N. C. 223; *McPherson v. Cox*, 96 U. S. 404; *Satterfield v. John*, 53 Ala. 127; *Farmers' Loan etc. Co. v. Hughes*, 18 N. Y. Sup. Ct. 130 (removing to a foreign country); *Bloomer's Appeal*, 83 Pa. St. 45; *Sparhawk v. Sparhawk*, 114 Mass. 356; *Ketchum v. Mobile etc. R. R.*, 2 Woods, 532; *Scott v. Rand*, 118 Mass. 215; *In re Adams's Trust*, L. R. 12 Ch. Div. 634; *Ex parte Hopkins*, L. R. 9 Ch. 506; as to accepting a voluntary resignation, see *Wilkinson v. Parry*, 4 Russ. 272, 276; *Coventry v. Coventry*, 1 Keen, 758; *Greenwood v. Wakeford*, 1 Beav. 576, 581; *Forshaw v. Higginson*, 20 Beav. 485; *In re Stokes's Trusts*, L. R. 13 Eq. 333; *Chalmer v. Bradley*, 1 Jacob & W. 51, 68; *Cruger v. Halliday*, 11 Paige, 314; *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561; *Diefendorf v. Spraker*, 10 N. Y. 246; as to removal in general, see *Forster v. Davies*, 4 De Gex, F. & J. 133, 138; *In re Blanchard*, 3 De Gex, F. & J. 131; *Palairret v. Carew*, 32 Beav. 564, 567; *Crombes v. Brookes*, L. R. 12 Eq. 61; *In re Roche*, 2 Dru. & War. 287; and *In re Watts's Settlement*, 9 Hare, 106 (bankruptcy); as to foreign residence, see *Mennard v. Welford*, 1 Smale & G. 426; *In re Bignold's Trusts*, L. R. 7 Ch. 223; *Withington v. Withington*, 16 Sim. 104.^a

the cases cited above in this note the point at issue was "did the trustee have an express or implied power to carry on the business?" if so, he could withdraw the assets for that purpose; where, instead of withdrawing the assets, he created a debt, it is generally held to bind the estate on the ground that it is equivalent to a pledge.

(^a) This section is cited in *Gaston v. Hayden*, 98 Mo. App. 683, 73 S. W. 939. See *In re Newen*, [1894] 2 Ch. 297 (the donee of a power to appoint cannot appoint himself); *In re Earl of Stamford*, [1896] 1 Ch. 288 (the court will not consider as invalid an appointment by the donee of a power, though it would not have made the appointment); *In re Chetwynd's*

§ 1087. **Appointment of New Trustees.**—The principle has already been stated that an express trust validly created shall not fail for want of a trustee. Courts of equity, therefore, independently of statute, possess the inherent power and jurisdiction to appoint new trustees whenever such ac-

Settlement. [1902] 1 Ch. 692; Haines v. Elliot, [Conn.] 58 Atl. 718. See, also, Letterstedt v. Boers, 9 App. Cas. (Priv. Coun.) 371; In re Nash, 16 Ch. Div. 504 (lunatic); Irvine v. Dunham, 111 U. S. 327, 4 Sup. Ct. 501, 28 L. ed. 444; Clay v. Edwards, 84 Ky. 548, 2 S. W. 147; Abernathy v. Abernathy, 8 Fla. 243.

Insolvency.—In re Barker's Trusts, 1 Ch. Div. 43, Ames' Cas. on Trusts 223 (the court said "a necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides, a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people"); Paddock v. Palmer, 6 How. Pr. 215 (the court refused to remove one who was known to be insolvent when selected); Terry v. Fitzgerald, 32 Gratt. 843 (insolvency does not disqualify a trustee, but he should give bond before undertaking management of the property); Williams v. Nicholl, 47 Ark. 254, 1 S. W. 243 (refusing to remove an insolvent who was in the same financial condition as when selected); Shryock v. Waggoner, 28 Pa. St. 430 (one "hopelessly insolvent" is not disqualified); Van Boskerck v. Herrick, 65 Barb. 250 (insolvency was held not to disqualify though coupled with non-residence, and friction between co-trustees).

Inability to Agree With the Beneficiary.—In some cases it has been held that such inability was not sufficient to disqualify the trustee: McPherson v. Cox, 96 U. S. 404, 24 L. ed.

746; In re Price's Estate, (Pa.) 58 Atl. 280; Gibbes v. Smith, 2 Rich. Eq. 131; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; In re Mayfield, 17 Mo. App. 684; Nickels v. Phillips, 18 Fla. 732 (mere personal friction is not ground for removal; "the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity, or a want of reasonable fidelity"); Berry v. Williamson, 11 B. Mon. 245 ("although harmony and mutual confidence between the trustee and beneficiaries are certainly desirable, they are not actually necessary for the purposes and intercourse of business"). The ground of support for such cases is, that in them the trustee was a mere ministerial officer with no discretion as to the benefit the beneficiary should receive; where such discretion exists, the rule is the opposite: See the *dictum* in McPherson v. Cox, *supra*, adopted in Wilson v. Wilson, 145 Mass. 490, 1 Am. St. Rep. 477, 14 N. E. 521; Scott v. Rand, 118 Mass. 215; May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. ed. 179.

Disagreement Between the Trustees.—Where the trustees cannot agree among themselves, and thereby endanger the safety of the property, or its proper management, the courts should remove one of them: Paget v. Stevens, 8 Misc. Rep. 236, 28 N. Y. Supp. 549; Re Morgan, 63 Barb. 621 (especially where the *cestui* desires the removal, and sympathizes with those sought to be retained); Quackenboss v. Southwick, 41 N. Y.

tion is necessary to protect the rights of the beneficiaries. In the absence of any other method prescribed by the instrument creating the trust, a court of equity will appoint trustees when none at all have been named by the creator of the trust, and will appoint new trustees when those originally named refuse to accept, or when a vacancy occurs by their death, resignation, permanent residence in a foreign country, or removal from office, as heretofore described.¹ The power

¹ *Leggett v. Hunter*, 19 N. Y. 445, 459; *In re Robinson*, 37 N. Y. 261; *Quackenboss v. Southwick*, 41 N. Y. 117; *In re Stevenson*, 3 Paige, 420; *In re Van Schoonhoven*, 5 Paige, 559; *Mask v. Miller*, 7 Baxt. 527; *Green v. Blackwell*, 31 N. J. Eq. 37; *Att'y-Gen. v. Barbour*, 121 Mass. 568; *Ketchum v. Mobile etc. R. R.*, 2 Woods, 532; *Collier v. Blake*, 14 Kan. 250; *Millard v. Eyre*, 2 Ves. 94; *Buchanan v. Hamilton*, 5 Ves. 722; *Dodkin v. Brunt*, L. R. 6 Eq. 580; *Coombes v. Brookes*, L. R. 12 Eq. 61; *In re Bignold's Trusts*, L. R. 7 Ch. 223; *In re Tempest*, L. R. 1 Ch. 485. The court does not necessarily adhere to the original number, but may appoint more or less, unless the instrument

117 (the selection of the one to be removed should depend largely on the choice of the beneficiaries); *In re Myers' Estate*, 205 Pa. St. 413, 54 Atl. 1093; *May v. May*, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. ed. 179; but see *Van Boskerck v. Herrick*, *supra*.

Trustee's Views at Variance with the Object of the Trust.—Such views should disqualify the trustee; see *Att'y-Gen. v. Pearson*, 7 Sim. 290, 3 Mer. 353; *Baker v. Lee*, *Re Ilminster School*, 8 H. L. C. 495; *Ross v. Crockett*, 14 La. Ann. 811 (where a trustee of a church withdrew from it and joined a different one, it was considered ground for vacating his position).

Non-Residence.—There seems to be no absolute rule that the non-residence of a trustee is ground for his removal from office, nor an insuperable objection to his appointment, though it may influence the court in a given case by reason of the greater facility with which a resident trustee could perform the duties of the office:

In re Walker, [1901] 1 Ch. 259; see *Strobel's Estate*, 11 Phila. 122 (non-residents appointed upon their giving bond). But a permanent removal from the jurisdiction would seem to justify the removal from office: *Sloan v. Frothingham*, 72 Ala. 589; *Dorsey v. Thompson*, 37 Md. 25; *Woods v. Fisher*, 3 W. Va. 536 (the departure from the jurisdiction was considered as a vacation of the office); *Farmers Co. v. Hughes*, *supra*, in author's note. The qualifications in this respect may be regulated by statute: see *Rinker v. Bissell*, 90 Ind. 375 (non-residents cannot be selected nor appointed); *Meikel v. Green*, 94 Ind. 344 (but the statute not extending to trusts by operation of law, a trustee of such trust may be a non-resident). Under certain circumstances the court may appoint a non-resident trustee; *In re Simpson*, [1897] 1 Ch. 256 (the beneficiary resident abroad, but the property within the jurisdiction). See, in general, *Waterman v. Alden*, 144 Ill. 90, 32 N. E. 972.

of appointment will be exercised on behalf of a beneficiary who has a real interest, even though it be contingent. Its exercise, as in the case of removal, is a matter of sound judicial discretion. In filling vacancies, therefore, the court is not necessarily confined to the original number of trustees. In the appointment as well as in the removal of trustees the court keeps in view and endeavors to accomplish three main objects: the wishes of the creator of the trust,

of trust expressly requires the same number to be kept up: *In re Tunstall's Will*, 4 De Gex & S. 421; *D'Adhemar v. Bertrand*, 35 Beav. 19; *In re Welch*, 3 Mylne & C. 292; *Miller v. Priddon*, 1 De Gex, M. & G. 335; *Emmet v. Clark*, 3 Giff. 32, 35; as illustrations of appointments, see *Ex parte Countess of Mornington*, 4 De Gex, M. & G. 537; *In re Boyce*, 4 De Gex, J. & S. 205; *In re Price's Trust*, L. R. 6 Eq. 460; *Dodkin v. Brunt*, L. R. 6 Eq. 580; *King of Hanover v. Bank of England*, L. R. 8 Eq. 350; *In re Raphael's Trust*, L. R. 9 Eq. 233; *In re Smirthwaite's Trusts*, L. R. 11 Eq. 251; *In re Davis's Trusts*, L. R. 12 Eq. 214; *In re Stokes's Trusts*, L. R. 13 Eq. 333; *In re Driver's Settlement*, L. R. 19 Eq. 352; *In re White*, L. R. 5 Ch. 698; *In re Sparrow*, L. R. 5 Ch. 662; *In re Donisthorpe*, L. R. 10 Ch. 55; *In re Rathbone*, L. R. 2 Ch. Div. 483; *In re Dalgleish's Settlement*, 4 Ch. Div. 143; *In re Lamotte*, L. R. 4 Ch. Div. 325; *In re Hodgson*, L. R. 11 Ch. Div. 888; *In re Harford's Trusts*, L. R. 13 Ch. Div. 135; *In re Liddiard*, L. R. 14 Ch. Div. 310.^a

(a) This section is cited in *Lanning v. Commissioners of Public Instruction*, 63 N. J. Eq. 1, 51 Atl. 787. See *In re Higginbottom*, [1892] 3 Ch. 132 (the court will not appoint a new trustee if an existing trustee has a power to appoint and desires to execute it); see as to appointment under statute, *Plomley v. Richardson & Wrench*, [1894] A. C. 632.

Kenaday v. Edwards, 134 U. S. 125, 10 Sup. Ct. 523; *Farrar v. McCue*, 89 N. Y. 140; *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386; *Carruth v. Carruth*, 148 Mass. 431, 19 N. E. 369; *Tucker v. Grundy*, 83 Ky. 540; *Willis v. Alvey*, 30 Tex. Civ. App. 96, 69 S. W. 1035 (where a corporation appointed trustee is incompetent, a court of equity will appoint another); *Kennard v. Bernard*, (Md.) 56 Atl. 793; *Leman v. Sherman*, 117 Ill. 657, 6 N. E. 872; *Dean v. Lanford*, 9 Rich.

Eq. 423 ("it was declared to be the rule of this court never to appoint the husband of a married woman as her trustee"); *Ex parte Hunter*, Rice Eq. 294; *Boaz v. Boaz*, 36 Ala. 334; *Force v. Force*, (N. J. Eq.) 57 Atl. 973; *Re Hallatt's Trusts*, 18 Weekly Reporter 416, Ames Cas. on Trusts 221 (a husband was appointed co-trustee on giving bond to apply for the appointment of a new trustee in case of his becoming a sole trustee). In *Wilding v. Balder*, 21 Beav. 222, Ames Cas. on Trusts 221, the court said: "I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family to undertake that office. I have always observed that the worst breaches of trusts are committed by relatives who are unable to resist the impor-

the interests of *all* the beneficiaries, not *some* of them, and the effectual performance of the trust. Even when the power of appointment is conferred by the instrument of trust upon an individual, a court of equity may control its exercise so as to prevent an abuse of discretion.²

SECTION VII.

CORPORATION DIRECTORS AND OTHER QUASI TRUSTEES.

ANALYSIS.

- § 1088. *Quasi* trustee; fiduciary persons.
- § 1089. Corporation directors and officers.
- § 1090. Trust relations in stock corporations.
- § 1091. Liability of directors for a violation of their trust.
- § 1092. First class: Directors guilty of fraudulent misrepresentations, etc.
- § 1093. Second class: *Ultra vires* proceedings of directors.
- § 1094. Third class: Wrongful dealing with corporate property.
- § 1095. Fourth class: The same; the corporation refuses to sue.
- § 1096. Special classes.
- § 1097. Guardians.

§ 1088. *Quasi Trustees — Fiduciary Persons.*^a— The conception of a trust runs through a large part of equity jurisprudence, and is the source of many doctrines applicable to conditions which are not strictly trusts. Wherever there

² Bailey v. Bailey, 2 Del. Ch. 95.

tunities of their *cestui que trust*, when they are nearly related to them"); approved in Parker v. Moore, 25 N. J. Eq. 228. It is obvious that a beneficiary cannot also be sole trustee, but where there are several trustees the beneficiary may be one of them: Ex parte Conybeare's Settlement, 1 Weekly Reporter 458, Ames Cas. on Trusts 222; see Armory v. Lord, 9 N. Y. 403; Wetmore v. Truslow, 51 N. Y. 338; Bundy v. Bundy, 38 N. Y. 410; Moke v. Norrie, 14 Hun 128; Rogers v. Rogers, 18

Hun 409; see, also, Craig v. Hone, 2 Edw. Ch. 564, and cases cited in the note; Gaskill v. Green, 152 Mass. 526, 25 N. E. 969.

(a) This and the following sections are cited in Byers v. Rollins, 13 Colo. 22, 21 Pac. 894; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163. Sections 1088-1090 are cited in Ellis v. Ward, 137 Ill. 509, 25 N. E. 530. This section is cited in Adams v. Cowen, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. ed. 851; Cowen v. Adams, 78 Fed. 536, 47 U. S. App. 676.

is a fiduciary relation, although the fiduciary may not hold the legal title to property in which the beneficiary has only an equitable estate, the dealings of the parties with each other and with the subject-matter of the relation are governed by the same rules which determine the duties of actual trustees towards their *cestuis que trustent*, and the beneficiaries are, in general, entitled to the same remedies which are given to *cestuis que trustent* against those who are truly express trustees.¹ It may be said, therefore, that the equitable obligations resting upon and the equitable remedies given against guardians, committees of persons *non compotes mentis*, corporation directors, partners, agents, as well as executors and administrators, are analogous to those resting upon and given against actual trustees; they result directly from the theory of trusts, and are not *mere* applications of the doctrine concerning accounting. I purpose, in the present section, to describe the operation of the theory of trusts upon certain species of fiduciary persons, especially corporation directors and officers; some other species will be considered in subsequent chapters.²

§ 1089. Corporation Directors and Officers.—The directors and supreme managing officers of corporations are constantly spoken of as trustees. They are not, however, true trustees with the corporation or the stockholders as their true *cestuis que trustent*, since they hold neither the legal title to the corporate property nor that to the stock. In fact, directors are clothed at the same time with a double character,—that of *quasi* trustees and that of agents.^{1a} It

§ 1088, 1 See *ante*, §§ 955–965, 1044–1058, 1075–1078.

§ 1088, 2 Namely, executors and administrators, partners, and agents.

§ 1089, 1 In *Ex parte Chippendale*, 4 De Gex, M. & G. 19, 52, Turner, L. J., speaking of the relation between the directors and the *company*, said: “Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some

(a) Quoted in *Empire State Sav. Bank v. Beard*, 81 Hun 184, 30 N. Y. Supp. 756.

is of the utmost importance to discriminate exactly between these two characters, and to determine accurately for whom, over what subject-matter, and to what extent they are thus trustees; for upon this trust relation primarily depend the equitable remedies which may be obtained against them by the corporation or by the stockholders.² With the character of agents belonging to directors, the present discussion has little or nothing to do. From their function of agency are derived their powers to act for the corporation as a legal entity; it measures the extent of these powers in the management of both the external and internal affairs; it fixes the rights and obligations of the corporation in dealings with stockholders and with third persons. The rights, duties, liabilities, and remedies which result from the directors' agency are therefore *chiefly* legal; the *equitable* rights, duties, and remedies are mainly referable to the *trust* element of the directors' functions.

§ 1090. Trust Relations in Stock Corporations.^a—The trust character of directors is involved in the very organization

degree, in the position of trustees. There is no inconsistency in this double view of the position of directors. They are agents, and cannot bind their companies beyond their powers. They are trustees, and are entitled to be indemnified for expenses incurred by them within the limits of their trust." See also *Hun v. Cary*, 82 N. Y. 65, 70; 37 Am. Rep. 546; *Kelley v. Greenleaf*, 3 Story, 93, 101, Fed. Cas. No. 7,657.

² There has been some confusion upon this subject in the decisions. There are, as I shall show, several classes of suits against directors maintained by a stockholder, or by the stockholders, or by the corporation; they are governed by entirely distinct rules, and depend upon entirely different conditions of fact. Rules peculiar to one of these classes have sometimes been applied to cases belonging to another class. Such mistakes result from a failure to form a correct notion of the trust relation in which directors are placed. If it be possible to formulate a true statement of this relation, to show when directors are *quasi* trustees for the stockholders and when for the corporation, and over what species of property the trust extends in each of these instances, then all difficulties connected with the various kinds of suits against directors will be removed, and it will be apparent that all these equitable remedies are governed by a system of distinct but harmonious rules. I shall attempt to accomplish this result, and I believe that the conclusions of the text are fully sustained by courts of the highest ability and authority.

(a) This section is cited in *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

of a corporation, and is necessarily twofold,—towards the corporation, and towards the stockholders. The doctrines are fundamental and familiar that the corporation itself is a legal personality, and holds the full title, legal and equitable, to all corporate property. Stockholders, individually and separately, hold the full title, legal and equitable, to their respective shares of stock. A stockholder does not, by virtue of his stock, acquire any estate, legal or equitable, in the corporate property; he obtains only a right to participate in the lawful dividends while the corporation is in being, and to his proportionate share of the net assets upon its dissolution and final settlement. Shares of stock, however, are regarded by courts of law and of equity as a species of property, as vendible in the market, as having a pecuniary value, and as clothing their owner with proprietary rights which will be protected and enforced.¹ From this analysis it is obvious that, so far as the trust embraces or is concerned with the *corporate property*, the directors and managing officers occupy the position of *quasi* trustees towards the *corporation* only; there is no relation of beneficiary and trustee, having the corporate property for its subject-matter, between the stockholders and the directors. The directors are also agents for the corporation, but that fact does not prevent them from being in a partial sense trustees for the corporation. The important conclusion I repeat, that this phase of their trust is concerned with and confined to the corporate property; from it arise their fiduciary duties towards the corporation in dealing with such property, and the equitable remedies of the corporation for a violation of those duties. On the other hand, the directors and managing officers occupy the position of *quasi* trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and

¹ Thus, for example, trover could be maintained for a wrongful conversion of shares.

all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders; from it arise the fiduciary duties of the directors towards the stockholders in dealings which may affect the stock and the rights of the stockholders therein, and their equitable remedies for a violation of those duties. To sum up, directors and managing officers, in addition to their functions as mere agents, occupy a double position of partial trust; they are *quasi* or *sub modo* trustees for the corporation with respect to the corporate property, and they are *quasi* or *sub modo* trustees for the stockholders with respect to their shares of the stock.²

§ 1091. Liability of Directors for a Violation of their Trust.^a
— Whenever directors or managing officers, acting within the scope of their general powers as agents, violate the

²The conclusions of the text are fully sustained by the following cases, among others, although no *single* decision, so far as I am aware, attempts to give the complete analysis or to formulate the entire results. Different cases have announced different phases of the doctrine, and by a comparison of all, the general principle is established: *Ex parte Chippendale*, 4 De Gex, M. & G. 19, 52; *Bagshaw v. Eastern Union R'y*, 7 Hare, 114, 130, 131; 2 Hall & T. 201; *Foss v. Harbottle*, 2 Hare, 461, 493, 494; *Russell v. Wakefield etc. Co.*, L. R. 20 Eq. 474, 479; *Duncomb v. New York etc. R. R.*, 84 N. Y. 190; *Smith v. Rathbun*, 22 Hun, 150; *Hun v. Cary*, 82 N. Y. 65, 70; *Forbes v. Memphis etc. R. R.*, 2 Woods, 323; *Jackson v. Ludeling*, 21 Wall. 616; *Smith v. Poor*, 3 Ware, 148; *Black v. Delaware etc. Co.*, 22 N. J. Eq. 130, 393; *Simons v. Vulcan Oil etc. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Deaderick v. Wilson*, 8 Baxt. 108; *Corbett v. Woodward*, 5 Saw. 403; *Ryan v. Leavenworth etc. R'y*, 21 Kan. 365; *Forbes v. McDonald*, 54 Cal. 98; *Davis v. Rock Creek etc. Co.*, 55 Cal. 359; 36 Am. Rep. 40; *Booth v. Robinson*, 55 Md. 419; *Chouteau v. Allen*, 70 Mo. 290; *Van Dyck v. McQuade*, 86 N. Y. 38, 45, 46, per Danforth, J.; *Chase v. Vanderbilt*, 62 N. Y. 307.^b

The *dictum* in *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, which describes directors as *mere* mandataries, cannot be reconciled with the general consensus of authorities.

(b) For a recent English case discussing the relation of corporation directors dealing directly with the individual shareholder, see *Percival v. Wright*, [1902] 2 Ch. 421 (they

may purchase his shares without disclosing pending negotiations for the sale of the company's undertaking, which increase the value of the shares).

(a) This section is cited in *Empire*

rights of a stockholder, their act is binding upon the corporation; it is, in legal effect, the act of the corporation, and the stockholder has a remedy, legal or equitable as the case may be, by suit against the corporation.¹ With remedies of this kind against the corporation we are not at present concerned, since they result from the directors' powers as *agents*, and not at all from their functions as *quasi* trustees. In regard to the various remedies against the directors or managing officers for their breaches of trust, the conclusions reached in the preceding paragraph furnish a most clear and certain criterion. Whenever the acts of the directors do not consist of any wrongful misuse of the corporate property, or wrongful exercise of the corporate franchise, but are of such a nature that they directly and primarily affect the interest of the stockholders in their shares of stock, by diminishing its value, or otherwise impairing their proprietary rights in it, then the stockholders are directly injured and are primarily interested; as the *c'estuis que trustent* whose rights have been violated, they must institute and maintain any equitable suits for relief against their defaulting trustees; the remedy is for their benefit and belongs to them alone. On the other hand, wherever the breach of trust consists in a wrongful dealing of any kind or in any manner with the corporate property or with the corporate franchises, the corporation itself is directly injured and is primarily interested; as the *cestui que trust* whose rights have been violated, it must institute and maintain any equitable suit for relief against its de-

¹ As, for example, when the directors or officers improperly refuse to recognize a transfer of stock, and to issue a new certificate to the assignee, or when they otherwise refuse to admit the rights of one who is really a stockholder, and to issue to him the stock to which he is justly entitled, their conduct, though wrongful in the particular instance, falls within the scope of their proper functions. The stockholder may therefore maintain an action at law against the corporation for damages, or he may sometimes resort to a suit in equity for the purpose of compelling it to issue the stock and to register it upon the books of the company.^b

faulting trustees; the remedy obtained, whether pecuniary or otherwise, is for its benefit, and belongs to it alone. Under certain special circumstances in cases of this latter kind, where the suit should be brought by the corporation as plaintiff, but it becomes impossible to institute such a proceeding, in order to prevent a complete failure of justice the stockholders are permitted to set the machinery of the court in motion by commencing the action in their own names; but otherwise the suit is treated in every respect as one brought by and for the corporation. In applying these general propositions, it will be found that there are several distinct classes of cases appropriate for different conditions of fact, and governed by different rules. These various classes I shall now proceed to describe.

§ 1092. **First Class. Directors Guilty of Fraudulent Misrepresentations or Concealments.**—Where directors or managing officers issue prospectuses, circulars, or reports containing fraudulent misrepresentations or concealments concerning the company's affairs, and persons are induced by these documents to purchase shares of the stock, or to enter into contracts for their purchase, and thereby sustain a loss, such defrauded stockholders may, as has already been shown, either obtain the relief by repayment or rescission against the corporation, or may obtain relief against the fraudulent directors personally by means of an equitable suit for an accounting and repayment of the money, or by an action at law for the deceit. The equitable suits against the directors must plainly be brought by the stockholders, and not by the corporation, since the wrong is not done to the corporate property or franchises, but consists wholly in a violation of the stockholders' proprietary rights in their shares of stock.¹ Such a suit cannot be maintained

¹ *Kisch v. Cent. R'y of Venezuela*, 3 De Gex, J. & S. 122; *Cent. R'y etc. v. Kisch*, L. R. 2 H. L. 99; *Hill v. Lane*, L. R. 11 Eq. 215; *Peek v. Gurney*, L. R. 13 Eq. 79; L. R. 6 H. L. 377; *Ship v. Crosskill*, L. R. 10 Eq. 73, 82, 83; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Cargill v. Bower*, L. R. 10 Ch. Div. 502; *Rohrschneider v. Knickerbocker Ins. Co.*, 76 N. Y. 216; 32 Am. Rep. 290; see *ante*, § 881, and cases in notes.

by one stockholder suing on behalf of himself and all others similarly situated; the injury is several and individual; each defrauded stockholder must sue for himself.²

§ 1093. Second Class. *Ultra Vires* Proceedings of Directors. — In a second class of cases, where the directors are not charged with any misappropriation of the corporate property for their own benefit, nor with any breach of their fiduciary duty to the corporation, but, although purporting to act for the common welfare, they have adopted, or are about to adopt, some measure which is *ultra vires*, or beyond the scope of their corporate powers, a suit may be prosecuted against them by stockholders to obtain the appropriate relief, either of rescission or of prevention.¹ Under some circumstances, even a single dissentient stockholder would not be bound by such an act, done by a unanimous board of directors, and approved by all the other stockholders except himself. The theory of this class of suits is, that a stockholder has a right that the operations of the corporation should be kept by the directors within the powers conferred by its charter; every measure which transcends those powers, although done in good faith, violates the rights which inhere in the ownership of stock, and puts the value of the stock itself at hazard. The suit may be brought by a single stockholder suing on his own account alone, or by a stockholder suing on behalf of himself and all others who are similarly situated. The corporation is, of course, made a co-defendant, and any other corporation or person who has joined in the *ultra vires* transaction may

² *Turquand v. Marshall*, L. R. 4 Ch. 376, 385. •

¹ In *Russell v. Wakefield etc. Co.*, L. R. 20 Eq. 474, 481, Sir George Jessel, M. R., after describing the suits generally to be brought by the corporation, and stating that there are exceptions to this rule, adds: "It remains to consider what are those exceptional cases in which such a suit [i. e., by stockholders] should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation."

also be made a co-defendant.^{2a} There is also a special action strictly analogous to those properly belonging to this class. When the managing body are doing or are about to do an *ultra vires* act of such a nature as to produce public mischief, the attorney-general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief.³

² Bagshaw v. Eastern Union R'y, 7 Hare, 114, 130, 131; Ware v. Grand Junction etc. Co., 2 Russ. & M. 470; Simpson v. Westminster Hotel Co., 2 De Gex, F. & J. 141; 8 H. L. Cas. 712; Hare v. London etc. R'y, 2 Johns. & H. 80; Simpson v. Denison, 10 Hare, 51; Beman v. Rufford, 1 Sim., N. S., 550; Salomons v. Laing, 12 Beav. 377; Colman v. Eastern Cos. R'y, 10 Beav. 1; Russell v. Wakefield etc. Co., L. R. 20 Eq. 474, 481; Clinch v. Financial Corporation, L. R. 5 Eq. 450; Att'y-Gen. v. Great Eastern R'y, L. R. 11 Ch. Div. 449, 485-500, per Baggallay, L. J.; Menier v. Hooper's Tel. Works, L. R. 9 Ch. 350; MacDougall v. Gardiner, L. R. 1 Ch. Div. 13; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Butts v. Wood, 37 N. Y. 317; Mander-son v. Commercial Bank, 28 Pa. St. 379; Black v. Delaware etc. Co., 22 N. J. Eq. 130, 393; Marseilles etc. Co. v. Aldrich, 86 Ill. 504; Chetlain v. Republic Life Ins. Co., 86 Ill. 220; Heath v. Erie R'y, 8 Blatchf. 347; Ribon v. R. R. Cos., 16 Wall. 446.

³ Some of the cases seem to hold that the attorney-general may thus interfere to restrain every *ultra vires* proceeding of a corporation, on the ground that the public and governmental rights must necessarily be invaded thereby. The later decisions, however, have established the limitation as stated in the text: Att'y-Gen. v. Great East. R'y, L. R. 11 Ch. Div. 449, 485-500; Att'y-Gen. v. Ely etc. R'y, L. R. 4 Ch. 194, 199; Att'y-Gen. v. Great West. R'y, L. R. 7 Ch. 767; Att'y-Gen. v. Cockermouth Local Board, L. R. 18 Eq. 172; Att'y-Gen. v. Great North. R'y, 1 Drew. & S. 154.

(a) This section is cited to this effect in Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867. See, also, Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 South. 981, 59 Am. St. Rep. 105; Elkins v. C. & A. R. Co., 36 N. J. Eq. 5; Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842; Coler v. Tacoma R'y & Power Co., (N. J. Eq.) 54 Atl. 413; Dittman v. Distilling Co. of America, 64 N. J. Eq. 537, 54 Atl. 570 (relief refused; action not *ultra vires* but in violation of statute; *quo warranto* only remedy); Forrester v. Boston & M. Con-

sol. C. & S. Min. Co., (Mont.) 74 Pac. 1088. A stockholder who has consented to an act cannot obtain relief therefrom in equity: McCampbell v. Fountain Head R. Co., (Tenn.) 77 S. W. 1070; nor can an assignee of such stockholder obtain relief: McCampbell v. Fountain Head R. Co., (Tenn.) 77 S. W. 1070; Hodge v. U. S. Steel Corp., 64 N. J. Eq. 90, 53 Atl. 601. See, also, Home Fire Ins. Co. v. Barber, (Nebr.) 93 N. W. 1024, and cases cited (holding that a purchaser of stock cannot complain of the prior acts and management of the corporation).

§ 1094. Third Class. Wrongful Dealing with Corporate Property.^a—In this vastly most numerous and important class, the wrongful acts of the directors or officers primarily and immediately affect the corporation, either by misuse of its property or by abuse of its franchises. The kinds, forms, and modes of such wrongful acts are practically unlimited in number or variety. In general, where the directors or officers, or some of them, cause a loss of corporate property by negligence, or culpable lack of prudence, or failure to exercise their functions; or fraudulently misappropriate the corporate property in any manner, whether for their own benefit or for the benefit of third persons; or obtain any undue advantage, benefit, or profit for themselves by contract, purchase, sale, or other dealings under color of their official functions; or misuse the franchises, or violate the rules established by the charter or the by-laws for their management of the corporate affairs; or in any other similar manner commit a breach of their fiduciary obligations towards the corporation, so that it sustains an injury or loss, and a liability devolves upon themselves, — then the corporation is the party which must, as the plaintiff, bring an equitable suit for relief against the wrong-doers; the trust relation between itself as the *cestui que trust* and the defaulting directors or officers as trustees has been violated, and as in all like cases the *cestui que trust* is primarily the only party to sue for redress. As a general rule, courts of equity will not interfere with the internal management of corporations by means of suits brought by stockholders against directors, officers, or other stockholders.¹ In cases belonging to this class, there-

¹ The doctrine is concisely stated in the quite recent cases of Greaves v. Gouge, 69 N. Y. 154, 157. A stockholder sues the president of a corpora-

(a) This section is cited in Empire State Sav. Bank v. Beard, 81 Hun 184, 30 N. Y. Supp. 756; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101,

29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90; Ellis v. Ward, 137 Ill. 509, 25 N. E. 530; McKee v. Chau-tauqua Assembly, 124 Fed. 808.

fore, whatever be the nature of the particular wrong, whether intentional and fraudulent, or resulting from negligence or want of reasonable prudence, and whatever be the *indirect* loss occasioned to individual stockholders, no equitable suit for relief against the wrong-doing directors or officers can be maintained by a stockholder or stockholders individually, nor by a stockholder suing representatively on behalf of all others similarly situated, *unless the special condition of circumstances exists* to be described in the next following paragraph, namely, that the corporation either actually or virtually refuses to prosecute. Even if the stockholder alleges that the value of his own stock has been depreciated by the defendants' acts, or that he has sustained other special damage, he is not thereby entitled

tion, alleging that defendant had fraudulently misappropriated the surplus earnings and other property of the corporation, and that plaintiff's stock had thereby become worthless. He claims to recover, not only for the misappropriation of the corporate funds, but also for the depreciation in the value of his own stock. The corporation is not made a party, and the complaint contains no averments showing why the suit was not brought by the corporation. In short, the case illustrates the doctrine in the most striking manner. The court say: "There is no doubt that a stockholder has a remedy for losses sustained by the fraudulent acts, and for the misapplication or waste of corporate funds and property by an officer of a corporation; but the weight of authority is in favor of the doctrine that an action for injuries caused by such misconduct must be brought in the name of the corporation, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an action the corporation must necessarily be made a party defendant. When a stockholder brings such an action the complaint should allege that the corporation, on being applied to, refuses to prosecute; and as this averment constitutes an essential element of the cause of action, the complaint is defective and insufficient without it. The claim of the plaintiff that when the stockholder seeks to recover his share of the loss which might be recovered of the company, and only then, the company must be made a party, is not sustained by the authorities, and those cited do not uphold the doctrine contended for. The same remark is also applicable to the position taken, that when the loss is peculiar to the stockholder, and is caused by the depreciation of the market value of the stock, that the loss may be recovered against a director or other person causing it, without making the company a party."

to maintain the suit. The reasons for this doctrine have already been explained. The stockholder, having no estate, legal or equitable, in the corporate property, has no *locus standi* in the courts while the corporation, in which alone are vested the corporate property and franchises, is able and willing to sue for their protection.^{2 b} Differing

² In most of the following cases the doctrine of the text is established in an express and positive manner: *Foss v. Harbottle*, 2 Hare, 461, 491, per Wigram, V. C.; *Mozley v. Alston*, 1 Phill. Ch. 790, per Lord Cottenham; *Lord v. Co. of Copper Miners*, 2 Phill. Ch. 740, per Lord Cottenham; *Russell v. Wakefield Water W. Co.*, L. R. 20 Eq. 474, 479, per Sir George Jessel, M. R.; *Gray v. Lewis*, L. R. 8 Ch. 1035, 1049, 1050; *MacDougall v. Gardiner*, L. R. 1 Ch. Div. 13; *Duckett v. Gover*, L. R. 6 Ch. Div. 82; *Forbes v. Memphis etc. R. R.*, 2 Woods, 323; *Fed. Cas. No. 4,926*; *Morgan v. R. R. Co.*, 1 Woods, 15; *Fed. Cas. No. 9,806*; *Newby v. Oregon Cent. R. R.*, 1 Saw. 63; *Fed. Cas. No. 10,145*; *Smith v. Poor*, 3 Ware, 148; *Fed. Cas. No. 13,093*; *Memphis City v. Dean*, 8 Wall. 64; 19 L. ed. 326; *Hawes v. Oakland*, 104 U. S. 450; 26 L. ed. 827; *Huntington v. Palmer*, 104 U. S. 482; 26 L. ed. 833; *Dannmeyer v. Coleman*, 11 Fed. Rep. 97; *Greaves v. Gouge*, 69 N. Y. 154; *Smith v. Rathbun*, 22 Hun, 150; *Black v. Huggins*, 2 Tenn. Ch. 780; *Jones v. Johnson*, 10 Bush, 649; *European etc. R'y v. Poor*, 59 Me. 277; *Henry v. Elder*, 63 Ga. 347; *Booth v. Robinson*, 55 Md. 419; *Evans v. Brandon*, 53 Tex. 56. In the following cases the same doctrine is recognized and followed as the basis of decision, although the actions are not *in form* the same as in the preceding cases: *Duncomb v. New York etc. R. R.*, 84 N. Y. 190 (applied defensively by the corporation); *Brooklyn etc. R. R. v. Strong*, 75 N. Y. 591 (action at law); *Craig v. Gregg*, 83 Pa. St. 19; *Union Pacific R. R. v. Durant*, 3 Dill. 343; *Fed. Cas. No. 14,377*; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220. See also, in support of the text, the cases cited under the next following paragraph, § 1095.

(b) *Malder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280 (suit to compel declaration of dividends); *Tuscaloosa Mfg. Co. v. Cox*, 68 Ala. 71; *Merchants' & Planters' Line v. Wagoner*, 71 Ala. 581; *Decatur Mineral Land Co. v. Palm*, 113 Ala. 531, 21 South. 315, 59 Am. St. Rep. 140; *Johns v. McLester*, 137 Ala. 283, 34 South. 174, 97 Am. St. Rep. 27; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 212; *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646; *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894; *Ide v. Bascomb*, (Colo. App.) 72 Pac. 62; *Smith*

v. Bulkley, (Colo. App.) 70 Pac. 958; *Dunphy v. Traveller Newspaper Union*, 146 Mass. 495, 16 N. E. 426; *Siegman v. Maloney*, (N. J. Eq.) 54 Atl. 405; *Niles v. N. Y. Central & H. R. R. Co.*, 176 N. Y. 119, 68 N. E. 142; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625 (*dictum* to effect that demand upon president alone and refusal by him is not sufficient to authorize stockholder to sue); *Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798, 8 S. E. 570.

from this class merely in form, there is a special group of cases governed by the same doctrine. If the corporation has been dissolved, or is in the process of winding up, then the suit, which would otherwise have been brought in its name, may be maintained by the receiver, official liquidator, or other official representative who has succeeded to its property and franchises for the purpose of the final settlement.³

§ 1095. Fourth Class. The Same Wrongful Dealing with Corporate Property — The Corporation Refuses to Sue. — Although the corporation holds all the title, legal or equitable, to the corporate property, and is the *immediate cestui que trust* under the directors with respect to such property, and is theoretically the only proper party to sue for wrongful dealings with that property, yet courts of equity recognize the truth that the stockholders are *ultimately* the only beneficiaries; that their rights are really, though indirectly, protected by remedies given to the corporation; and that the final object of suits by the corporation is to maintain the interests of the stockholders. While, in general, actions to obtain relief against wrongful dealings with the corporate property by directors and officers must be brought by and in the name of the corporation, yet if in any such case the corporation should refuse to bring a suit, the courts have seen that the stockholders would be without any immediate and certain remedy, unless a modification of the general rule were admitted. To that end the following modification of the general rule stated in the last preceding paragraph has been established as firmly and surely as the rule itself. Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the

³ Land Credit Co. v. Lord Fermoy, L. R. 8 Eq. 7, 11; Joint Stock Co. v. Brown, L. R. 8 Eq. 381; 3 Eq. 139; Hun v. Cary, 82 N. Y. 65; 37 Am. Rep. 546; Sperring's Appeal, 71 Pa. St. 11; 10 Am. Rep. 684; Brinckerhoff v. Bostwick, 88 N. Y. 52.

remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation *either actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers, and other persons;* but it is absolutely indispensable that the corporation itself should be joined as a party,—usually as a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court*. The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that *it* may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such *direct* interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an

(a) Quoted in *Slattery v. St. Louis, etc., R. R. Co.*, 91 Mo. 217, 4 S. W. 79, 60 Am. St. Rep. 245.

otherwise complete failure of justice.^b When may such an action be brought? I have already stated the rule in its most general form, that a stockholder may thus sue whenever the corporation either actually or virtually refuses to permit a proceeding by itself. These are two distinct conditions of fact; and the circumstances must determine whether any particular case belongs to one or the other of the two conditions. In general, a case should come within the first condition; and it should appear that the board of directors or other managing body has actually refused to bring or permit an action in its own name. To this end the plaintiff should allege an application to the directors or managing body, a reasonable notice, request, or demand, that they would institute proceedings on the part of the corporation against the wrong-doers, and their refusal to do so after such reasonable request or demand. These allegations are material and issuable; if controverted by the defendant, they must be proved. If the proof of them fails, the whole foundation of the plaintiff's action is gone.^c This condition of fact, however, is not indispensable; the action *may* be maintainable without showing any notice, request, or demand to the managing body, or any actual refusal by them to prosecute; in other words, the refusal may be virtual.^d If the facts as alleged show that the defendants charged with the wrong-doing, or some of them, constitute a majority of the directors or managing body at the time of commencing the suit, or that the directors or a majority thereof are still under the control of the wrong-doing defendants, so that a refusal of the managing body, if requested to bring a suit in the name of the corporation, may be inferred with reasonable certainty, then an action by a stockholder may be maintained without alleging or

(b) Quoted in *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189.

(c) Quoted in *Tevis v. Hammer-*

smith, 31 Ind. App. 281, 66 N. E. 79, 912.

(d) Quoted in *Tevis v. Hammer-smith*, 31 Ind. App. 281, 66 N. E. 79, 912.

proving any notice, request, demand, or express refusal.¹
In like manner, if the plaintiff's pleading discloses any

¹ These conclusions are fully sustained by the cases which have applied the rule under a great variety of circumstances: *Atwool v. Merryweather*, L. R. 5 Eq. 464, note; *Mason v. Harris*, L. R. 11 Ch. Div. 97; *MacDougall v. Gardiner*, L. R. 1 Ch. Div. 13; *Duckett v. Gover*, L. R. 6 Ch. Div. 82; *Menier v. Hooper's Tel. Works*, L. R. 9 Ch. 350; *Benson v. Heathorn*, 1 *Younge & C.* 326; *Davenport v. Dows*, 18 Wall. 626; 21 L. ed. 938; *Jackson v. Ludeling*, 21 Wall. 616; 22 L. ed. 492; *Memphis City v. Dean*, 8 Wall. 64; 19 L. ed. 326; *Forbes v. Memphis etc. R. R.*, 2 Woods, 323; *Fed. Cas. No. 4,926*; *Newby v. Oregon Cent. R. R.*, 1 Saw. 63; *Fed. Cas. No. 10,145*; *Smith v. Poor*, 3 Ware, 148; *Fed. Cas. No. 13,093*; *Heath v. Erie R'y*, 8 Blatchf. 347; *Fed. Cas. No. 6,306*; *Memphis etc. Gas Co. v. Williamson*, 9 Heisk. 314; *Hazard v. Durant*, 11 R. I. 196; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Young v. Drake*, 8 Hun, 61; *Rogers v. Lafayette etc. Works*, 52 Ind. 296; citing *March v. Eastern R. R.*, 40 N. H. 548; 77 Am. Dec. 732; *Brewer v. Boston Theatre*, 104 Mass. 378; *Peabody v. Flint*, 6 Allen, 52; *Hodges v. New Eng. Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Sears v. Hotchkiss*, 25 Conn. 171; 65 Am. Dec. 557; *Allen v. Curtis*, 26 Conn. 456; *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212; *Goodin v. Cin. etc. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Smith v. Prattville M. Co.*, 29 Ala. 503; *Wright v. Oroville etc. Co.*, 40 Cal. 20; *Dodge v. Woolsey*, 18 How. 331; 15 L. ed. 401; *Board of Commissioners v. Lafayette etc. R. R.*, 50 Ind. 85; *Jones v. Johnson*, 10 Bush, 649; *Gray v. New York etc. Co.*, 3 Hun, 383; 5 Thomp. & C. 224; *O'Brien v. O'Connell*, 7 Hun, 228; *Carpenter v. Roberts*, 56 How. Pr. 216; *Ryan v. Leavenworth etc. R'y*, 21 Kan. 365; *Gardner v. Butler*, 30 N. J. Eq. 702; *Deaderick v. Wilson*, 8 Baxt. 108; *Booth v. Robinson*, 55 Md. 419; *Baldwin v. Canfield*, 26 Minn. 43; *Wilcox v. Bickel*, 11 Neb. 154; 8 N. W. 436; *Evans v. Brandon*, 53 Tex. 56; *Hawes v. Oakland*, 104 U. S. 450; 26 L. ed. 827; *Huntington v. Palmer*, 104 U. S. 482; 26 L. ed. 833; *Dannmeyer v. Coleman*, 11 Fed. Rep. 97. In *Atwool v. Merryweather*, L. R. 5 Eq. 464, note, 467, note, a suit by a stockholder was sustained, although no demand or request to sue had been made to the managing body, and no leave to sue had been obtained, because the principal defendant, a director, by means of the very fraud complained of, had control of a majority of the votes in the managing body. In *Mason v. Harris*, L. R. 11 Ch. Div. 97, 107, Sir George Jessel, M. R., said: "As a general rule, the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception to the rule requiring the company to be plaintiff is, that where a fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as, unless such an exception were allowed, it would be in the power of a majority to defraud the minority with impunity. . . . It

(e) This section is cited in *Kimble v. Board of Commissioners*, (Ind. App.) 66 N. E. 1023; *Zerelly v. Casper*, 160 Ind. 455, 67 N. E. 103;

Beach v. Guaranty Sav. & Loan Assn., (Oreg.) 76 Pac. 16; *McKee v. Chautauqua Assembly*, 124 Fed. 808. In the following cases there was a

other condition of fact which renders it reasonably certain

appears that the defendant Harris holds such a number of shares that he can outvote those who wish the sale set aside [i. e., the sale alleged to be fraudulent]. By reason, therefore, of his influence with the directors and his number of votes, he has the sole control of the company. The case is precisely within the rules laid down by James, L. J., in *Menier v. Hooper's Tel. Co.*" In *Newby v. Oregon Cent. R. R.*, 1 Saw. 63, 67, 68; Fed. Cas. No. 10,145, plaintiff had averred in his bill a demand made upon the board of directors to sue in the name of the company, and their refusal; on the hearing it was conceded that this averment could not be proved, and the suit was therefore dismissed, upon the authority of *Memphis City v. Dean*, 8 Wall. 64; 19 L. ed. 326, which is directly to the same point. The American courts fully adopt the rules as settled by English judges. In *Young v. Drake*, 8 Hun, 61, it was said: "Stockholders have a right to maintain an action against the trustees of the corporation for a fraudulent breach of trust, when it is apparent that the corporation itself will not sue for their benefit. And where the corporation is still controlled by the same trustees who are accused of the fraud, or where such accused persons are a majority of the trustees, that is sufficient evidence that the corporation will not prosecute, and that an application to the trustees to direct a suit to be brought against themselves, or the derelict majority of their members, would be useless." The same rule is stated in the clearest manner in the important and well-considered case of *Heath v. Erie R'y*, 8 Blatchf. 347; Fed. Cas. No. 6,306. In *Wilcox v. Bickel*, 11 Neb. 154; 8 N. W. 436, the plaintiff alleged that the wrong-doing officials, who constituted a majority of the directors, had absconded, and their whereabouts was unknown, and these facts, it was held, brought the case within the principle and operation of the rule. In *Baldwin v. Canfield*, 26 Minn. 43, the action was brought by a person to whom shares of the stock had been assigned as collateral security, and the court, in sustaining the action, held that a person holding stock of a corporation, not as a stockholder, but merely as a pledgee, may bring an action on his own account and in his own name to protect his rights and interests as pledgee, and cannot be required to act through the corporation. In the very recent case of *Hawes v. Oakland*, which was an action by a stockholder suing representatively against the board of directors, the corporation, and others, the supreme court of the United States summed up the general results of the English and American authorities as follows: "There must exist as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization [*Note*.—This is identical with the "second class" of cases described in the text; what follows embraces the various conditions of fact which belong to the "fourth class"]; or such a fraudulent transaction completed or contemplated by

sufficient demand and the suits were sustained: *Mills v. City of Chicago*, 127 Fed. 731; *Brinckerhoff v. Roose-*

velt, 131 Fed. 955; *City of Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899; *The Telegraph v. Lee*, (Iowa) 98 N.

that a suit by the corporation would be impossible, and that

the acting managers, in connection with some other party, or among themselves, or with other share-holders, as will result in serious injury to the corporation, or to the interests of the other share-holders; or where the board of directors, or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other share-holders; or where the majority of the share-holders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other share-holders, and which can only be restrained by a court of equity." To these general conclusions the court adds a statement of very minute averments which must be made by the plaintiff, tending to show that he has used all possible efforts, and exhausted all possible means, both with the managing officers and with the other share-holders, to obtain redress through corporate action, or through a

W. 364; *Wineburgh v. U. S., etc., Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625 (demand upon trustee under general assignment is sufficient). "It is not enough, to enable a stockholder to bring a bill to enforce in behalf of a corporation the rights which, if successful, will inure to the corporation, to make a naked request that such a bill should be brought, without submitting to the directors the facts on which it could be brought": *Doherty v. Mercantile Trust Co.*, 184 Mass. 590, 69 N. E. 335.

In the following cases demand was unnecessary: *Nathan v. Tompkins*, 82 Ala. 437, 2 South. 747; *Montgomery Traction Co. v. Harmon*, (Ala.) 37 South. 371; *Moyle v. Landers*, 83 Cal. 579, 23 Pac. 798; *Ashton v. Dashaway Assn.*, 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189; *Green v. Hedenberg*, 159 Ill. 489, 42 N. E. 851, 50 Am. St. Rep. 178; *Davis v. Gemmell*, 70 Md. 356, 17 Atl. 259; *McConnell v. Combination Min. & Mill. Co.*,

(Mont.) 76 Pac. 194; *Appleton v. American Malting Co.*, (N. J. Eq.) 54 Atl. 454; *Berry v. Moeller*, (N. J. Eq.) 59 Atl. 97; *Brinkerhoff v. Bostwick*, 88 N. Y. 52, per Rapallo, J.; 105 N. Y. 567, 12 N. E. 58; *Crumlish v. Shenandoah Valley R. R. Co.*, 28 W. Va. 623. It has been held, however, that "when a stockholder, being unable to induce the directors of a corporation, whose stock he holds, to bring an action at law, comes into a court of equity to aid him, he must, in order to excite the favorable action of that court, show to its satisfaction that the result of the action will be to promote justice, and will not produce any inequitable results": *Siegmán v. Malone*, 63 N. J. Eq. 422, 51 Atl. 1003.

The corporation must be made a party plaintiff or defendant: *Wilson v. American Palace Car Co.*, (N. J. Eq.) 54 Atl. 415; *Groel v. United Electric Co.*, 132 Fed. 252 (reviewing cases, whether corporation should be joined as defendant or as plaintiff). In general, see *Metcalf v. American School Furn. Co.*, 122 Fed. 115; *Northwestern Land Assn. v. Grady*, 137 Ala. 219, 33 South. 874; *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, 67 N. E.

a demand therefor would be nugatory, the action may be maintained without averring a demand or any other similar proceeding on the part of the stockholder-plaintiff.^b

§ 1096. *Special Classes.*—In addition to the foregoing general classes of suits, there are certain special classes, analogous to the former, and, like them, based upon the conception of an existing *quasi* trust relation, and of a breach of the fiduciary duty growing out of such relation. These special cases should be mentioned, in order to complete the view of partial trusts connected with the existence and management of corporations. In the first place, an action may be maintained by the corporation against its promoters, to set aside a transfer, or to rescind an agreement, or to obtain other proper relief, whenever, in the organization of the company, there has been a breach of

suit by the corporation itself.^c It is not claimed, however, that these specific and extraordinary allegations are demanded by the general course of English and American decisions. They are intended to guard the federal jurisdiction from encroachment, and are prescribed by a rule of the United States supreme court (rule 94) for the purpose of preventing collusive attempts to bring causes within that jurisdiction. To the same effect are *Huntington v. Palmer* and *Dannmeyer v. Coleman*, *supra*.^d

17; *Pencille v. State F. M. H. Ins. Co.*, 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326 (suit by policyholders in mutual insurance company); *Wildes v. Rural Homestead Co.*, 53 N. J. Eq. 452, 32 Atl. 676; *Lillard v. Oil, Paint & Drug Co.*, (N. J. Eq.) 56 Atl. 254; *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, 54 Atl. 543 (depositor in savings bank may enjoin officers from dissolving, when no sufficient reason for dissolution); *Farmers' L. & T. Co. v. New York & N. Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. Rep. 689, 34 L. R. A. 76. Equity will not interfere with the discretion of the directors at suit of minority stockholders unless the acts are *ultra vires*, fraudulent, or in disregard of the rights of plaintiff: *Talbot J. Taylor &*

Co. v. Southern Pac. Co., 122 Fed. 147; *Dickinson v. Consolidated Traction Co.*, 119 Fed. 871, 56 C. C. A. 401; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 212.

(^c) See, also, *Kessler v. Ensley Co.*, 123 Fed. 546.

(^d) *Dimpfell v. O. & M. Ry. Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; *Taylor v. Holmes*, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; *Corbus v. Alaska Treadwell Gold M. Co.*, 187 U. S. 455, 23 Sup. Ct. 156; *Squair v. Lookout Mt. Co.*, 42 Fed. 729; *Weidenfeld v. Allegheny & K. R. Co.*, 47 Fed. 11; *Converse v. Dimock*, 22 Fed. 573.

(^h) Quoted in *Eschweiler v. Stowell*, 78 Wis. 316, 47 N. W. 361, 23 Am. St. Rep. 411.

the fiduciary duty owed by the promoters to the future corporation.^{1 a} Secondly, under the same general circumstances in which an action may be maintained by a stockholder against wrong-doing directors or officers, if the corporation is municipal, or the trust is public and charitable, the attorney-general may sue, as a representative of the public beneficiaries, for appropriate relief.^{2 b} Finally, it seems that a person who has shares, not as a full stockholder, but as a pledgee or assignee for security, may bring a suit against defaulting directors or officers, for the purpose of protecting his own interests, without calling upon the corporation itself to interfere.^{3 c}

§ 1097. Guardians.—Guardians of infant wards, committees or guardians of persons *non compos mentis*, and even agents where the agency is strictly fiduciary, stand in the relation of *quasi* trustees towards their wards or principals. It is true, they do not hold the title to the property which is the subject-matter of the relation, but their position and obligations are wholly fiduciary. Equity has, therefore, a general jurisdiction, at the suit of the wards or other beneficiaries, to compel a performance of the trust duties, to relieve against violations of these trust obligations, to

1 This suit is clearly analogous to the "third general class" of the text. If the corporation is winding up, the suit may, of course, be brought by the receiver or official liquidator: *Emma etc. Mining Co. v. Grant*, L. R. 11 Ch. Div. 918; *Taylor v. Salmon*, 4 Mylne & C. 134; *Benson v. Heathorn*, 1 Younge & C. 326; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *McElhenny's Appeal*, 61 Pa. St. 188; *Union Pac. R. R. v. Durant*, 3 Dill. 343, Fed. Cas. No. 14,377.

2 *Att'y-Gen. v. Wilson, Craig & P.* 1, 9 Sim. 30, is an example of such suits.

3 *Baldwin v. Canfield*, 26 Minn. 43.

(a) The text is cited to this effect in *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 29 Atl. 303, 42 Am. St. Rep. 159, 25 L. R. A. 90.

(b) *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520 (suit by taxpayer); *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis.

245, 75 N. W. 964, 69 Am. St. Rep. 915 (same).

(c) The proposition of *Baldwin v. Canfield* is by no means universally conceded at the present day. As to what persons are stockholders for the purposes of these suits, see *Brown v. Duluth, M. & N. Ry. Co.*, 53 Fed. 889 (unregistered stockholder not allowed to sue).

direct an accounting and final settlement of the *quasi* trust, and to grant other special relief made requisite by the circumstances. This jurisdiction exists throughout the American states, except, perhaps, in a very few, where statutes have given exclusive control over such matters to some particular tribunal, to be exercised in some prescribed manner.¹

¹In many of the states a jurisdiction over guardians is given to the probate courts; and modes of annual or final accounting are provided; but this legislation does not interfere with the inherent jurisdiction of equity, as a part of its general supervisory power over trusts. In a very few states, it seems, the legislation has gone farther, and has conferred an exclusive jurisdiction over guardians and their accounts upon these probate tribunals. For cases illustrating the text, and the fiduciary duties of guardians, and the jurisdiction of equity over them, see *ante*, § 961, and cases cited. With respect to these duties and this jurisdiction, committees or guardians of persons *non compos mentis* stand upon exactly the same footing as guardians of infant wards. The following recent cases are examples of the mode in which the jurisdiction is exercised: *Fiduciary agents*: Thornton v. Thornton, 31 Gratt. 212. *Committees or guardians of insane persons*: Stephens v. Marshall, 23 Hun, 641; Stumph v. Guard. of Pfeiffer, 58 Ind. 472; Polis v. Tice, 28 N. J. Eq. 432; Cole's Com. v. Cole's Adm'r, 28 Gratt. 365; Moody v. Bibb, 50 Ala. 245. *Guardians of infants*: Lewis v. Allred, 57 Ala. 628; overruling Spencer v. Spencer's Ex'r, 50 Ala. 445; Monnin v. Beroujon, 51 Ala. 196; Corbett v. Carroll, 50 Ala. 315; Chanslor v. Chanslor's Trustees, 11 Bush, 663; Tanner v. Skinner, 11 Bush, 120; Wood v. Stafford, 50 Miss. 370; Sledge v. Boone, 57 Miss. 222; McNeill v. Hodges, 83 N. C. 504; Lanier v. Griffin, 11 S. C. 565; Smith v. Davis, 49 Md. 470; Sage v. Hammonds, 27 Gratt. 651; Wyckoff v. Hulse, 32 N. J. Eq. 697; Wickiser v. Cook, 85 Ill. 68; Reed v. Timmins, 52 Tex. 84; Hoyt v. Sprague, 103 U. S. 613; 26 L. ed. 585; Micou v. Lamar, 17 Blatchf. 378; 1 Fed. Rep. 14; Bourne v. Maybin, 3 Woods, 724; Fed. Cas. No. 1,700; In re Dean, 86 N. Y. 398 (assignee).

CHAPTER SECOND.

ESTATES AND INTERESTS OF MARRIED WOMEN.

SECTION I.

THE SEPARATE ESTATE OF MARRIED WOMEN.

ANALYSIS.

- § 1098. Origin and general nature.
- § 1099. Statutory legal separate estate in the United States.
- § 1100. How the separate estate is created; trustees not necessary.
- § 1101. The same: By what modes and instruments.
- § 1102. The same: What words are sufficient.
- § 1103. What property is included.
- § 1104. Her power of disposition.
- § 1105. The same, in the United States.
- § 1106. Her disposition under a power of appointment.
- § 1107. Restraints upon anticipation.
- § 1108. What words are sufficient to create a restraint.
- § 1109. Effect of the restraint.
- § 1110. End of the separate estate; its devolution on the wife's death.
- § 1111. Pin-money.
- § 1112. Wife's paraphernalia.
- § 1113. Settlement or conveyance by the wife in fraud of the marriage.

§ 1098. **Origin and General Nature.**^a—The married woman's separate estate, as recognized by equity, and independently of any statutory legislation, is merely a particular instance of trusts, and the jurisdiction of equity over it has been established from a very early day.¹ As the wife's interest in the property held to her separate use is wholly a creature of equity, the equitable jurisdiction over it is, of course,

¹ See *Drake v. Storr*, 2 Freem. 205, which shows that in A. D. 1695, the wife's separate estate was a well-settled doctrine of equity.

(a) This section is cited in *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567.

exclusive. The notion of an equitable separate estate free from the claims of the husband was avowedly introduced in order to evade the harsh and unjust dogmas of the law, and, in direct antagonism to the common-law theory which completely merges the legal personality of the wife in that of her husband, equity regards and treats the married woman, with relation to such separate property, in many respects as though she were unmarried.² This capacity or

²The doctrine that equity regards a married woman as a *feme sole* has sometimes been stated too broadly. The true meaning of the doctrine, with its limitations and restrictions and the extent of its operation, has been explained in recent English cases, from which I shall quote a few passages. The capacity of a married woman to act as a *feme sole* may embrace, among other elements, a power to make contracts, a power to dispose of her property, and a freedom from the control which the common law gives to her husband. How far these elements are contained in the equitable conception of the wife's condition, and whether with or without limitation, is the question to be determined. In the most recent case of *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, the particular question was as to the wife's power of making contracts. Cotton, L. J., said (p. 463): "I think that the ingenious and able argument on the part of the plaintiff has proceeded on one or two fallacies in the use of language. As I understand their argument it is this, that a court of equity deals with a married woman who has a separate estate as if she were a *feme sole*. Now, is that correct? First of all, there is one clear and absolute distinction. Can a *feme sole*, or can a man, be restrained from anticipating, or disposing by way of anticipation of any property to which she or he is entitled? No. A married woman under coverture can; but how and why? Simply as regards property settled to her separate use, and because equity can modify the incidents of separate estate, which is the creation of equity, and thus the position of a married woman having separate property differs materially from that of a *feme sole*. Is it true that she is regarded in equity as a *feme sole*? She is regarded as a *feme sole* to a certain extent, but not as a *feme sole* absolutely, and there is the fallacy. She, in my opinion, is regarded as a *feme sole* only as regards property which, under the trust, she is entitled to deal with as if she were a *feme sole*; but as regards property which she is restrained from anticipating, she is not, as regards persons other than her husband, in the position of a *feme sole*. As regards her husband, no doubt she is, as regards property settled to her separate use (whether there is a restraint upon anticipation or not), treated as a *feme sole*; that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but as regards the outside world she is not regarded as a *feme sole* in respect of property subject to a restraint upon anticipation." See also p. 460, per James, L. J., and pp. 461, 462, per Brett, L. J. In the very important case of *Johnson v. Gallagher*, 3 De Gex, F. & J. 494, the particular question was as to the wife's power of disposition, connected with

status of being as though a *feme sole* is; however, only partial. As regards the husband and his common-law rights

her power of contracting. Turner, L. J., said (p. 509): "Before entering into the facts of the case, it may be as well to consider the nature and extent of the rights and remedies of such creditors, as established by the decisions of the courts of equity, or by conclusions which may fairly be drawn from these decisions. It is to be observed, in the first place, that the separate estate, against which these rights and remedies exist and are to be enforced, is the creature of courts of equity, and that the rights and remedies themselves, therefore, can exist and be enforced in those courts only. The courts of law recognize in married women no separate existence, no power to contract, and, except for some collateral and incidental purposes, no possession or enjoyment of property separate and apart from their husbands. They deny to married women both the power to contract and the power to enjoy. Courts of equity, on the other hand, have, through the medium of trusts, created for married women rights and interests in property, both real and personal, separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has, in courts of equity, power to alienate, to contract, and to enjoy; in fact, to use the language of all the cases from the earliest to the latest, she is considered in a court of equity as a *feme sole* in respect of property thus settled or secured to her separate use. It is from this position of married women, and from the rights and powers incident to it, that the claims of creditors against separate estates of married women have arisen." In *Taylor v. Meads*, 4 De Gex, J. & S. 597, 603, 604, Lord Westbury, dealing particularly with the wife's freedom from the control of her husband, and consequent power of disposition, said: "There is no difficulty as to the principle. When the courts of equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal *status*, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property the *feme covert* is by the form of trust released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. . . . The violence thus done by courts of equity to the principles and policy of the common law as to the *status* of the wife during coverture is very remarkable, but the doctrine is established, and must be consistently followed to its legitimate consequences." See also *Picard v. Hine*, L. R. 5 Ch. 274, 276, 277; *Hulme v. Tenant*, 1 Brown Ch. 16; 1 Lead. Cas. Eq., 4th Am. ed., 679, 684, 732; *Owens v. Dickenson*, Craig & P. 48; *Field v. Sowle*, 4 Russ. 112; *Aylett v. Ashton*, 1 Mylne & C. 105, 112; *Murray v. Barlee*, 3 Mylne & K. 209; *Lady Arundell v. Phipps*, 10 Ves. 139; *Nantes v. Corrock*, 9 Ves. 182, 189; *Heatley v. Thomas*, 15 Ves. 596; *Grigby v. Cox*, 1 Ves. Sr. 517; *Owen v. Homan*, 4 H. L. Cas. 997; *McHenry v. Davies*, L. R. 10 Eq. 88.

over the property, it is absolute; as regards third persons, and her power of disposing and contracting, it is never absolute, and *may* be restricted to any extent by the terms of the trust and of the instrument creating the separate estate. It should be carefully observed that a wife's trust estate and her separate estate are not synonymous or convertible terms. The separate estate of a married woman must, in contemplation of equity, be a trust estate, but an estate held in trust for her, in which she is the *cestui que trust*, is not necessarily a separate estate. The peculiar doctrine of the wife's "separate estate" applies only to such property as, being in contemplation of equity held in trust for her, is, by the terms of the conveyance or agreement, held or agreed to be held to her *separate use*.³ The separate estate may include every species of property, real or personal, and the trusts upon which it is held may, except when modified or restricted by statute, be of every extent or variety, but must, of course, be express.⁴ In all those states which have made the sweeping changes in the system of trusts, heretofore described, trusts of property held to the separate use of married women must, of course, conform to the general statutory regulations.⁵

³ For example, if land is conveyed to A in fee, in trust for a married woman and her heirs, or in trust for a single woman and her heirs, and she afterwards marries, thus creating an ordinary passive trust in fee, the married woman's equitable estate in the land would not be a "separate estate"; her husband would be entitled to curtesy in it; her power of conveying it and the mode of conveying would be governed by the same rules which apply to her legal estates in fee; her capacity to contract would not be enlarged: See *ante*, §§ 989, 990, and cases cited; *Taylor v. Meads*, 4 De Gex, J. & S. 597, 604, 605, per Lord Westbury.

⁴ The trust estate of the wife may be in fee, for life, or for years; it *may* be held upon a mere passive trust; or it may be held upon an active trust, where the trustee manages the *corpus* of the property, and pays over the rents, profits, and income to the wife.

⁵ See *ante*, §§ 1003-1005, New York, Michigan, Wisconsin, Minnesota, California, Dakota. In all these states a *passive* trust in land for the separate use of a married woman is forbidden.

§ 1099. **Statutory Legal Separate Estate.**^a—The separate estate thus described is wholly a creature of equity; the wife's interest is purely an equitable one, since the legal title is either vested in actual trustees, or is held by the husband in the character of a trustee; and the jurisdiction over it is exclusively equitable. Modern statutes in nearly all of the states have made most radical changes in the common-law relations of married women to their property, and have incidentally enlarged the jurisdiction of equity, so far as it is concerned with the contracts of married women, by extending it to their *legal* separate estates created by statute. These statutes do not, it is true, create any equitable estate in the property of wives; their effect is to vest a purely legal title in married women, and to free such title from the rights, interests, and claims which the common law gave to husbands. But while this legislation empowers married women to acquire and hold property separate and distinct from their husbands, and while it renders their title and estate entirely legal, and dispenses with the necessity of trustees, it does not, in most of the states, entirely remove the common-law disabilities of entering into contracts, nor clothe married women with the general capacity of making contracts which are personally binding at law, and enforceable against them by legal actions and personal pecuniary judgments. The matter of married women's contracts, and of their enforcement against the property rather than the persons of wives, is therefore left exclusively to courts of equity, and is governed by equitable doctrines. The jurisdiction of equity in the enforcement of married women's liabilities against their separate property has thus been enlarged, since it has been extended in these states to all the property which a wife may now hold by a legal title, and is not confined to such equitable estate as is held by trustees for her separate

(a) This section is cited in *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. 242, 32 L. ed. 396.

use.¹ In a very few states the legislation has removed the statutory separate estate of married women entirely out of the equitable jurisdiction, by conferring upon them the power of making contracts in relation to it, and by render-

¹These states may be divided into two groups, the legislation of each group following the same general type. By the first type the property of a married woman is declared to be her separate property, free from any interest or control of her husband, and not liable for his debts, but the statutes contain no provisions expressly authorizing her to make contracts. By the second type all the wife's property is likewise declared to be her own separate property, free from all claims of her husband; she furthermore possesses the sole power to manage it; may sell and convey it; and may make contracts in relation to it, but these contracts are not declared to be personally binding on her at law. Of course, equity is not concerned with these statutory differences in the extent of the wife's *legal* separate estate, and her legal powers over it. Equity is only interested in this legislation so far as the wife's contracts relating to her legal separate estate are enforced in equity, in the same manner as her contracts made upon the faith of her equitable separate estate. The states which have adopted the two foregoing types of legislation are as follows: *Alabama*:^b Code 1876, secs. 2705, 2707. *Arkansas*: Dig. 1874, p. 756, secs. 4193, 4194; Const. 1874, art. 9, sec. 7. *Connecticut*: Gen. Stats. (Rev. 1875), p. 186, secs. 1-4, 6. *Delaware*: Laws 1874, pp. 478, 479. *Florida*: McClellan's Dig. 1881, p. 754, secs. 1, 3, 4. *Georgia*: Code 1873, secs. 1754, 1756, 1772, 1773, 1783, 5136. *Illinois*: Hurd's Rev. Stats. 1880, p. 592, secs. 6, 7, 9. *Indiana*: 1 Gavin and Hord's Rev. Stats. 1870, p. 295, note 2, sec. 5; pp. 374-377; Acts of 1875, p. 178; Acts of 1879, p. 160; Acts of 1881, p. 528. *Kansas*: Dassel's Comp. Laws 1881, p. 539, c. 62, secs. 1, 2. *Kentucky*: Rev. Stats. 1873, p. 518, c. 52, art. 2, secs. 1, 5, 10. *Maine*: Rev. Stats. 1871, p. 491, c. 61, sec. 1. *Maryland*: Rev. Code 1873,

(b) *Alabama*: But by statute, Feb. 28, 1887, Code 1886, secs. 2341, 2351, all previous legislation on this subject was repealed. The distinction between "equitable" and "statutory" estates is abolished, and all separate property of married women is of the latter description, except such as is conveyed on an active trust for her benefit. The wife may contract with reference to her statutory estate only in writing, and with the assent of the husband expressed in writing; and may alienate the same or any interest therein only by the husband's joining in the alienation in the manner prescribed by law: *Rooney v. Michael*, 84 Ala.

585, 4 South. 421; *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 South. 578.

Arkansas: Dig. of Stats. 1884, secs. 4624, 4625; *Bundy v. Cocke*, 128 U. S. 185, 9 Sup. Ct. 242, 32 L. ed. 396.

Connecticut: Gen. Stats. 1888, secs. 2790-2794.

Georgia: Const. 1877, art. 3, sec. 11.

Illinois: Rev. Stats. 1889, c. 68, secs. 6, 7, 9.

Indiana: Rev. Stats. 1888, secs. 5115-5141.

Maryland: 1 Pub. Gen. Laws 1888, art. 45, sec. 1.

ing these contracts personally binding upon them at law, and enforceable against them personally by ordinary legal actions, pecuniary judgments, and executions.^{2c}

p. 481, sec. 19. *Massachusetts*: Gen. Stats. 1860, p. 537, secs. 1, 3, 5; Laws 1874, c. 184, sec. 1. *Michigan*: 2 Comp. Laws 1871, p. 1477, sec. 1. *Minnesota*: Stats. 1878, p. 769, secs. 1, 2. *Missouri*: 1 Rev. Stats. 1879, secs. 3284-3286, 3295, 3296. *Nebraska*: Brown's Comp. Stats. 1881, p. 343, c. 53, secs. 1, 2, 4. *New Hampshire*: Gen. Laws 1878, p. 434, secs. 1, 4, 12. *New Jersey*: Rev. 1877, p. 636, secs. 1-4; p. 638, sec. 6; p. 639, sec. 18; *Ibid.*, p. 637, sec. 5 (gives a married woman power to contract as a single woman, enforceable against her alone either at law or in equity, except that she cannot be an accommodation indorser, guarantor, or surety; on this section see *Hinkson v. Williams*, 41 N. J. L. 35; *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243). *North Carolina*: Battle's Rev. 1873, p. 592, sec. 29; Const., art. 10, sec. 6. *Ohio*: 1 Rev. Stats. 1880, pp. 806-809, secs. 3108, 3112. *Oregon*: Gen. Laws 1872, p. 663, secs. 4, 5; Const., art. 15, sec. 5. *Pennsylvania*: 2 Brightly's Purdon's Dig., p. 699, sec. 11. *Rhode Island*: Pub. Stats. 1882, p. 422, secs. 1-7. *Tennessee*: Stats. 1871, secs. 2486 a-2486 f. *Texas*: Rev. Stats. 1879, p. 411, secs. 2851, 2854; Const., art. 16, sec. 15. *Vermont*: Gen. Stats. 1862, p. 471, sec. 18. *West Virginia*: Kelly's Rev. Stats. 1879, p. 773, secs. 1-3; Const., art. 6, sec. 49. *Wisconsin*: 2 Rev. Stats. 1871, p. 1195, secs. 1-3.

² Equity cannot, of course, deal with cases arising under this legisla-

Massachusetts: Pub. Stats. 1882, c. 147, secs. 1-4, 10.

Michigan: Howell's Stats. 1882, sec. 6295.

Minnesota: Kelly's Stats. 1891, sec. 3865.

North Carolina: Code 1883, sec. 1837.

Ohio: Act repealed March 19, 1887. Rev. Stats. 1890, sec. 3112: "A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried." Sec. 3114: "A married person may take, hold, and dispose of property, real or personal, the same as if unmarried."

Oregon: 2 Hill's Laws 1887, secs. 2993, 2994.

Pennsylvania: Brightly's Purdon's Dig., ed. of 1883, tit. Marriage, sec. 13.

Tennessee: Code 1884, secs. 3346-3351.

Vermont: Rev. Laws 1880, sec. 2324.

Virginia: Code 1887, c. 103.

Wisconsin: 1 Sanborn and Berryman's Stats. 1889, secs. 2340-2342.

(c) The most important portions of the English Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), are as follows:

1. (1) A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were *feme sole*, without the intervention of any trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on

§ 1100. How the Separate Estate is Created — Trustees not Necessary.^a— Although the wife's separate estate is an equitable one, being, in conception of equity, a trust estate with the legal and the equitable titles separated, and although

tion.^d *California*: Civ. Code, secs. 158, 162, 171, 1556. *Colorado*: Gen. Laws 1877, p. 614, sec. 1; p. 615, secs. 1-3. *Dakota*: Rev. Code 1877, secs. 78, 79, 83. *Iowa*: Miller's Rev. Code 1880, secs. 2202, 2213. *Mississippi*: Rev. Code 1880, sec. 1167. *Nevada*: 1 Comp. Laws 1873, p. 56, sec. 1; p. 58, secs. 17, 19. *New Jersey*: Rev. 1877, p. 637, sec. 5. *New York*: Rev. Stats. 1875, Banks's ed., p. 159, art. 6. *South Carolina*: Rev. Stats. 1873, p. 482, secs. 1-3; Const., art. 14, sec. 8.

any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) & (4) as amended, 1893, [56 & 57 Vict. c. 63].

1. Every contract hereafter entered into by a married woman otherwise than as agent (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to. Provided nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which

at that time or thereafter she is restrained from anticipating.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act.

§ 13. Separate property liable for her ante-nuptial debts.

§ 19. The act does not interfere with restraint on anticipation in existing or future settlements.

It is held that this legislation does not apply to property of which she is merely a trustee: *In re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358; but it does apply to her interest as a mortgagee: *In re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647.

(d) *Colorado*: Mills's Stats. 1891, secs. 3007-3021.

Connecticut: See Laws 1877, c. 114; Gen. Stats. 1888, secs. 2796-2798.

Nevada: Gen. Stats. 1885, secs. 499, 515, 517.

New York: Rev. Stats., 8th ed., pp. 2600-2606.

Ohio: Rev. Stats. 1890, secs. 3112, 3114.

South Carolina: Rev. Stats. 1882, secs. 2035-2037.

(a) This section is cited in *Snodgrass v. Hyder*, 95 Tenn. 568, 32 S. W. 764.

in strict theory and in every regular and formal settlement the legal title should be conveyed to or held by express trustees, yet it is well settled, whatever doubts may have once existed,¹ that the interposition of actual trustees is unnecessary.^b If property is in any mode, by sufficient and apt words to express the intention, given directly to a wife, either before or after marriage, for her sole and separate use, without the intervention of trustees, equity will carry the intention into effect, will regard the property as her separate estate, and will protect it against the claims of her husband and of his creditors. Equity accomplishes this result, in the absence of express trustees, by declaring and holding the husband himself as a trustee, with respect to such property, for his wife.² The *rationale* of this rule is

¹ Some early cases had intimated that trustees were necessary: *Harvey v. Harvey*, 1 P. Wms. 125, per Lord Chancellor Cowper.

² This rule operates in the clearest manner when a husband conveys or agrees to convey property directly to his wife; such a conveyance or agreement could be made effective in no other manner, since it would be void at the common law.^c As illustrating the general rule given in the text, see *Newlands v. Paynter*, 4 Mylne & C. 408; *Gardner v. Gardner*, 1 Giff. 126; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 369, 375; *Bennet v. Davis*, 2 P. Wms. 316; *Slanning v. Style*, 3 P. Wms. 334, 337-339; *Lucas v. Lucas*, 1 Atk. 270; *Darley v. Darley*, 3 Atk. 399; *Lee v. Prieaux*, 3 Brown Ch. 381, 385; *Major v. Lansley*, 2 Russ. & M. 355; *Woodmeston v. Walker*, 2 Russ. & M. 197; *McMillan v. Peacock*, 57 Ala. 127; *Miller v. Voss*, 62 Ala. 122; *Pepper v. Lee*, 53 Ala. 33; *Crooks v. Crooks*, 34 Ohio St. 610; *Pribble v. Hall*, 13 Bush, 61; *Thomas v. Harkness*, 13 Bush, 23; *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908; *Payne v. Twyman*, 68 Mo. 339; *Loomis v. Brush*, 36 Mich. 40; *Holthaus v. Hornbostle*, 60 Mo. 439; *Davis v. Davis*, 43 Ind. 561; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158; *Barron v. Barron*, 24 Vt. 375; *Porter v. Bank of Rutland*, 19 Vt. 410; *Shirley v. Shirley*, 9 Paige, 363; *Bradish v. Gibbs*, 3 Johns. Ch. 523, 540; *Firemen's Ins. Co. v. Bay*, 4 Barb. 407; *Blanchard v. Blood*, 2 Barb. 352; *Varner's Appeal*, 80 Pa. St. 140; *Vance v. Nogle*, 70 Pa. St. 176, 179; *Shonk v. Brown*, 61 Pa. St. 320; *Jamison v. Brady*, 6 Serg. & R. 466; 9 Am. Dec. 460; *McKennan v. Phillips*, 6 Whart. 571; 37 Am. Dec. 438; *Trenton Bank Co. v. Woodruff*, 2 N. J. Eq. 117; *Steel v. Steel*, 1 Ired. Eq. 452; *Ellis v. Woods*, 9 Rich. Eq. 19; *Boykin v. Ciples*, 2 Hill Eq. 200; 29 Am. Dec. 67; *Whitten v. Jenkins*, 34 Ga. 297; *Fears v. Brooks*, 12 Ga. 195; *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101; *Long's Adm'r v. White's Adm'rs*, 5 J. J. Marsh. 226; *Freeman*

(b) This portion of the text is quoted in *Miller v. Miller's Adm'r*, 92 Va. 510, 23 S. E. 891.

(c) See *Smith v. Seiberling*, 35 Fed. 677.

very clear. By the equitable conception, in order to the existence of a trust, there must be a separation of the legal and equitable titles. Although property is given directly to a married woman in such a way that she would hold the perfect legal title if she were single, still, by the operation of common-law doctrines, the husband, by virtue of the marriage, becomes himself vested with the legal estate in such property, either absolutely or for his life. Equity does not abrogate this common-law doctrine, nor deny the legal title acquired by the husband; on the contrary, it admits *his legal title*, but declares that he shall hold it as a trustee for his wife,—impresses a trust upon it in her favor. In this manner equity effects a separation of the titles, although there are no words expressly creating a trust, or expressly vesting the legal title in a trustee.

§ 1101. *The Same. By What Modes and Instruments.*—The wife's separate estate may include any species of property, and may be created by any of the following modes or instruments: 1. By a written antenuptial agreement with her intended husband, or marriage settlement, which may embrace her own property, or that of her intended husband, or that of third persons, and may covenant to bring in after-acquired property of either herself or her husband. 2. By a post-nuptial agreement with her husband, under certain circumstances.^a 3. By gifts from her husband

v. Freeman, 9 Mo. 772.^d The husband is thus bound if the property has been settled or given to the wife's separate use before marriage, unless such gift to her separate use has been destroyed by a marriage settlement: *Ibid.*; **Tullett v. Armstrong**, 4 Mylne & C. 377; *In re Gaffee*, 1 Macn. & G. 541; and interference by him, or persons claiming under or through him, may be restrained by injunction: **Newlands v. Paynter**, 4 Mylne & C. 408; **Green v. Green**, 5 Hare, 400, note; **Allen v. Walker**, L. R. 5 Ex. 187.

(^d) See, also, **Templeton v. Brown**, 86 Tenn. 50, 5 S. W. 441 (gift of notes by husband to wife); **Richardson v. De Giverville**, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; **Snodgrass v. Hyder**, 95 Tenn. 568, 32 S. W. 764 (gift to wife of her earnings); **Barnum v. Le Master**, 110 Tenn. 638, 75

S. W. 1045 (conveyance from husband to wife); **Carroll v. Lee**, 3 Gill & J. 504, 22 Am. Dec. 350; **Wassell v. Leggatt**, [1896] 1 Ch. 554, affirming the rule of the text.

(^a) The text is cited to this point in **Moore v. Page**, 111 U. S. 117, 4 Sup. Ct. 388, 28 L. ed. 373.

during coverture, if made absolutely, and not intended as mere paraphernalia, or to be used merely as ornaments.^b The two latter modes are, however, so far subject to the rights of the husband's creditors, that if made with intent to hinder, delay, or defraud such creditors, they would be void. 4. By gifts from strangers made directly to the wife during coverture. 5. By conveyance, devise, or bequest of property expressly limited to her separate use, made to her directly, either before or during coverture.¹

¹ *Antenuptial agreements and marriage settlements.*—A mere verbal antenuptial agreement is not binding, and a settlement made after marriage in conformity with it would be voluntary, and liable to be impeached by the husband's creditors: *Warden v. Jones*, 2 De Gex & J. 76, 84; *Spurgeon v. Collier*, 1 Eden, 55, 61; ^c still, if such agreement is acted upon by the property being voluntarily placed under the dominion of trustees, and treated as separate property, it may be effectual, at least as against the husband: See *Simmons v. Simmons*, 6 Hare, 352, 359. As to the effect of a covenant to bring in and settle after-acquired property, see *Smith v. Lucas*, L. R. 18 Ch. Div. 531; *Dawes v. Tredwell*, L. R. 18 Ch. Div. 354; *Kane v. Kane*, L. R. 16 Ch. Div. 207; *Ex parte Bolland*, L. R. 17 Eq. 115; *Campbell v. Bainbridge*, L. R. 6 Eq. 269; *In re Edwards*, L. R. 9 Ch. 97; *In re Jones's Will*, L. R. 2 Ch. Div. 362; *In re Campbell's Policies*, L. R. 6 Ch. Div. 686.^d The following cases illustrate the text: *Tullett v. Armstrong*, 1 Beav. 1, 21; 4 Mylne & C. 377; *In re Gaffee*, 1 Macn. & G. 541; *Hastie v. Hastie*, L. R. 2 Ch. Div. 304 (agreement to settle); *Viret v. Viret*, L. R. 17 Ch. Div. 365, note (the same); *Coatney v. Hopkins*, 14 W. Va. 338; *Radford v. Carwile*, 13 W. Va. 572; *Bank of Greensboro' v. Chambers*, 30 Gratt. 202; 32 Am. Rep. 661; *Herring v. Wickham*, 29 Gratt. 628; 26 Am. Rep. 405; *Brown v. Foote*, 2 Tenn. Ch. 255; *Reynolds v. Brandon*, 3 Heisk. 593; *Head v. Temple*, 4 Heisk. 34; *Wallace v. Wallace*, 82 Ill. 530; *Tucker's Appeal*, 75 Pa. St. 354; *Hardy v. Holly*, 84 N. C. 661; *Caulk v. Fox*, 13 Fla. 148.^e

Post-nuptial agreements and settlements.—The question in most cases is, whether they are valid as against creditors of the husband:^f *Warden v. Jones*,

(b) The text is cited to this point in *Templeton v. Brown*, 86 Tenn. 50, 5 S. W. 441.

(c) *Flory v. Houck*, 186 Pa. St. 263, 40 Atl. 482; *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520. See, however, *In re Holland*, [1902] 2 Ch. 360.

(d) See, also, *In re Coghlan*, [1894] 3 Ch. 76; *In re Haden*, [1898] 2 Ch. 220; *Butcher v. Butcher*, 14 Beav. 222; *Lee v. Lee*, 4 Ch. Div. 175, 179;

In re De Ros's Trust, 31 Ch. Div. 81, 88; *In re Dowding's Settlements Trusts*, [1904] 1 Ch. 441; *In re Simpson*, [1904] 1 Ch. 1.

(e) See *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184; *Clay v. Walter*, 79 Va. 92 (valid, unless intended wife knows of guilty purpose and participates in fraudulent intent).

(f) See § 973. Also, *Moore v. Page*, 111 U. S. 117, 4 Sup. Ct. 388, 28 L. ed.

§ 1102. **The Same: What Words are Sufficient.**—No particular form of words is necessary in order to vest property in a married woman for her separate use, and to thus create a separate estate. The intention to do so, although not expressed in terms, may be inferred from the nature

2 De Gex & J. 76, 84; *Pride v. Bubbs*, L. R. 7 Ch. 64; *Payne v. Hutcheson*, 32 Gratt. 812; *Dukes v. Spangler*, 35 Ohio St. 119; *Sproul v. Atchison Nat. Bank*, 22 Kan. 336 (a verbal post-nuptial agreement executed by a conveyance); *Majors v. Everton*, 89 Ill. 56, 31 Am. Rep. 65; *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908; *Blakeslee v. Mobile Life Ins. Co.*, 57 Ala. 205; *Kilby v. Godwin*, 2 Del. Ch. 61; *Perkins v. Perkins*, 1 Tenn. Ch. 537.

Absolute gifts from the husband.—These may be conveyances of land from the husband directly to the wife, which would be nullities by the common law, or gifts of personalty; or they may be in the form of declarations of trust by the husband, or his assent that the earnings or other property of the wife shall be regarded as her separate estate, which assent would be equivalent to a declaration of trust. The evidence of such assent or declaration must be clear, unequivocal, and convincing: *Graham v. Londonderry*, 3 Atk. 393; *Mews v. Mews*, 15 Beav. 529; *Grant v. Grant*, 34 Beav. 623; *Byam v. Byam*, 19 Beav. 58; *Rycroft v. Christy*, 3 Beav. 238; *McLean v. Longlands*, 5 Ves. 71; *Rich v. Cockell*, 9 Ves. 369; *Hoyes v. Kindersley*, 2 Smale & G. 195, 197; *Lloyd v. Pughe*, L. R. 14 Eq. 241; L. R. 8 Ch. 88; *Marshal v. Crutwell*, L. R. 20 Eq. 328; *Ashworth v. Outram*, L. R. 5 Ch. Div. 923; *In re Eykyn's Trusts*, L. R. 6 Ch. Div. 115; *Parker v. Lechmere*, L. R. 12 Ch. Div. 256; *Linker v. Linker*, 32 N. J. Eq. 174; *McMillan v. Peacock*, 57 Ala. 127; *Helmetag v. Frank*, 61 Ala. 67; *Crooks v. Crooks*, 34 Ohio St. 610; *Loomis v. Brush*, 36 Mich. 40; *Majors v. Everton*, 89 Ill. 56; 31 Am. Rep. 65; *Thomas v. Harkness*, 13 Bush, 23; *Irvine v. Greever*, 32 Gratt. 411. Assent to use of

373 (valid when no fraud); *Sanford v. Finkle*, 112 Ill. 146; *Smith v. Bradford*, 76 Va. 758 (settlement of uncollected share of estate of which husband was distributee).

(*g*) *Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151 (husband becomes trustee); *Marshall v. Jaquith*, 134 Mass. 138 (gift of personalty—"there should be clear, satisfactory and incontrovertible evidence, not only of the gift and delivery of the property, but of the separate custody of it by the wife"); *Botts v. Gooch*, 97 Mo. 88, 11 S. W. 42, 10 Am. St. Rep. 286 (husband's consent that personal property given

by wife's father should be separate property); *Chadbourne v. Gilman*, 64 N. H. 353, 10 Atl. 701 (mortgage of land by husband to wife); *Miller v. Miller*, 17 Oreg. 423, 21 Pac. 938 (conveyance of land); *Thompson v. Allen*, 103 Pa. St. 44, 49 Am. Rep. 116 (conveyance of real estate valid when no fraud); *Templeton v. Brown*, 86 Tenn. 50, 5 S. W. 441 (gift of notes); *Richardson v. Hutchins*, 68 Tex. 81, 3 S. W. 276; *Dugger's Children v. Dugger*, 84 Va. 130, 144, 4 S. E. 171 (gift of personalty); *Cummings v. Friedman*, 65 Wis. 183, 26 N. W. 575, 56 Am. Rep. 628 (gift of money).

of the provisos annexed to the gift. The intention, however, must be clear and unequivocal, not merely to confer the use upon the wife for her benefit, *but also to exclude the husband*. The doctrine was very concisely and accurately stated by Vice-Chancellor Malins in a recent case: "There must be, in a will, or in any other instrument, an intention shown *that the wife shall take and that the husband shall not*."^{1a} The decisions upon particular expres-

earnings, etc.: ^(h) *McCampbell v. McCampbell*, 2 Lea, 661; 31 Am. Rep. 623; *Pribble v. Hall*, 13 Bush, 61; *Jones v. Reid*, 12 W. Va. 350; 29 Am. Rep. 455; *Haden v. Ivey*, 51 Ala. 381; *Mounger v. Duke*, 53 Ga. 277; *Woodford v. Stephens*, 51 Mo. 443; *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *Syracuse etc. Co. v. Wing*, 85 N. Y. 421; *Campbell v. Bowles's Adm'r*, 30 Gratt. 652 (no assent); *Kidwell v. Kirkpatrick*, 70 Mo. 214 (ditto).

Gifts from third persons: *Graham v. Londonderry*, 3 Atk. 393; *Steedman v. Poole*, 6 Hare, 193; *Haden v. Ivey*, 51 Ala. 381; *Holthaus v. Hornbostle*, 60 Mo. 439.

Limitations to her separate use.—These may be by conveyance or by will, — devises or legacies,—made directly to her, or to trustees for her, while she is single or during the coverture: *Goulder v. Camm*, 1 De Gex, F. & J. 146; *In re Benton*, L. R. 19 Ch. Div. 277; *Bland v. Dawes*, L. R. 17 Ch. Div. 794; *Humphrey v. Humphrey*, 1 Sim., N. S., 536 (gift of income); *Gurney v. Goggs*, 25 Beav. 334 (ditto); *Troutbeck v. Boughy*, L. R. 2 Eq. 534 (ditto); *Radford v. Willis*, L. R. 7 Ch. 7; *Austin v. Austin*, L. R. 4 Ch. Div. 233; *Miller v. Voss*, 62 Ala. 122; *Robinson v. O'Neal*, 56 Ala. 541; *Sprague v. Shields*, 61 Ala. 428; *Pepper v. Lee*, 53 Ala. 33; *Short v. Battle*, 52 Ala. 456; *Grain v. Shipman*, 45 Conn. 572; *Gray v. Robb*, 4 Heisk. 74; *Buckalew v. Blanton*, 7 Cold. 214; *Robertson v. Wilburn*, 1 Lea, 633; *Morrison v. Thistle*, 67 Mo. 596; *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Musson v. Trigg*, 51 Miss. 172; *Prout v. Roby*, 15 Wall. 471, 21 L. ed. 58. As to effect of desertion by the husband, independently of statute, see *Cecil v. Juxon*, 1 Atk. 278.

¹ *In re Peacock's Trusts*, L. R. 10 Ch. Div. 490, 495, 496; *Bland v. Dawes*, L. R. 17 Ch. Div. 794, 797; to the same effect, see *Stanton v. Hall*, 2 Russ. & M. 175, 180; *Darley v. Darley*, 3 Atk. 399; *Moore v. Morris*, 4 Drew. 33, 37; *Massy*

(^(h)) *Roberts v. Walker*, 101 Mo. 597, 14 S. W. 631; *Bailey v. Gardner*, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847 (land purchased with her earnings subjected to payment of husband's debts). As to ownership of husband's earnings handed by him from week to week to his wife, see valuable discussion in the very re-

cent case of *Fretz v. Roth*, (N. J. Eq.) 59 Atl. 676.

(a) This section is cited in *Miller v. Miller's Adm'r*, 92 Va. 510, 23 S. E. 891; *Laufer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549; *Stiles v. Japhet*, 84 Tex. 91, 19 S. W. 450; *Roberts v. Stevens*, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266.

sions are very numerous, and somewhat conflicting. From a comparison of the cases it would seem that the American courts have been more liberal than the English in giving effect to language. I have placed in the foot-note some examples of words held to be sufficient, and of those held to be insufficient.²

v. Rowen, L. R. 4 H. L. 288, 301; Tyler v. Lake, 2 Russ. & M. 183, 188; Massey v. Parker, 2 Mylne & K. 174, 181; Prout v. Roby, 15 Wall. 471; Wood v. Polk, 12 Heisk. 220; Buck v. Wroten, 24 Gratt. 250; Woodford v. Stephens, 51 Mo. 443; Charles v. Coker, 2 S. C. 122. The place of the words is immaterial; they need not be in the granting clause nor in the *habendum*; the intent governs: Morrison v. Thistle, 67 Mo. 596; compare Lippincott v. Mitchell, 94 U. S. 767, 24 L. ed. 315. In Nix v. Bradley, 6 Rich. Eq. 43, 48, the cases in which a separate estate has been created were classified as follows: 1. Where the technical words "sole and separate use," or equivalent words, are used; 2. Where the husband's rights are expressly excluded; 3. Where the wife is empowered to do acts concerning the estate, inconsistent with the disabilities of coverture. See also Bullock v. Menzies, 4 Ves. 798; Barrow v. Barrow, 18 Beav. 529; Blacklow v. Laws, 2 Hare, 40, 49; Radford v. Willis, L. R. 7 Ch. 7; Austin v. Austin, L. R. 4 Ch. Div. 233; Nightingale v. Hidden, 7 R. I. 115; Jarvis v. Prentice, 19 Conn. 272; Stuart v. Kissam, 2 Barb. 493; Snyder v. Snyder, 10 Pa. St. 423; Tritt's Adm'r v. Colwell's Adm'r, 31 Pa. St. 228; Clevenstine's Appeal, 15 Pa. St. 495, 499; Craig v. Watt, 8 Watts, 498; Evans v. Knorr, 4 Rawle, 66; Turton v. Turton, 6 Md. 375; Brandt v. Mickle, 28 Md. 436; Carroll v. Lee, 3 Gill & J. 504; 22 Am. Dec. 350; Nixon v. Rose, 12 Gratt. 425; Lewis v. Adams, 6 Leigh, 320; West v. West's Ex'rs, 3 Rand. 373, 378; Goodrum v. Goodrum, 8 Ired. Eq. 313; Heathman v. Hall, 3 Ired. Eq. 414; Davis v. Cain's Ex'r, 1 Ired. Eq. 304; Rudisell v. Watson, 2 Dev. Eq. 430; Ellis v. Woods, 9 Rich. Eq. 19; Martin v. Bell, 9 Rich. Eq. 42; 70 Am. Dec. 200; Tennant v. Ex'r of Stoney, 1 Rich. Eq. 222; 44 Am. Dec. 213; Ballard v. Taylor, 4 Desaus. Eq. 550; Williams v. Avery, 38 Ala. 115; Ozley v. Ikelheimer, 26 Ala. 332; Cuthbert v. Wolfe, 19 Ala. 373; Brown v. Johnson, 17 Ala. 232; Hale v. Stone, 14 Ala. 803; Cook v. Kennerly, 12 Ala. 42; Newman v. James, 12 Ala. 29; Williams v. Claiborne, 7 Smedes & M. 488; Warren v. Haley, 1 Smedes & M. Ch. 647; Coatney v. Hopkins, 14 W. Va. 338; Griffith's Adm'r v. Griffith, 5 B. Mon. 113; Bridges v. Wood, 4 Dana, 610; Hamilton v. Bishop, 8 Yerg. 33; 29 Am. Dec. 101; Somers v. Craig, 9 Humph. 467; Beaufort v. Collier, 6 Humph. 487; 44 Am. Dec. 321; Woodrum v. Kirkpatrick, 2 Swan, 218; Eaves v. Gillespie, 1 Swan, 128; Houston v. Embry, 1 Sneed, 480; Gardenhire v. Hinds, 1 Head, 402; Burnley v. Thomas, 63 Mo. 390, 392; Boal v. Morgner, 46 Mo. 48; Clark v. Maguire, 16 Mo. 302; Roane v. Rives, 15 Ark. 328, 330; Hulme v. Tenant, 1 Brown Ch. 16; 1 Lead. Cas. Eq., 4th Am. ed., 679, 709-713, 732-734.^b

² *Expressions held sufficient to create a separate estate.*—It will be seen that

<p>(b) Vail v. Vail, 49 Conn. 52; Duke v. Duke, 81 Ky. 308; Noland v. Chambers, 84 Ky. 516, 2 S. W. 121; Turner</p>	<p>v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319.</p>
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§ 1103. What Property is Included.—Property of any kind, real or personal, and any interest therein, may be conveyed, settled, or held to the wife's separate use. Her equitable separate estate may therefore include estates in

some of the earlier English decisions upon the words "sole use" have been overruled. For her "sole use and disposal": *Bland v. Dawes*, L. R. 17 Ch. Div. 794; "sole benefit": *Green v. Britten*, 1 De Gex, J. & S. 649; "for her own sole use and benefit absolutely": *In re Tarsey's Trust*, L. R. 1 Eq. 561; "sole use": *Adamson v. Armitage*, 19 Ves. 416 (overruled: See *Massy v. Rowen*, *infra*); "for her own use, independent of her husband": *Wagstaffe v. Smith*, 9 Ves. 520; "for her own use and benefit, independent of any other person": *Margetts v. Barringer*, 7 Sim. 482; see *Glover v. Hall*, 16 Sim. 568; "for her own use and at her own disposal": *Pritchard v. Ames*, Turn. & R. 222; "for her own sole use, benefit, and disposition": *Ex parte Ray*, 1 Madd. 199; *Lindsell v. Thacker*, 12 Sim. 178; *Hobson v. Ferraby*, 2 Coll. C. C. 412; "her receipt to be a sufficient discharge to the executors": *Lee v. Prieaux*, 3 Brown Ch. 381; *Cooper v. Wells*, 11 Jur., N. S., 923; "to enjoy the profits": *Tyrrell v. Hope*, 2 Atk. 558, 561; "to be at her disposal, to do therewith as she should think fit": *Kirk v. Paulin*, 7 Vin. Abr. 95, pl. 43; "according to her appointment, whether covert or sole": *Lumb v. Milnes*, 5 Ves. 517; "solely and entirely for her own use and benefit during her life": *Inglefield v. Coghlan*, 2 Coll. C. C. 247; "to be delivered to her when she should demand it": *Dixon v. Olmius*, 2 Cox, 414; "to her absolutely, if living apart from her husband": *Shewell v. Dwarris*, Johns. 172; for her "sole and separate use": *Parker v. Brooke*, 9 Ves. 583; for her "sole and proper use, benefit, and behoof": *Miller v. Voss*, 62 Ala. 122; "sole and separate use": *Robinson v. O'Neal*, 56 Ala. 541; to a trustee "for her use and behoof": *Sprague v. Shields*, 61 Ala. 428; to a trustee "for the sole use and benefit of my wife during her natural life": *Blakeslee v. Mobile Life Ins. Co.*, 57 Ala. 205; "to her own separate use, benefit, and behoof": *Pepper v. Lee*, 53 Ala. 33; to her "absolutely, and in her own right," to have and to hold, etc., "for her own, separate, and absolute use and behoof forever": *Short v. Battle*, 52 Ala. 456; "for the sole, separate, and exclusive use, benefit, and behoof": *Metropolitan Bank v. Taylor*, 53 Mo. 444; to her "sole aid and behoof": *Gray v. Robb*, 4 Heisk. 74; conveyance to a trustee, on trust, to pay the income to a wife "for and during the joint lives of her and her husband, taking her receipt therefor": *Charles v. Coker*, 2 S. C. 122; bequest to a daughter, "and to no other person," and providing that "her receipt for the same shall be conclusive evidence of its payment": *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; conveyance, in trust, "for use of his wife as if she never had been married": *Garland v. Pamplin*, 32 Gratt. 305; "solely for her own use": *Jamison v. Brady*, 6 Serg. & R. 466; 9 Am. Dec. 460; "for the use, maintenance, and support of": *Good v. Harris*, 2 Ired. Eq. 630; "to be paid to her when she is divorced from her husband or voluntarily withdraws from him": *Perry v. Boileau*, 10 Serg. & R. 208; "for her sole use, benefit, and behoof": *Williman v. Holmes*, 4 Rich. Eq. 475, 479.

Expressions held insufficient to create a separate estate.—"Into their own proper and respective hands, to and for their own use and benefit": *Tyler v.*

fee in land, in possession or reversion, life estates, estates for years, things in action, securities, specific chattels, or money.¹ Where a wife has a separate estate, the rents, income, and profits thereof are, of course, her separate property; and if the savings of such income are invested by her, the investment so made will also be her separate property.² In general, when land or other property is purchased by or on behalf of the wife with proceeds of her separate estate it becomes impressed with the same char-

Lake, 2 Russ. & M. 183; "for and under their sole control": Massey v. Parker, 2 Mylne & K. 174; "to pay to a married woman and her assigns": Lumb v. Milnes, 5 Ves. 517; to trustees, in trust, to pay income to a wife "to be applied by her to and for the maintenance of herself and children": Wardle v. Claxton, 9 Sim. 524; "to her use": Jacobs v. Amyatt, 1 Madd. 376, note; "for her own use": Wills v. Sayers, 4 Madd. 409; "for her own use and benefit": Roberts v. Spicer, 5 Madd. 491; "to her own use and benefit": Kensington v. Dollond, 2 Mylne & K. 184; "to her own use": Johnes v. Lockhart, 3 Brown Ch. 383, note; "only for her": Spirett v. Willows, 11 Jur., N. S., 70; "for her and their own sole and absolute use and benefit": Lewis v. Mathews, L. R. 2 Eq. 177; a devise, *without trustees*, to a woman, "for her sole use and benefit": Gilbert v. Lewis, 1 De Gex, J. & S. 38; the precise meaning of "sole" was determined by the house of lords in Massy v. Rowen, L. R. 4 H. L. 288, in which it was held (approving of Lord Westbury's decision in Gilbert v. Lewis) that the words, *per se*, have no fixed, technical meaning, like the word "*separate*," though from the context it might be so construed; words vesting the fee in the wife, but containing no provision excluding the husband: Paul v. Leavitt, 53 Mo. 595; "for her use and benefit": Fears v. Brooks, 12 Ga. 195, 198; "but the said gift to extend to no other person": Ashcraft v. Little, 4 Ired. Eq. 236; as to the effect of a clause that the property "is not to be liable for her husband's debts," *quære*, see Lewis v. Elrod, 38 Ala. 17; Gillespie's Adm'r v. Burleson, 28 Ala. 551; Young v. Young, 3 Jones Eq. 216; Martin v. Bell, 9 Rich. Eq. 42; 70 Am. Dec. 200. For further illustrations of the effect of particular expressions, see the cases cited in the last preceding note.

¹ As to property to be acquired in future embraced in the covenants of a settlement, see Forster v. Davies, 4 De Gex, F. & J. 133; Smith v. Lucas, L. R. 18 Ch. Div. 531; Dawes v. Tredwell, L. R. 18 Ch. Div. 354; Kane v. Kane, L. R. 16 Ch. Div. 207.^a

² Gore v. Knight, 2 Vern. 535; Gage v. Lister, 2 Brown Parl. C. 4; Newlands v. Paynter, 4 Mylne & C. 408; Humphery v. Richards, 2 Jur., N. S., 432; Barrack v. McCulloch, 3 Kay & J. 110; Brooke v. Brooke, 25 Beav. 342; Muggeridge v. Stanton, 1 De Gex, F. & J. 107; Askew v. Rooth, L. R. 17 Eq. 426; but see Ordway v. Bright, 7 Heisk. 681.

(a) See, also, cases cited *ante*, § 1101, note 1, first part.

acter.³ The wife's earnings may also, by the assent of her husband, be her separate property.⁴ While equity thus provides a separate property for a wife free from the control of her husband, still, she may so deal with it that it will lose that character. If the wife, acting without any undue influence, expressly authorize or tacitly permit her husband to receive the income of her separate property and apply it to his own uses and purposes, or to receive it and apply it for the benefit of the family, it will thereby cease to be her separate property and become his; she can never recall it, nor claim any reimbursement.^{5 a}

³ *Justis v. English*, 30 Gratt. 565; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158; *Beals's Ex'r v. Storm*, 26 N. J. Eq. 372 (proceeds of a sale of her contingent dower); but it must clearly appear that the purchase was actually made with the proceeds of her separate estate: *Joyce v. Haines*, 33 N. J. Eq. 99; and where the husband was permitted to receive the income or proceeds of his wife's separate property, and he purchased land therewith in his own name, without any agreement or understanding with her that the purchase was to be for her benefit, the land so purchased did not become her separate property: *Kidwell v. Kirkpatrick*, 70 Mo. 214.

⁴ *Jones v. Reid*, 12 W. Va. 350; 29 Am. Rep. 455; *Pribble v. Hall*, 13 Bush, 61; *Haden v. Ivey*, 51 Ala. 381; *Kidwell v. Kirkpatrick*, 70 Mo. 214; and see cases cited under the last preceding paragraph.^c

⁵ *Powell v. Hankey*, 2 P. Wms. 82; *Milnes v. Busk*, 2 Ves. 488; *Caton v. Rideout*, 1 Macn. & G. 599, 601, 603; *Rowley v. Unwin*, 2 Kay & J. 138, 142; *Gardner v. Gardner*, 1 Giff. 126; *Payne v. Little*, 26 Beav. 1; *Squire v. Dean*, 4 Brown Ch. 326; *Parkes v. White*, 11 Ves. 209, 225; *Dalbiac v. Dalbiac*, 16 Ves. 116, 126; *Beresford v. Archbishop of Armagh*, 13 Sim. 643; *Howard v. Digby*, 8 Bligh, N. S., 224; 2 Clark & F. 634; *Green v. Carlill*, L. R. 4 Ch. Div. 882 (separate property not given up); *Coleman v. Semmes*, 56 Miss. 321; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Dunn v. Sargent*, 101 Mass. 336; *Meth.*

(b) See, also, *Bristor v. Bristor*, 101 Ind. 47.

(c) See, also, cases cited under § 1101.

(d) *Bristor v. Bristor*, 101 Ind. 47; *Tyson v. Tyson*, 54 Md. 35 (conversion of entire amount of legacy by husband, with wife's consent); *Grover, etc., Sewing Machine Co. v. Radcliff*, 63 Md. 496 (where husband receives money with wife's consent, no promise to repay will be implied); *Hauer's Estate*, 140 Pa. St. 420, 21 Atl. 445,

23 Am. St. Rep. 245 (rents). And see *McLure v. Lancaster*, 24 S. C. 273, 58 Am. Rep. 259, where the court held that such circumstances are to be considered as evidence as to whether there has been a gift. That the husband's receipt and use of the principal of the wife's separate estate presumptively raises a trust in her behalf, is held in *Heymond v. Bledsoe*, 11 Ind. App. 202, 38 N. E. 530, 54 Am. St. Rep. 502.

§ 1104. Her Power of Disposition.^a—The general doctrine long settled by the English court of chancery is, that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*.¹ Among these incidents of substantial ownership is the *jus disponendi*, which is possessed and may be exercised by the married woman without her husband's assent, unless the instrument creating the separate estate contains restrictions upon the power. It is therefore well settled, that so far as the separate estate embraces personal property, money, chattels, things in action, chattels real, rents and profits of land, although no power of disposition is given to her in express terms, she may dispose of it as though she were unmarried, by acts *inter vivos* or by will.²

Epis. Ch. v. Jaques, 3 Johns. Ch. 77, 90-92. In *Caton v. Rideout*, *supra*, Lord Cottenham thus stated the doctrine: "A wife, having property settled for her separate use, is entitled to deal with the money as she pleases. If she directly authorizes the money to be paid to her husband, he is entitled to receive it, and she can never recall it. If the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she would otherwise be entitled to, should be received by him. . . . Separate money of the wife paid to the husband, with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled." The court must be satisfied that the husband has not unduly influenced the action of his wife: See *Hughes v. Wells*, 9 Hare, 749, 773; and see cases cited in note 5, under § 963. If the husband, without the wife's consent, or in fraud of her rights, purchases land or other property, and pays for the same with her separate estate and takes the title in his own name, a resulting, or perhaps a constructive, trust will arise in her favor, so that she can follow the property: See *Darkin v. Darkin*, 17 Beav. 578; *Scales v. Baker*, 28 Beav. 91, and cases cited in note 2, under § 1037.

¹ *Peacock v. Monk*, 2 Ves. Sr. 190; *Hulme v. Tenant*, 1 Brown Ch. 16, per Lord Thurlow.

² *Fettiplace v. Gorges*, 1 Ves. 46; 3 Brown Ch. 8; *Rich v. Cockell*, 9 Ves. 369; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp*, 13 Ves. 190; *Lady Arundell v. Phipps*, 10 Ves. 139; *Anderson v. Anderson*, 2 Mylne & K. 427; *Calvert v. Johnston*, 3 Kay & J. 556; *Thackwell v. Gardiner*, 5 De Gex & S. 58; *Hodg-*

(a) This section is cited in *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898.

Where the separate estate embraces land, the wife's power of disposition over her life estates therein has never been doubted, and her contracts to sell or to mortgage such life estates have always been specifically enforced against her.³ With respect to estates in fee settled or held to her separate use, there had formerly been some doubt arising from conflicting authorities. The general rule is now established, however, that the wife's power of disposition as a *feme sole* extends to estates in fee in lands as fully as to life estates or to personal property.⁴ It seems to have been formerly supposed that a difference existed, in the wife's power of alienation or disposition, between the case where the property is actually held by trustees to her separate use and the case where the property is conveyed directly to herself for her sole and separate use. All notion of any such difference has been abrogated; the same power of disposition belongs equally to both these conditions or forms of the separate estate.⁵ As an incident of her general power of disposition, unless she is expressly restrained

son v. Hodgson, 2 Keen, 704; *Humphery v. Richards*, 2 Jur., N. S., 432; *Lechmere v. Brotheridge*, 32 Beav. 353; *Winter v. Easum*, 2 De Gex, J. & S. 272; *Farington v. Parker*, L. R. 4 Eq. 116.

³ *Stead v. Nelson*, 2 Beav. 245; *Wainwright v. Hardisty*, 2 Beav. 363; *Major v. Lansley*, 2 Russ. & M. 355, 357; *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268, 274; *Wilcocks v. Hannington*, 5 Ir. Ch. Rep. 38; *Blatchford v. Woolley*, 2 Drew. & S. 204.

⁴ The doubt was, whether the wife could dispose of the *corpus* of the land held in fee by her will, without an express power of appointment, or by any act *inter vivos* other than a fine or recovery, or the acknowledged deed substituted by statute in the place of a fine or recovery. The recent decisions hold that she may thus dispose without any express power of appointment, and without her husband's concurrence or consent, either by a will or by an instrument not acknowledged under the statute: *Taylor v. Meads*, 4 De Gex, J. & S. 597, 604-607, per Lord Westbury; *Hall v. Waterhouse*, 5 Giff. 64; 11 Jur., N. S., 361; *Adams v. Gamble*, 12 Ir. Ch. Rep. 102; *Pride v. Bubbs*, L. R. 7 Ch. 64; and see *Cooper v. Macdonald*, L. R. 7 Ch. Div. 288. Where the gift to the wife's separate use extends merely to her life interest, she has no power to dispose of the entire *corpus* of the estate, and an attempted disposition of the whole fee would be invalid: *Troutbeck v. Boughey*, L. R. 2 Eq. 534.

⁵ Where the property is actually held by trustees, she can bind or dispose of her equitable interest without their consent, unless the instrument of trust makes that consent necessary: *Essex v. Atkins*, 14 Ves. 542; *Hodgson v.*

from anticipation, a married woman renders her separate property liable for a breach of trust by her trustees in which she has concurred, and for a breach of trust which she herself commits.⁶

§ 1105. *Her Power in This Country.*—Such being the rules concerning the wife's *jus disponendi* as now settled in England, I shall next inquire how far these or other rules have been adopted by the courts of the various American states. One or two preliminary observations are very important in determining the present condition of the law upon this subject in our own country. In the first place, in very many of the states, under modern statutes, where property is conveyed or given to the wife directly, she now takes a full separate *legal* estate therein, wholly free from the interests and claims of the husband, and has over it the power of disposition given by the statute.¹ In the second place, in New York and the other states which have adopted the same type of legislation, where lands are given to trustees upon an express trust for the benefit of a married woman, the *cestui que trust* acquires no *estate* in the trust property, and she is prohibited from aliening, charging, or binding her own interest.² With regard to the main question concerning the wife's power of disposition, there is such a divergence of opinion among the American decisions that

Hodgson, 2 Keen, 704. Where the property has been conveyed directly to her, if her will or transfer *inter vivos* did not convey the *legal* estate, it would certainly convey her *equitable* estate, and either her husband, or after her death her heir, would be a trustee holding the legal estate for the person beneficially entitled: Hall v. Waterhouse, 5 Giff. 64; 11 Jur., N. S., 361.

⁶ Davies v. Hodgson, 25 Beav. 177, 186; Crosby v. Church, 3 Beav. 485; Mant v. Leith, 15 Beav. 524; Hanchett v. Briscoe, 22 Beav. 496; Brewer v. Swirles, 2 Smale & G. 219; Jones v. Higgins, L. R. 2 Eq. 538; Clive v. Carew, 1 Johns. & H. 199; Pemberton v. McGill, 1 Drew. & S. 266; but the *future income* of such property is not so liable: Clive v. Carew; Pemberton v. McGill; Jackson v. Hobhouse, 2 Mer. 483, 488; it may also be liable for her actual fraud: See Sharpe v. Foy, L. R. 4 Ch. 35.

¹ See *ante*, § 1099, note 2. In many states this statutory power is absolute, as though she were unmarried.

² See *ante*, §§ 1003–1005. Express trusts in personal property for the separate use of wives seem to be left under the operation of the doctrines of equity.

it would be very difficult, if not in fact impossible, to formulate any general rule as established by their authority.³ It may be doubtful whether in any single state all the conclusions reached by the English courts have been accepted without limitation or modification. The American states may be broadly separated into two generic classes; the decisions which mark the existence of these classes differ not in any matters of detail, but in the underlying principle. In the *first* class, the courts have accepted the *principle* of the English doctrine. They regard the wife's *jus disponendi* as resulting from the fact of an equitable separate estate over which she is, partially at least, a *feme sole*, and not as resulting from the permissive provisions of the instrument creating such separate estate. It follows, therefore, where the instrument creating the separate estate imposes no express restrictions, that the wife has a general power of disposing or charging it, even though no such authority is in terms conferred. This power of disposition, however, does not generally extend to the *corpus* of the land held for her separate use in fee; it is confined to personal property, the rents and profits of the land, and perhaps to her life estates in lands.⁴ In the states com-

³ Indeed, in some instances it would be a difficult task to reconcile the decisions made by the courts of the same state. In several of the states the courts seem to have regarded the wife's separate property, instead of rendering her a *feme sole* with respect to its use, as depriving her of all rights of ownership except the single one of enjoying its income. These judges have forgotten that a nominal ownership, without any of the rights incident to ownership, without the power of aliening, managing, or in any way binding the property, is in reality no ownership. A wife holding a so-called separate estate, but whose hands are tied, and who is completely debarred from dealing with it, from obtaining credit upon it, and from using it in the affairs of life, is actually in a worse position than the wife under the operation of common-law rules, whose property is subject to the control and disposition of her husband.

⁴ In very many of the cases the power of disposition is discussed in connection with the power to bind the separate estate by her contracts or debts. In some decisions the two powers are treated as one and the same,—the same in extent, and subject to the same limitations. In others, a distinction seems to be drawn, and the power of disposing regarded as narrower or sub-

posing the *second* class, the courts have widely departed from the principle of the English doctrine. They regard the wife's power over her separate estate as resulting, not from the existence of an equitable separate estate itself, but from the permissive provisions of the instrument creating such estate. They have accordingly adopted the general

ject to greater restrictions than that of binding by contract. The recent case of *Radford v. Carwile*, 13 W. Va. 572, furnishes an excellent illustration of this first class, and I briefly state the points which it decides: "A married woman, as to the property settled to her separate use, is regarded as a *feme sole*, and has a right to dispose of all her separate personal estate, and the rents and profits of her real estate accruing during coverture, as if she were a *feme sole*, unless restrained by the instrument creating the estate. The restraint upon the power of alienating the property settled to her separate use must be equivalent to an express restraint; *it will not be implied from her being authorized to dispose of the property in a particular manner*. The *jus disponendi* and the liability to payment of all debts incurred are incidents of her separate estate, and can only be taken away or limited by express words, or by an intent so clear as to be equivalent to express words. But these incidents extend no further than to all her separate personal property, and the rents and profits of her separate real estate accruing during coverture. *The corpus of her separate real estate is in no manner affected by the equitable doctrine of a separate estate.*" The following states may all be properly placed in this *first* class. It should be observed, however, that in some of them the general doctrine of the text is adopted only to a partial extent, and with limits which do not exist in other states. In a few instances the decisions are directly conflicting, the later cases adopting the doctrine which was rejected by the earlier. The decided cases in each state should be separately examined. *Vermont*: To a partial extent, and as applied to contracts: *Frery v. Booth*, 37 Vt. 78; *Caldwell v. Renfrew*, 33 Vt. 213; *Dale v. Robinson*, 51 Vt. 20; 31 Am. Rep. 669. *Connecticut*: *Imlay v. Huntington*, 20 Conn. 146. *New York*: *Jaques v. Meth.* Epis. Ch., 17 Johns. 548; 8 Am. Dec. 447; overruling decision of Chancellor Kent in 3 Johns. Ch. 77; *Dyett v. North Am. Coal Co.*, 20 Wend. 570; 32 Am. Dec. 598; 7 Paige, 9, 14; *Powell v. Murray*, 2 Edw. Ch. 636, 643; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Wadhams v. Am. Home etc. Soc.*, 12 N. Y. 415. The following cases, as well as some of the preceding, relate particularly to contracts: *Gardner v. Gardner*, 7 Paige, 112, 116; *Knowles v. McCamly*, 10 Paige, 342, 346; *Cumming v. Williamson*, 1 Sand. Ch. 17, 25; *Curtis v. Engel*, 2 Sand. Ch. 287, 289; *Mallory v. Vanderheyden*, 3 Barb. Ch. 10; 1 N. Y. 452, 462; *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; 22 N. Y. 450; 78 Am. Dec. 216; *Dickerman v. Abrahams*, 21 Barb. 551; *Coon v. Brook*, 21 Barb.

(a) *Connecticut*: *Stafford Sav. Bank v. Underwood*, 54 Conn. 2, 4 Atl. 248 (wife's real property may be conveyed by her with consent of husband).

rule that a married woman has only those powers of disposing or charging her separate property which are expressly or by necessary construction conferred upon her

546. Under the present statutes of New York these questions can seldom arise. *New Jersey*:^b *Leaycraft v. Hedden*, 4 N. J. Eq. 512, 551; *Perkins v. Elliott*, 23 N. J. Eq. 526; *Peake v. La Baw*, 21 N. J. Eq. 269, 282; *Homœopathic Mut. Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103. *Delaware*: *Kilby v. Godwin*, 2 Del. Ch. 61. *Maryland*: *Buchanan v. Turner*, 26 Md. 1, 5; *Cooke v. Husbands*, 11 Md. 492, overruling earlier cases. *Virginia*: The doctrine of the text is adopted with limitations; great weight seems to be given to the instrument creating the separate property; the wife's power of disposition is confined to personal property and rents and profits: *Bank of Greensboro' v. Chambers*, 30 Gratt. 202; 32 Am. Rep. 661; *Justis v. English*, 30 Gratt. 565; *McChesney v. Brown's Heirs*, 25 Gratt. 393; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Nixon v. Rose*, 12 Gratt. 425; *Vizonneau v. Pegram*, 2 Leigh, 183.^c *West Virginia*: *Coatney v. Hopkins*, 14 W. Va. 338; *Radford v. Carwile*, 13 W. Va. 572; *Patton v. Merchants' Bank*, 12 W. Va. 587. *North Carolina*: *Newlin v. Freeman*, 4 Ired. Eq. 312; *Harris v. Harris*, 7 Ired. Eq. 111; 53 Am. Dec. 393; but see *Hardy v. Holly*, 84 N. C. 661. *Georgia*: *Dallas v. Heard*, 32 Ga. 604; *Robert v. West*, 15 Ga. 122; *Fears v. Brooks*, 12 Ga. 195, 200; *Wylly v. Collins*, 9 Ga. 223. *Florida*: To a partial extent: *Lewis v. Yale*, 4 Fla. 418. *Alabama*: *Miller v. Voss*, 62 Ala. 122; *Sprague v. Shields*, 61 Ala. 428; *McMillan v. Peacock*, 57 Ala. 127; *Blakeslee v. Mobile Life Ins. Co.*, 57 Ala. 205; *Robinson v. O'Neal*, 56 Ala. 541; *Short v. Battle*, 52 Ala. 456; *Denechaud v. Berrey*, 48 Ala. 591; *Glenn v. Glenn*, 47 Ala. 204; *Ozley v. Ikelheimer*, 26 Ala. 332; *Jenkins v. McConico*, 26 Ala. 213; *Bradford v. Greenway*, 17 Ala. 797, 805; 52 Am. Dec. 203. *Arkansas*:^d *Collins v. Wassell*, 34 Ark. 17. *Missouri*:^e *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Kimm v. Weippert*, 46 Mo. 532; 2 Am. Rep. 541; *Whitesides v. Cannon*, 23 Mo. 457; *Segond v. Garland*, 23 Mo. 547; *Coats v. Robinson*, 10 Mo. 757. *Kentucky*: *Burch v. Breckinridge*, 16 B. Mon. 482; 63 Am. Dec. 553; *Lillard v. Turner*, 16 B. Mon. 374; *Bell v. Kellar*, 13 B. Mon. 381; *Cole-*

(b) *New Jersey*.—*Union Brick, etc., Co. v. Lorillard*, 44 N. J. Eq. 1, 13 Atl. 613 (may contract to sell her real estate).

(c) *Virginia*.—Later decisions seem to place Virginia more clearly in the first class. Thus it is held that a grant of special power to dispose of her estate in a particular manner does not, in general, divest her of power to dispose of it in any other manner: *Smith v. Fox's Adm'r*, 82 Va. 763, 1 S. E. 200; and see, in general, *Finch v. Marks*, 76 Va. 207; *Averett*

v. Lipscombe, 76 Va. 404; *Bailey v. Hill*, 77 Va. 492 (power to sell and reinvest does not include power to mortgage); *Christian v. Keen*, 80 Va. 369; *Green v. Claiborne*, 83 Va. 386, 5 S. E. 376; *Chapman v. Price*, 83 Va. 392, 11 S. E. 879.

(d) *Arkansas*.—*Rudd v. Peters*, 41 Ark. 177 (may deal with property as *feme sole*); *Petty v. Grisard*, 45 Ark. 117.

(e) *Missouri*.—*Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426.

in the instrument conveying the property or creating the trust, and that in determining the extent of these powers the terms of the instrument are to be strictly construed.⁵

man v. Wooley's Ex'r, 10 B. Mon. 320. *Minnesota*: Pond v. Carpenter, 12 Minn. 430. *California*: Miller v. Newton, 23 Cal. 554. *District of Columbia*: Smith v. Thompson, 2 McAr. 291; 29 Am. Rep. 621.^f

⁵ According to this theory, not only the existence, but the nature, extent, and mode of exercise of the wife's powers, are to be determined by the affirmative provisions of the instrument creating her separate property. This remarkable deviation from the general doctrine of equity jurisprudence seems to have been first made by the courts of South Carolina, and was followed by the courts of the other states which constitute the second class, viz.: *Rhode Island*: Metcalf v. Cook, 2 R. I. 355; but see Ives v. Harris, 7 R. I. 413. *New Hampshire*: Cutter v. Butler, 25 N. H. 343; 57 Am. Dec. 330. *Pennsylvania*:^g Maurer's Appeal, 86 Pa. St. 380; Hephurn's Appeal, 65 Pa. St. 468; Wells v. McCall, 64 Pa. St. 207; Jones's Appeal, 57 Pa. St. 369; McMullin v. Beatty, 56 Pa. St. 389; Shonk v. Brown, 61 Pa. St. 320; Penn. Co. for Ins. v. Foster, 35 Pa. St. 134; Wright v. Brown, 44 Pa. St. 224; Rogers v. Smith, 4 Pa. St. 93; Lyne's Ex'r v. Crouse, 1 Pa. St. 111; Wallace v. Coston, 9 Watts, 137; Thomas v. Folwell, 2 Whart. 11, 16; 30 Am. Dec. 230; Lancaster v. Dolan, 1 Rawle, 231; 18 Am. Dec. 625. *Maryland* (the earlier cases): Miller v. Williamson, 5 Md. 219; Tarr v. Williams, 4 Md. Ch. 68. These cases are overruled by subsequent decisions: See last preceding note. *Virginia*: Some of the most recent decisions incline towards the doctrine adopted by this class (see last note). *North Carolina*:^h Hardy v. Holly, 84 N. C. 661 (for earlier cases see the last note). *South Carolina*: Ewing v. Smith, 3 Desaus. Eq. 417; 5 Am. Dec. 557 (the leading case of this class); Oliver v. Grimhall, 14 S. C. 556; Porcher v. Daniel, 12 Rich. Eq. 349; Adams v. Mackey, 6 Rich. Eq. 75; Reid v. Lamar, 1 Strob. Eq. 27, 37; Magwood v. Johnston, 1 Hill Eq. 228; Robinson v. Ex'rs. of Dart, Dud. Eq. 128; 31 Am.

(⁶) *Tennessee* now belongs to the first class. In Webster v. Helm, 93 Tenn. 322, 24 S. W. 488, the court says: "In one of the two principal classes of cases it has been held that she has no power of disposition, except that clearly given by the terms of the instrument creating the estate; while in the other the ruling has been that she has every power of disposition except such as may have been withheld expressly or by necessary implication. After some fluctuation, the latter is now the prevailing doctrine in Tennessee, as it is in England, where the wife's separate estate had its origin." In Bank of Shelby

v. James, 95 Tenn. 8, 30 S. W. 1038, it was held that restraint was necessarily implied under the circumstances.

(^g) *Pennsylvania*.—MacConnell v. Lindsay, 131 Pa. St. 476, 19 Atl. 306 ("The rule is now well settled that neither the *feme covert*, nor her husband, nor both together, have any powers over her separate estate, except what are given by the trust instrument, and that even these must be strictly construed"); In re Quinn's Estate, 144 Pa. St. 444, 22 Atl. 965.

(^h) *North Carolina*.—Clayton v. Rose, 87 N. C. 106.

§ 1106. **Disposition under a Power of Appointment.**—If a married woman has a life estate in property to her separate use, and is also clothed with a general power of appointment over the *corpus* of the property, which in default of an appointment by her goes to other persons, and she exercises the power, the appointed property is not thereby made applicable to the payment of her debts, excepting only those which are fraudulent,—that is, her liabilities arising from fraud.¹ When the *jus disponendi* is conferred by means of a power,—that is when the wife has only a life estate to her separate use, with power to appoint the principal of the fund or the *corpus* of the property,—she can only dispose of such capital or *corpus* through an execution of the power by an appointment.²

Dec. 569. *Mississippi*: Doty v. Mitchell, 9 Smedes & M. 435, 447; Montgomery v. Agricultural Bank, 10 Smedes & M. 566, 276; Armstrong v. Stovall, 26 Miss. 575; Musson v. Trigg, 51 Miss. 172. *Tennessee*:¹ Hix v. Gosling, 1 Lea, 560; Robertson v. Wilburn, 1 Lea, 635; Brown v. Foote, 2 Tenn. Ch. 253; Cheatham v. Huff, 2 Tenn. Ch. 616; Reynolds v. Brandon, 3 Heisk. 593; Head v. Temple, 4 Heisk. 34; Gray v. Robb, 4 Heisk. 74; Kirby v. Miller, 4 Cold. 3; Ware v. Sharp, 1 Swan, 489; Marshall v. Stephens, 8 Humph. 159, 173; 47 Am. Dec. 601; but see Young v. Young, 7 Cold. 461. *Ohio* (partially): Machir v. Burroughs, 14 Ohio St. 519. *Illinois*: Wallace v. Wallace, 82 Ill. 530; Bressler v. Kent, 61 Ill. 426; 14 Am. Rep. 67; overruling Young v. Graff, 28 Ill. 20; Cookson v. Toole, 59 Ill. 515; Carpenter v. Mitchell, 50 Ill. 470; Rogers v. Higgins, 48 Ill. 211; Cole v. Van Riper, 44 Ill. 58; Swift v. Castle, 23 Ill. 209.

¹ It is a settled doctrine of the English equity that, under the same circumstances, where the power is held and exercised by a man, the appointed property is liable for his debts. The different rule in case of a married woman is based upon the distinction between a "power" and "property." A power of appointment conferred on a married woman is not property held to her separate use: 1 Lead. Cas. Eq., 4th Am. ed., 690, 691; Vaughan v. Vanderstegen, 2 Drew. 165, 363; Shattock v. Shattock, L. R. 2 Eq. 182; 35 Beav. 489; Hobday v. Peters, 28 Beav. 354, 356; Blatchford v. Woolley, 2 Drew. & S. 204; but see London Bank of Australia v. Lemprière, L. R. 4 P. C. 572.

² If the power authorize an appointment by deed, its execution by her may be "immediate" during her lifetime; if by will *only*, then the disposition cannot take effect until after her death: See 1 Lead. Cas. Eq. 690;

(1) *Tennessee* now belongs to the first class: Webster v. Helm. 93 Tenn. 322, 24 S. W. 488. See also cases cited under notes to first class.

(a) This rule is changed by the Married Women's Property Act, 1882, § 4 (*ante*, note to § 1099).

§ 1107. *Restraint upon Anticipation.*— The large powers of dealing with her separate property as though she were single, thus given to the wife by the English courts of equity, tended in some degree to defeat the very object for which a separate estate is created. Since the wife had full power to dispose of, charge, or bind her separate property for the benefit of her husband as well as of herself or others, and since she was necessarily exposed to the moral influence of her husband, there was danger lest her separate estate should virtually be as much under his control and liable for his debts as though no settlement to her own separate use had been made, and the property were left under the operation of common-law rules. Experience showed that this danger was actual. To obviate it, the plan was contrived of inserting in the settlement or conveyance a clause in restraint of anticipation, the object of which was to prevent the wife from aliening or charging her separate property, or from assigning or exercising other acts of dominion over the income until its payment was due and actually made. The experiment proved successful. The courts gave full force and effect to the clause against anticipation, and the rules concerning it became an established part of the doctrine concerning the wife's equitable separate estate.¹

Bradly v. Westcott, 13 Ves. 445, 451; *Reid v. Shergold*, 10 Ves. 370, 380; *Anderson v. Dawson*, 15 Ves. 532; *Heatley v. Thomas*, 15 Ves. 596; *Richards v. Chambers*, 10 Ves. 580; *Socket v. Wray*, 4 Brown Ch. 483; *Lee v. Mugeridge*, 1 Ves. & B. 118; *Nixon v. Nixon*, 2 Jones & L. 416; and see *Noble v. Willock*, L. R. 8 Ch. 778; *Bishop v. Wall*, L. R. 3 Ch. Div. 194.

¹ The clause is said to have been contrived by Lord Thurlow, and to have been first introduced by him into the settlement of a Miss Watson, for whom he was a trustee: *Pybus v. Smith*, 3 Brown Ch. 340, note 1; *Jackson v. Hobhouse*, 2 Mer. 483, 487; *Baggett v. Meux*, 1 Coll. C. C. 138; 1 Phill. Ch. 627; *Rennie v. Ritchie*, 12 Clark & F. 204; *Tullett v. Armstrong*, 1 Beav. 1, 22; 4 Mylne & C. 390, 405; *In re Gaffee*, 1 Macn. & G. 541; 1 Lead. Cas. Eq. 713-722, 735-748, 765-772.^a As the wife's separate estate is wholly a creature of equity, the courts of equity had the power to impose

(a) For the history and original form of the restraint clause, see 174, speeches of Lord Herschell and Lord Macnaghten. *Hood-Barrs v. Heriot*, [1896] A. C. In Maryland, it is held that a re-

§ 1108. What Words are Sufficient.—In order to constitute an effective restraint, the intention must be clear from the expressions used that the wife was to be restrained from anticipation. If such intention is shown, no particular form of words is requisite, nor are express negative words essential.¹ In the American states which compose the first

upon it any limitations or restrictions, even though they might contravene the established doctrines which regulate the use of property in general. An attempt to impose such a restraint upon alienation in a conveyance to a man would, of course, be nugatory: *Brandon v. Robinson*, 18 Ves. 429.

¹ *Moore v. Moore*, 1 Coll. C. C. 54, 57; *Harrop v. Howard*, 3 Hare, 624; *Brown v. Bamford*, 1 Phill. Ch. 620; *In re Sarel*, 10 Jur., N. S., 876; *Herbert v. Webster*, L. R. 15 Ch. Div. 610. The rule was very accurately stated in the recent case of *Radford v. Carwile*, 13 W. Va. 572: "The restraint upon her power of alienating property settled to her separate use must be *equivalent to an express restraint*; it will not be implied from her being authorized to dispose of the property in a particular manner. The *jus disponendi*, and the liability to payment of all debts incurred, can only be taken away or limited by express words, or by an intent so clear as to be equivalent to express words." The operation of this general rule can best be illustrated by examples, of which I add a few. *Words and expressions held sufficient to constitute a restraint*: A direction to pay the income to such person as the wife "shall, by writing, and as the same becomes due, but not by way of assignment, charge, or other anticipation, appoint": *Brown v. Bamford*, 1 Phill. Ch. 620; *Harnett v. Macdougall*, 8 Beav. 187; where the gift is of income to her separate use, not to be sold or mortgaged: *Steedman v. Poole*, 6 Hare, 193; *Goulder v. Camm*, 1 De Gex, F. & J. 146; a gift or trust to her sole and separate use with a direction that she shall not sell, charge, mortgage, or encumber the property: *Baggett v. Meux*, 1 Coll. C. C. 138; 1 Phill. Ch. 627; *per contra*, *Medley v. Horton*, 14 Sim. 222, is thus overruled; where the property is directed to be a separate, personal, and inalienable provision during coverture: *Spring v. Pride*, 10 Jur., N. S., 646; *In re Sarel*, 10 Jur., N. S., 876; where trustees were directed to receive the income "when and as often as the same should become due," and to pay it, etc., and that her receipts for such income *after it should become due*, should be valid discharges: *Baker v. Bradley*, 7 De Gex, M. & G. 597; *Field v. Evans*, 15 Sim. 375. *Words and expressions held not sufficient*: A direction to pay income to a wife as she should, from time to time, appoint, and in default of any appointment, into her proper hands for her separate use, does not create a restraint: *Pybus v. Smith*, 3 Brown Ch. 340; *Witts v. Dawkins*, 12 Ves. 501; nor a declaration that her receipts shall be, or shall alone

straint on anticipation created by a married woman herself in contemplation of marriage was invalid against her debts contracted after

marriage on the credit of her separate estate: *Brown v. McGill*, 87 Md. 161, 67 Am. St. Rep. 334, 39 Atl. 613, 39 L. R. A. 806.

class heretofore described, the same general rule would necessarily be adopted. In the states forming the second class, however, a material modification of this rule must be made. Since the *jus disponendi* in those states is derived from the affirmative provisions of the instrument creating the separate property, the restraint upon the power of disposing or binding the property would be inferred from the whole tenor of the instrument, or from the absence of permissive language.² The subject-matter on which the restraining clause is to operate may be any kind of property, real or personal, and any estate therein, absolute, for life, or for years.³

§ 1109. Effect of the Restraint.—The restraint, if valid, prevents the wife from doing any act, during her coverture, which would deprive her of her interest in the separate property; she can neither alien nor charge the *corpus* nor future income.^{1a} With regard to the time during which

be, good discharges: *Sturgis v. Corp*, 13 Ves. 190; *Acton v. White*, 1 Sim. & St. 429; unless there is also a direction that said receipts shall only be discharges *after the income becomes due*: See *Baker v. Bradley and Field v. Evans*, *supra*; nor a direction that the interest shall be paid on personal appearance and receipt: *In re Ross's Trust*, 1 Sim., N. S., 196; nor that it shall be for her absolute use, free from all marital control: *Symonds v. Wilkes*, 11 Jur., N. S., 659; see also, as illustrations of the general rule, *Perkins v. Hays*, 3 Gray, 405; *Nixon v. Rose*, 12 Gratt. 425; *Nix v. Bradley*, 6 Rich. Eq. 43; *Weeks v. Sego*, 9 Ga. 199.

² *Nix v. Bradley*, 6 Rich. Eq. 43.

³ *Baggett v. Meux*, 1 Phill. Ch. 627.

¹ *Horlock v. Horlock*, 2 De Gex, M. & G. 644; *In re Sykes's Trusts*, 2 Johns. & H. 415; *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454 (not liable for her contracts); *In re Ellis's Trusts*, L. R. 17 Eq. 409; *In re Benton*, L. R. 19 Ch. Div. 277; *Kenrick v. Wood*, L. R. 9 Eq. 333; *Clive v. Clive*, L. R. 7 Ch. 433; but see *Cooper v. Macdonald*, L. R. 7 Ch. Div. 288; *In re Ridley*, L. R. 11 Ch. Div. 645 (restraint held void in this case). Where income of the separate property, being due, has been actually paid to the wife, the restraint clause does not prevent her from dealing with the money as she pleases. *Arrears* of income overdue are treated in the same manner; she may assign them, but cannot, by any contrivance, anticipate income not yet due: See *In re Brettell*, 2 De Gex, J. & S. 79.^b The restraint cannot even be overcome

(a) This section is cited in *Bank of Shelby v. James*, 95 Tenn. 8, 30 S. W. 1038.

(b) The restraint on anticipation does not apply to arrears of income; a judgment creditor may enforce his

they operate, the separate use itself and the restraint upon anticipation stand upon exactly the same principle, and are governed by exactly the same rules. Property may be given to a woman to her sole and separate use while she is single, and not in contemplation of any *particular* intended marriage, and the gift is valid in that form;² but the peculiar qualities of the separate estate do not, and

by making the property liable for her breach of trust or fraud: *Arnold v. Woodhams*, L. R. 16 Eq. 29; *Clive v. Carew*, 1 Johns. & H. 199; *Stanley v. Stanley*, L. R. 7 Ch. Div. 589.c

² *Tullett v. Armstrong*, 4 Mylne & C. 377. In *Massey v. Parker*, 2 Mylne & K. 174, it was held that a trust for the sole and separate use of a single woman, not in contemplation of a particular marriage, would be ineffectual, and that no separate estate would arise on her subsequent marriage. This decision, however, has been completely overruled. Partly on the authority of *Massey v. Parker*, and partly from peculiar views of trusts, the courts of Pennsylvania have established the rule that there can be no valid trust for the separate use of a woman unless she is married at the time of its creation, or unless it is created in expectation of an immediate intended marriage: *Hamersley v. Smith*, 4 Whart. 126; *Snyder's Appeal*, 92 Pa. St. 504; *In re Stirling*, 11 Phila. 150; *Pickering v. Coates*, 10 Phila. 65; *Ash v. Bowen*, 10 Phila. 96; *Ogden's Appeal*, 70 Pa. St. 501; *Wells v. McCall*, 64 Pa. St. 207; *Springer v. Arundel*, 64 Pa. St. 218. Similar decisions have been made in one or two other states: See *Lindsay v. Harrison*, 8 Ark. 302, 311; *Apple v. Allen*, 3 Jones' Eq. 120; but see *Bridges v. Wilkins*, 3 Jones Eq. 342. The doctrine of the text has, however, been generally followed in this country: See cases *infra*, under note.

judgment against income due at or before the date of the judgment, though it has not come into her hands or her agent's hands: *Hood-Barrs v. Heriot*, [1896] A. C. 174, reversing *Loftus v. Heriot*, [1895] 2 Q. B. 212, overruling the reasoning in *Hood-Barrs v. Catcart*, [1894] 2 Q. B. 559, 570, and following *Pember-ton v. McGill*, 1 Drew. & Sm. 268; *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328; *Rowley v. Unwin*, 2 K. & J. 138; and *Cox v. Bennett*, [1891] 1 Ch. 617. It appears, however, that the judgment cannot be enforced against income which has become due after the date of the judgment: *Hood-Barrs v. Catcart*, [1894] 2 Q. B. 559.

A legacy, with a restraint clause, was payable to a married woman on determination of a prior life interest. Held, the restraint ceases at the date when she is entitled to have the legacy paid to her; therefore, a covenant in her marriage settlement, made before the testator's death, to settle after-acquired property, binds the legacy: *In re Bankes*, [1902] 2 Ch. 333 (citing *In re Bown*, 27 Ch. D. 411; *In re Holmes*, 67 L. T. 335).

(c) Nor can the restraint be overcome by virtue of an estoppel which would be binding on her in the absence of the restraint: *Lady Bateman v. Faber*, [1897] 2 Ch. 223, [1898] 1 Ch. 144.

cannot, exist until she is married. In like manner, and for the same reason, since they are inseparable, the restraint upon anticipation or upon the *jus disponendi* can only operate during coverture. If, therefore, she is single at the time of the gift of a separate estate with restraint upon anticipation, or if she becomes so afterwards, during the time when she is single or is a widow, she may alienate, dispose of, or charge the property, entirely irrespective of the clause of restraint. Her power over the property will then depend, not in the least upon the special clause of restraint, but upon the general nature of her estate in it, and of the trust upon which it is held.³ ^d It is also settled that unless clearly restricted to one coverture, the clause in restraint of anticipation annexed to a gift of property to the separate use of a woman will operate upon all her covertures and be effectual, unless it be destroyed by her own act in alienating or

³ These positions are now thoroughly settled by the English cases: *Tullett v. Armstrong*, 1 Beav. 1, 22; 4 Mylne & C. 377, 392; *In re Gaffee*, 1 Macn. & G. 541, 547; *Barton v. Briscoe*, Jacob, 603; *Wright v. Wright*, 2 Johns. & H. 647, 655; *Buttanshaw v. Martin*, Johns. 89; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Brown v. Foote*, 2 Tenn. Ch. 255; *Hepburn's Appeal*, 65 Pa. St. 468. The doctrine was stated by the master of rolls in *Tullett v. Armstrong*, *supra*, as follows: "If the gift be made for her sole and separate use, without more, she has, during her coverture, an alienable estate independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an inalienable estate independent of her husband. In either of these cases she has, when discoverd, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discoverd, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage. The restriction cannot be considered distinctly from the separate estate, of which it is only a modification; to say that the restriction exists is saying no more than that the separate estate is so modified. . . . If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it."

(d) That a conveyance in trust to the separate use of a married woman creates an active trust, not within the Statute of Uses, but that the title

vests absolutely in the widow upon the death of the husband, is held in *Temple v. Ferguson*, 110 Tenn. 84, 72 S. W. 455, 100 Am. St. Rep. 791.

dealing with the property while she is discovert,—that is, before marriage or during widowhood.⁴ The clause in restraint, however, like the trust itself for separate use, may be confined in its operation to a particular coverture, but the words must be clear and unequivocal.⁵ The same rules have generally, though not uniformly, been adopted by the courts of this country.⁶ It follows, as a necessary consequence from the foregoing conclusions, that where property has been given to the sole and separate use of a woman, even coupled with a restraint against alienation, she may, before her marriage or during her widowhood, terminate both the separate use and the restraint, either by disposing of the property and investing its proceeds in a new form, or by settling the property in a different manner at her marriage.⁷ A court of equity, however, has no power to disregard the restraint, nor to release a married woman from its operation, however beneficial that course might be in any particular case.⁸

⁴ Tullett v. Armstrong, 4 Mylne & C. 377; 1 Beav. 1; In re Gaffee, 1 Macn. & G. 541; Scarborough v. Borman, 4 Mylne & C. 378; Anderson v. Anderson, 2 Mylne & K. 427; Hawkes v. Hubback, L. R. 11 Eq. 5; Newlands v. Paynter, 4 Mylne & C. 408.

⁵ In re Gaffee, 1 Macn. & G. 541, 545; Moore v. Morris, 4 Drew. 33; Hawkes v. Hubback, L. R. 11 Eq. 5.

⁶ The decisions are few, but they generally have followed the doctrine, that the restraint upon anticipation operates during a second or subsequent coverture, unless destroyed by the act of the woman while discovert: Shirley v. Shirley, 9 Paige, 363; Waters v. Tazewell, 9 Md. 291; Fears v. Brooks, 12 Ga. 195, 197; Robert v. West, 15 Ga. 122; Staggers v. Matthews, 13 Rich. Eq. 142, 154; Nix v. Bradley, 6 Rich. Eq. 43; Fellows v. Tann, 9 Ala. 999; Beaufort v. Collier, 6 Humph. 487; 44 Am. Dec. 321; Brown v. Foote, 2 Tenn. Ch. 255. In Pennsylvania and the few states which adopt the peculiar theory described in a previous note, the restraint only operates during the single marriage for which the separate use was originally created: Hamersley v. Smith, 4 Whart. 126; Kuhn v. Newman, 26 Pa. St. 227; Dubs v. Dubs, 31 Pa. St. 149; Freyvogel v. Hughes, 56 Pa. St. 228; Hepburn's Appeal, 65 Pa. St. 468; Bush's Appeal, 33 Pa. St. 85; McKee v. McKinley, 33 Pa. St. 92; Lindsay v. Harrison, 8 Ark. 302, 311; Miller v. Bingham, 1 Ired. Eq. 423; 36 Am. Dec. 58; Apple v. Allen, 3 Jones Eq. 120; and see cases *ante*, in note 5, under § 1105.

⁷ Wright v. Wright, 2 Johns. & H. 647, 655; Campbell v. Bainbridge, L. R. 6 Eq. 269; Brown v. Foote, 2 Tenn. Ch. 255.

⁸ Robinson v. Wheelwright, 21 Beav. 214; 6 De Gex, M. & G. 535; In re

§ 1110. End of the Separate Estate — Its Devolution on the Wife's Death.—The trust for the wife's separate use, like the restraint upon alienation, may be terminated before the coverture or after it ends, by her dealings with the property, as by disposing of it, and investing the proceeds in other property.¹ The adultery of the wife will not, in the absence of statute, affect her rights to property settled to her own separate use.² When a married woman holding a separate estate dies without making a disposition by will, it will devolve, subject to the future limitations, if any, in the settlement, in the same manner and to the same successors as her legal estates and her other equitable estates. In the absence of statutory regulations, the real estate in fee descends to her heirs, subject to the husband's life interest as tenant by the curtesy; the cash, personal chattels, and chattels real will belong to the husband *juri mariti*; while the things in action will devolve upon him as her administrator.^{3 a}

Gaskell's Trusts, 11 Jur., N. S., 780; but see *Sanger v. Sanger*, L. R. 11 Eq. 470, decided under a statute.

¹ See last preceding paragraph, and cases cited in note.

² *Seagrave v. Seagrave*, 13 Ves. 439, 443; *Evans v. Carrington*, 2 De Gex, F. & J. 481; *Duncan v. Campbell*, 12 Sim. 616; and in the absence of statute it seems the rights of the husband under a marriage settlement are not forfeited or destroyed by a divorce procured by the wife, which could only be for the husband's adultery: *Fitzgerald v. Chapman*, L. R. 1 Ch. Div. 563; *Burton v. Sturgeon*, L. R. 2 Ch. Div. 318; *per contra*, *Swift v. Wenman*, L. R. 10 Eq. 15; *Fussell v. Dowding*, L. R. 14 Eq. 421.

³ *Roberts v. Dixwell*, 1 Atk. 607; *Pitt v. Jackson*, 2 Brown Ch. 51; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Harris v. Mott*, 14 Beav. 169; *Appleton v. Bowley*, L. R. 8 Eq. 139; *Molony v. Kennedy*, 10 Sim. 254; *Johnstone v. Lumb*, 15 Sim. 308; *Proudley v. Fielder*, 2 Mylne & K. 57; *Musters v. Wright*, 2 De Gex & S. 777; *Stewart v. Stewart*, 7 Johns. Ch. 229; *Donnington v. Mitchell*, 2 N. J. Eq. 243; *Cooney v. Woodburn*, 33 Md. 320. These common-law rules concerning succession have been greatly modified in many of the states, especially concerning the husband's rights as his wife's successor. In each state, the statutory regulations will, of course, govern.

(a) *Johnson v. Prairie*, 91 N. C. 159; *Meacham v. Bunting*, 156 Ill. 586, 41 N. E. 175, 47 Am. St. Rep. 239, 28 L. R. A. 618. ("If it appears that the grantor intended to exclude

the husband from the curtesy, courts will give effect to that intention. But the husband can be deprived of his marital rights only when the intention to do so clearly appears.")

§ 1111. *Pin-money*.—Pin-money is a yearly allowance given by a marriage settlement, made by the husband to the wife, for the purchase of her clothes or ornaments, or for her other *personal* expenditure. Gifts or payments made by the husband to the wife, from time to time, after marriage, for the *same purposes*, are also treated as pin-money. Pin-money resembles the wife's separate estate in one feature, that she uses and disposes of it herself; it differs from her separate estate in not being an absolute gift to her own use, and in not being free from the *jus mariti*. The only object of pin-money is personal expenditure; the wife is not entitled to have her personal expenses otherwise defrayed by her husband, without drawing upon the pin-money fund, and then to demand payment of its arrears as a debt due to her from him or from his estate.¹

§ 1112. *The Wife's Paraphernalia*.—The wife's paraphernalia include the wearing apparel and ornaments given to her by her husband, reasonably suitable to her condition in society, with the express design of being worn by her as clothing, or as her *own personal* ornaments.¹ Parapherna-

§ 1111, ¹ The leading case upon this subject, in which most of the rules concerning it are laid down, is *Howard v. Digby*, 8 Bligh, N. S., 224, 245, 265-269; 2 Clark & F. 634; and see 1 Lead. Cas. Eq., 4th Am. ed., 729. Pin-money does not include the purchase of jewels, nor the cost of maintaining the house, grounds, carriage, and the like, but only the wife's current *personal* expenses. The wife is not liable to account for its expenditure; and if she fulfills the duty of applying it to her dress and other personal expenses, she is entitled to any surplus remaining out of what has been actually paid to her: *Jodrell v. Jodrell*, 9 Beav. 45; *Howard v. Digby*, *supra*; if the husband has actually paid or provided for all her personal expenses, she cannot claim *any* arrears from his estate at his death: *Fowler v. Fowler*, 3 P. Wms. 353, 355; *Thomas v. Bennet*, 2 P. Wms. 347; *Howard v. Digby*; except that, when he had not made the stipulated payments, and on her demanding them he had promised to pay them in full, she may claim *all* the arrears from his estate: *Ridout v. Lewis*, 1 Atk. 269; *Foss v. Foss*, 15 Ir. Ch. Rep. 215; *Edgeworth v. Edgeworth*, 16 Ir. Ch. Rep. 348; as a general rule she cannot claim more than the arrears for one year: *Lord Townshend v. Windham*, 2 Ves. Sr. 1, 7; *Peacock v. Monk*, 2 Ves. Sr. 190; *Aston v. Aston*, 1 Ves. Sr. 264, 267; *Howard v. Digby*, *supra*; finally, her own representatives have no claim for arrears upon the husband or his estate: *Howard v. Digby*.

§ 1112, ¹ See *Graham v. Londonderry*, 3 Atk. 393; 1 Lead. Cas. Eq., 4th Am. ed., 730, 731. Jewels and ornaments in the nature of heir-looms in her hus-

lia are very different in their legal incidents from the wife's separate estate. While she is entitled to their possession and use, and may under some circumstances have a claim with respect to them in the nature of a debt against her husband's estate, she is not their absolute owner; she cannot dispose of them; on the contrary, her husband *may* dispose of them, and they are liable to the claims of his creditors.

§ 1113. **Settlement or Conveyance by the Wife in Fraud of the Marriage.**— By marriage at the common law the husband acquires large interests in the wife's property. Any alienation by her of her property in fraud of her husband's

band's family are not paraphernalia: *Jervoise v. Jervoise*, 17 Beav. 566, 570; *Calmady v. Calmady*, 11 Vin. Abr. 181, pl. 21; but where the husband makes presents to his wife of jewels, ornaments, and the like, for the purpose of being worn by her, they are considered as paraphernalia: *Jervoise v. Jervoise*, 17 Beav. 566, 571; *Graham v. Londonderry*, 3 Atk. 393, 394; see *Whiton v. Snyder*, 88 N. Y. 299; jewels and such articles may be given by the husband to his wife absolutely so as to become part of her separate estate, and presents which become paraphernalia should be distinguished from such gifts: *Graham v. Londonderry*, *supra*; and articles which, if given by her husband, would be paraphernalia, when given by a third person will rather be considered as her separate property: *Graham v. Londonderry*, *supra*; *Lucas v. Lucas*, 1 Atk. 270. The husband cannot bequeath the paraphernalia: *Tipping v. Tipping*, 1 P. Wms. 729; *Seymore v. Tresilian*, 3 Atk. 358; but may dispose of them by gift or sale during her life: *Seymore v. Tresilian*, *supra*; they are liable to the claims of his creditors, even though given to her before marriage: *Boyntun v. Boyntun*, 1 Cox, 106; *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Snelson v. Corbet*, 3 Atk. 369; *Campion v. Cotton*, 17 Ves. 264, 273; but they are not subject to the claims of his legatees, general or specific: *Graham v. Londonderry*, *supra*. If her paraphernalia have been pledged by her husband in his lifetime, and there are sufficient assets after payment of his debts, she is entitled to have them redeemed therewith: *Graham v. Londonderry*. If the paraphernalia have been used in payment of her husband's debts, she will be a creditor for their value against his personal estate, and the assets will be marshaled in her favor: *Aldrich v. Cooper*, 8 Ves. 382, 397; against the heir taking land by descent: *Snelson v. Corbet*, 3 Atk. 369; *Tipping v. Tipping*, 1 P. Wms. 729; and against devisees of land: *Boyntun v. Boyntun*, 1 Cox, 106; *Incedon v. Northcote*, 3 Atk. 430, 436; *Tynt v. Tynt*, 2 P. Wms. 542, 543; but see *Ridout v. Earl of Plymouth*, 2 Atk. 104; *Probert v. Clifford*, Amb. 6. The husband's possession of the paraphernalia at the time of his death is immaterial: *Northey v. Northey*, 2 Atk. 77, 79. It may be added, that as the legal title to the paraphernalia is held by the husband, he is the proper party to bring any legal action for their loss or for injury to them.

marital rights would therefore be set aside by a court of equity as null and void. In accordance with the common-law theory of marriage, and while that theory yet prevailed unmodified by statute, the doctrine on this subject was established by the English courts of equity as follows:¹ "A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty of marriage* with her, makes, without notice to the intended husband, a conveyance of any part of her property, it should be set aside, though good *prima facie*, because affected with that fraud." The rules thus established by the English court of chancery have been repeatedly approved and adopted in various states of this country, where the common-law

¹ Countess of Strathmore v. Bowes, 2 Brown Ch. 345; 1 Ves. 22; 1 Lead. Cas. Eq. 605, 611-617, 618-623. I add a brief abstract of the points settled by the English decisions. A woman, prior to the commencement of a marriage negotiation, may make such disposition of her property as she sees fit, and no fraud will be thereby committed upon the husband whom she finally marries; nor is it necessary that such disposition should be communicated to him: Countess of Strathmore v. Bowes, *supra*; Cotton v. King, 2 P. Wms. 358, 674; Ball v. Montgomery, 2 Ves. 191, 193; England v. Downs, 2 Beav. 522. But a settlement or conveyance by the intended wife after the commencement of the negotiation for a marriage, which afterwards takes place, made without notice to her intended husband, is, in general, void as against him, except when in favor of a *bona fide* purchaser for value: Goddard v. Snow, 1 Russ. 485; Lance v. Norman, 2 Ch. Rep. 79. A disposition made to a *bona fide* purchaser for value cannot be impeached: Blanchet v. Foster, 2 Ves. Sr. 264; Lewellin v. Cobbold, 1 Smale & G. 376. The rule is: "Deception will be inferred if, *after the commencement* of the treaty for marriage the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence": Taylor v. Pugh, 1 Hare, 608, 614; Downes v. Jennings, 32 Beav. 290; Chambers v. Crabbe, 34 Beav. 457; but see St. George v. Wake, 1 Mylne & K. 610, 623; De Manneville v. Crompton, 1 Ves. & B. 354. There can be no such presumption of fraud where the intended husband assents to or has notice of the disposition: Hunt v. Matthews, 1 Vern. 408; Slocombe v. Giubb, 2 Brown Ch. 545; Countess of Strathmore v. Bowes, *supra*; Ashton v. McDougall, 5 Beav. 56; Wrigley v. Swainson, 3 De Gex & S. 458; Griggs v. Staplee, 2 De Gex & S. 572; Prideaux v. Lonsdale, 1 De Gex, J. & S. 433; and the husband's acquiescence to the disposition would bar any relief: Loader v. Clarke, 2 Macn. & G. 382.

theory concerning the effect of marriage still prevailed.² The extensive and radical changes made by modern legislation have rendered these rules obsolete in a majority of the states.³

SECTION II.

THE WIFE'S EQUITY TO A SETTLEMENT.

ANALYSIS.

- § 1114. General nature.
- § 1115. Extent of the wife's equity; to what property and against what persons.
- § 1116. When the equity does not arise.
- § 1117. Amount of the settlement.
- § 1118. Form of the settlement.
- § 1119. Maintenance of wife.
- § 1120. Alimony.

§ 1114. General Nature.^a—The origin of this peculiar equity, as an application of the maxim, He who seeks equity must do equity, has been fully explained in a former chapter.¹ The wife's equity to a settlement does not depend

²Tucker v. Andrews, 13 Me. 124; Williams v. Carle, 10 N. J. Eq. 543; Robinson v. Buck, 71 Pa. St. 386; Belt v. Ferguson, 3 Grant Cas. 289; Duncan's Appeal, 43 Pa. St. 67; Waller v. Armistead's Adm'rs, 2 Leigh, 11; 21 Am. Dec. 594; Fletcher v. Ashley, 6 Gratt. 332, 339; Linker v. Smith, 4 Wash. 224; Logan v. Simmons, 3 Ired. Eq. 487, 494; Terry v. Hopkins, 1 Hill Eq. 1; Ramsay v. Joyce, 1 McMull. Eq. 236, 249; 37 Am. Dec. 550; McClure v. Miller, Bail. Eq. 108; 21 Am. Dec. 522; Manes v. Durant, 2 Rich. Eq. 404; 46 Am. Dec. 65; Freeman v. Hartman, 45 Ill. 57; 92 Am. Dec. 193; McAfee v. Ferguson, 9 B. Mon. 475; Cheshire v. Payne, 16 B. Mon. 618; overruling Hobbs v. Blandford, 7 Mon. 469.

³See *ante*, § 1099, note.

¹See *ante*, vol. 1, quotation from opinion of Lord Cottenham in the leading case of Sturgis v. Champneys, 5 Mylne & C. 97, 101, in note 1, under § 385; also § 389, and the numerous English and American cases cited under it.

§ 1113, (a) Leary v. King, 6 Del. Ch. 108, 33 Atl. 621.

§ 1114, (a) The text, §§ 1114—

1120, is cited in Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94. .

upon *her* right of property in the subject-matter, for it must be enforced for the benefit of herself and her children, and the amount is wholly discretionary with the court; it is an obligation which the court fastens, not upon the property, *but upon the right to receive it*,—the right of her husband and those claiming under him to receive it, as well as that of the wife.² The doctrine was first applied to cases only where the husband resorted to the jurisdiction of equity in order to enforce his *jus mariti* and reach assets belonging to his wife. Having been established in this application, it was soon extended to cases where the general assignees in bankruptcy or insolvency of the husband sought the aid of equity in reaching property of the wife; the court imposed on them the same conditions which it would impose on the husband himself.³ The next step was soon taken, and the doctrine was applied to particular assignees of the husband for a valuable consideration, whenever they attempted to enforce their assignments by a proceeding in equity.⁴ In these early stages of the doctrine, the court was always set in motion by the husband or his assignees, and it was formerly supposed that this was essential; it is now settled, however, that the wife may herself originate the proceeding, and may maintain a suit for a settlement.^{5 b} A court of

² Osborn v. Morgan, 9 Hare, 432, 434.

³ Oswell v. Probert, 2 Ves. 680, 682; Dunkley v. Dunkley, 2 De Gex, M. & G. 390.

⁴ Macaulay v. Philips, 4 Ves. 15, 19; Scott v. Spashett, 3 Macn. & G. 599; Haviland v. Bloom, 6 Johns. Ch. 178, 180.

⁵ Lady Elibank v. Montolieu, 5 Ves. 737; Ex parte Coysegame, 1 Atk. 192; Sturgis v. Champneys, 5 Mylne & C. 97; Duncombe v. Greenacre, 2 De Gex, F. & J. 509, 517; Wallace v. Auldjo, 1 De Gex, J. & S. 643; Giacometti v. Prodggers, L. R. 14 Eq. 253; 8 Ch. 338; Kenny v. Udall, 5 Johns. Ch. 464; 3 Cow. 590; Van Epps v. Van Deusen, 4 Paige, 64, 74; 25 Am. Dec. 516; Van Duzer v. Van Duzer, 6 Paige, 366, 368; 31 Am. Dec. 257; Martin v. Martin, 1 Hoff. Ch. 462, 467; Haviland v. Myers, 6 Johns. Ch. 25, 178; Helms v. Franciscus, 2 Bland, 544; 20 Am. Dec. 402; Poindexter v. Jeffries, 15 Gratt. 363; but see Jackson v. Hill, 25 Ark. 223. In Duncombe v. Greenacre, 2 De

(b) See, also, Salter v. Salter, 80 249; Tabor v. Tabor, 98 Ky. 173, 32 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. S. W. 414.

equity will not, therefore, interfere with the *purely* legal rights of the husband, or of his assignees, which can be completely enforced at law, without the aid of equity, and where the property is not already in the custody or under the immediate control of the court of equity. The general doctrine may be formulated as follows: Where the husband, or some person claiming under him, is suing in equity to reach the wife's property; and where the property is already within the reach of the court,—as where it is vested in trustees, or has been paid into court, or is in any other situation which brings it under the control of the court,—the court of equity will not grant the relief in the first instance, nor permit the property to be removed out of its jurisdiction and control in the second, until an adequate provision is made for the wife, unless special circumstances exist which defeat her right; and under a like condition of the property, the wife may herself institute a suit and obtain the relief.⁶

Gex, F. & J. 509, 28 Beav. 472, it was held that where a legacy to a wife *had been paid into the court*, the wife could maintain a suit to restrain the husband's assignee from enforcing his legal remedies for the recovery of the legacy. Here it will be noticed that the subject-matter was already within the control and custody of the court.

⁶ Lady Elibank v. Montolieu, 1 Lead. Cas. Eq. 623, 639–669, 670–679; in addition to the English and American cases illustrating the general doctrine cited under § 389, vol. 1, see Duncombe v. Greenacre, 2 De Gex, F. & J. 509; Life Association v. Siddal, 3 De Gex, F. & J. 271; Smith v. Matthews, 3 De Gex, F. & J. 139; Martin v. Foster, 7 De Gex, M. & G. 98; Allday v. Fletcher, 1 De Gex & J. 82; Biddles v. Jackson, 3 De Gex & J. 544; Wallace v. Auldjo, 1 De Gex, J. & S. 643; Johnson v. Lander, L. R. 7 Eq. 228; Croxton v. May, L. R. 9 Eq. 404; Aitchison v. Dixon, L. R. 10 Eq. 589; In re Carr's Trusts, L. R. 12 Eq. 609; Giacometti v. Prodggers, L. R. 14 Eq. 253; 8 Ch. 338; Knight v. Knight, L. R. 18 Eq. 487; Ruffles v. Alston, L. R. 19 Eq. 539; In re Cordwell's Estate, L. R. 20 Eq. 644; Spirett v. Willows, L. R. 1 Ch. 520; In re Suggitt's Trusts, L. R. 3 Ch. 215; In re Lush's Trusts, L. R. 4 Ch. 591; Barnard v. Ford, L. R. 4 Ch. 247; Walsh v. Wason, L. R. 8 Ch. 482; In re Mellor's Trusts, L. R. 6 Ch. Div. 127; Taunton v. Morris, L. R. 8 Ch. Div. 453; 11 Ch. Div. 779; In re Robinson's Estate, L. R. 12 Ch. Div. 188; Ward v. Ward, L. R. 14 Ch. Div. 506; In re Bryan, L. R. 14 Ch. Div. 516; Shipway v. Ball, L. R. 16 Ch. Div. 376; Pond v. Skeen, 2 Lea, 126; White v. Gouldin's Ex'rs, 27 Gratt. 491; Canby v. McLearn, 13 Bank. Reg. 22; Beal's Ex'r v. Storm, 26 N. J. Eq. 372 (proceeds of sale of wife's contingent dower

§ 1115. *Extent of the Wife's Equity — To What Property and against What Persons.*— The rule is fundamental that the wife's equity does not exist where the husband is only exercising his *legal* right over the personalty of his wife's estate which vested in him by the marriage, or over his own joint life interest in her realty.¹ It only arises where the wife's interest being equitable, the property itself is originally under the control and jurisdiction of equity, or being legal, the husband or his assignees resort to courts of equity in order to enforce, protect, or perfect their claims. *Realty — Estates in fee:* The right extends to her equitable estates in fee, although the husband's possible estate by the curtesy will not be interfered with, and to her equitable estates in tail, with this limitation, however, that it cannot embrace the *corpus*, but only the rents, profits, and income.²

in her husband's lands will be secured to her); *McCaleh v. Crichfield*, 5 Heisk. 288; *Jackson v. Hill*, 25 Ark. 223; *Atkinson v. Beall*, 33 Ga. 153; *Sabel v. Slingluff*, 52 Md. 132; *Moore v. Moore*, 14 B. Mon. 208; *Bennett v. Dillingham*, 2 Dana, 436; *Coppedge v. Threadgill*, 3 Sneed, 577; *Phillips v. Hassell*, 10 Humph. 197; *Poindexter v. Jeffries*, 15 Gratt. 363; *Wiles v. Wiles*, 3 Md. 1; 56 Am. Dec. 733; *Lay's Ex'rs v. Brown*, 13 B. Mon. 295; *Andrews v. Jones*, 10 Ala. 401; *Ward v. Amory*, 1 Curtis, 419, 432.^c In a few states, including New Hampshire and North Carolina, the doctrine seems to have been expressly rejected. The modern legislation in so large a portion of the American states, destroying the husband's interest in his wife's property, and making it her own separate legal estate, has, of course, taken away the very foundation for this equitable doctrine, and it has thus been rendered virtually obsolete. For this reason, I shall not attempt to give any detailed statement of its particular rules and applications.

¹ *Warden v. Jones*, 2 De Gex & J. 76, 87; *Durham v. Crackles*, 32 L. J. Ch. 111; *Ward v. Ward*, L. R. 14 Ch. Div. 506; *In re Bryan*, L. R. 14 Ch. Div. 516; *Canby v. McLearn*, 13 Bank. Reg. 22.

² *Smith v. Matthews*, 3 De Gex, F. & J. 139; *Life Association v. Siddal*, 3 De Gex, F. & J. 271; *Wortham v. Pemberton*, 1 De Gex & S. 644. In *Life Association v. Siddal*, Turner, L. J., while showing that the equity extended only to the income, and not to the *corpus*, of the land in such estates, laid down a fundamental rule as follows: "The equity for a settlement attaches on what the husband takes in right of the wife, and not on what the wife takes in her own right." A legacy to the wife charged on lands devised to a

(c) *Poulter v. Shackel*, 39 Ch. Div. 471, 476 (right to settlement out of a legacy to her is paramount to the

right of the testator's executor to retain the legacy for the husband's debt to the testator).

Even where the wife's estate in land is wholly legal, if the husband or his assignee comes into a court of equity as plaintiff with respect to it, and it is thus brought within the equitable jurisdiction, the wife's equity will attach and be protected.³ *Terms of years*: The equity extends to the wife's leasehold estates, and will be enforced against the husband and his assignees, unless her interest and his title in virtue thereof are wholly legal.⁴ *Personalty—Things in action*: That the equity embraces the wife's equitable personal property, and especially her things in action, unless "reduced to possession" by her husband, and will be enforced against him, and his general assignees, and even against his particular assignees for a valuable consideration, is settled beyond dispute.⁵ *Life estates*: It was formerly supposed that a radical distinction existed between the wife's *absolute* estates, and those which she held only for her life.⁶ The latest English decisions, however, have established the rule that a wife has the same equity to a settlement, as against her husband or his general assignee, out of property in which she has only a life interest, as out of property in which she

third person is subject to her equity: *Duncombe v. Greenacre*, 2 De Gex, F. & J. 509.

³ *Sturgis v. Champneys*, 5 Mylne & C. 97; see *Atkinson v. Beall*, 33 Ga. 153; *Sabel v. Slingluff*, 52 Md. 132.

⁴ *Hanson v. Keating*, 4 Hare, 1; *Clark v. Cook*, 3 De Gex & S. 333; *Hill v. Edmonds*, 5 De Gex & S. 603.

⁵ *Scott v. Spashett*, 3 Macn. & G. 599, 603; *Barrow v. Barrow*, 5 De Gex, M. & G. 782; *Burdon v. Dean*, 2 Ves. 607; *Beresford v. Hobson*, 1 Madd. 362; *Ruffles v. Alston*, L. R. 19 Eq. 539; *In re Mellor's Trusts*, L. R. 6 Ch. Div. 127 (a life policy). As to the right against a particular assignee of the husband for a valuable consideration, see *Earl of Salisbury v. Newton*, 1 Eden, 370; *Macaulay v. Philips*, 4 Ves. 15, 19; *Wright v. Morley*, 11 Ves. 12, 16; *Elliott v. Cordell*, 5 Madd. 149, 156; *Carter v. Taggart*, 1 De Gex, M. & G. 286; 5 De Gex & S. 49; *Tidd v. Lister*, 3 De Gex, M. & G. 857.

⁶ See *Tidd v. Lister*, 3 De Gex, M. & G. 857, 869, 870, and cases cited. It was therefore held that where she is living with and maintained by her husband, although, as she alleges, in a manner very inadequate to her fortune, she has no equity to a settlement out of her life estate: *Vaughan v. Buck*, 13 Sim. 404. This and similar cases which deal with her right as against her husband must be regarded as overruled.

has an absolute interest; and the court will make no distinction between the two cases as regards the amount to be settled.⁷ The following general conclusions may be regarded as settled by a comparison of all the decisions: The wife's equity to a settlement out of her life estate exists against her husband while he has made no disposition of it; and against his general assignees or trustees in bankruptcy or insolvency in whom it has vested; but not against his particular assignee, to whom he has transferred it for a valuable consideration. In the latter case, however, the assignment only operates during coverture.⁸ The wife's right does not extend to her mere reversionary personal estate,⁹ nor to arrears of income accruing before she made a claim.¹⁰

§ 1116. When the Equity does not Arise.—Although the property may be such that, under ordinary circumstances, the equity would attach, still the wife's own acts, conduct, or situation may prevent it from arising, or the husband's mode of dealing with the property may defeat it. The wife's equity to a settlement out of her things in action does not embrace those which the husband has fully “re-

⁷ *Taunton v. Morris*, L. R. 8 Ch. Div. 453; see especially the observations of Malins, V. C., on p. 456, criticising the opinion of Lord Cranworth in *Tidd v. Lister*, *supra*; affirmed on appeal, L. R. 11 Ch. Div. 779, 780, per James, L. J.; 781, per Brett, L. J.; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Koeber v. Sturgis*, 22 Beav. 588; *In re Ford*, 32 Beav. 621.

⁸ Against the husband: See *Taunton v. Morris*, *supra*; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Koeber v. Sturgis*, 22 Beav. 588; *In re Ford*, 32 Beav. 621; *per contra*, *Vaughan v. Buck*, 13 Sim. 404, is virtually overruled. Against the husband's general assignees:^a See *Elliott v. Cordell*, 5 Madd. 149; *Pryor v. Hill*, 4 Brown Ch. 139; *Ex parte Coysegame*, 1 Atk. 192; *Jacobs v. Amyatt*, 1 Madd. 376, note; *Squires v. Ashford*, 23 Beav. 132. Against the husband's particular assignees for a valuable consideration: See *Tidd v. Lister*, 3 De Gex, M. & G. 857, 869, 870; 10 Hare, 140; *Wright v. Morley*, 11 Ves. 12, 22; *Elliott v. Cordell*, 5 Madd. 149; 1 Russ. 71, note; *Stanton v. Hall*, 2 Russ. & M. 175; *In re Duffy's Trust*, 28 Beav. 386.

⁹ *Osborn v. Morgan*, 9 Hare, 432; but see *In re Robinson's Estate*, L. R. 12 Ch. Div. 188; *McCaleb v. Crichfield*, 5 Heisk. 288.

¹⁰ *In re Carr's Trusts*, L. R. 12 Eq. 609.

(a) *Clark v. Hezekiah*, 24 Fed. 663 (against assignee in bankruptcy).

duced into his own possession.”¹ If she alien or assign her property in such a manner as to *legally* bind herself, she is thereby precluded from asserting her equity as to such property.² The equity does not exist where the property is already the subject of or affected by a settlement;³ nor in general, where she is already otherwise well provided for;⁴ nor where the property is governed by a foreign law in which the equity is not recognized.⁵ The wife’s own misconduct or inequitable acts will bar the right which might otherwise exist.⁶ A married woman may waive any

¹ *Purdew v. Jackson*, 1 Russ. 1; *Elliott v. Cordell*, 5 Madd. 149; *Stanton v. Hall*, 2 Russ. & M. 175, 182; *In re Duffy’s Trust*, 28 Beav. 386. What amounts to a reduction into his possession depends largely upon the circumstances of each case. Attempting no discussion of the question, I add a few cases merely as illustrations: *Hornsby v. Lee*, 2 Madd. 16; *Ellison v. Elwin*, 13 Sim. 309; *Le Vasseur v. Scrutton*, 14 Sim. 116; *Michelmores v. Mudge*, 2 Giff. 183; *Aitchison v. Dixon*, L. R. 10 Eq. 589, 597, 598; *Ex parte Norton*, 8 De Gex, M. & G. 258; *Allday v. Fletcher*, 1 De Gex & J. 82; *Widgery v. Tepper*, L. R. 7 Ch. Div. 423; *In re Barber*, L. R. 11 Ch. Div. 442; *Heirs of Holmes v. Adm’r of Holmes*, 28 Vt. 765; *Dunn v. Sargent*, 101 Mass. 336; *Howard v. Bryant*, 9 Gray, 239; *Bartlett v. Van Zandt*, 4 Sand. Ch. 396; *Burr v. Sherwood*, 3 Bradf. 85; *Needles’s Ex’r v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85; *Corley v. Corley*, 22 Ga. 178; *Machem v. Machem*, 28 Ala. 374; *Lockhart v. Cameron*, 29 Ala. 355; *McNeill v. Arnold*, 17 Ark. 154; *Canby v. Mc-Lear*, 13 Bank. Reg. 22 (a legacy).

² It should be remembered, however, that, under the common-law incapacities of a married woman, her joining with her husband in an assignment of her property would ordinarily be nugatory: *Williams v. Cooke*, 9 Jur., N. S., 658; *Tuer v. Turner*, 20 Beav. 560.

³ *Brett v. Forcer*, 3 Atk. 403; *Pond v. Skeen*, 2 Lea, 126.

⁴ *Spicer v. Spicer*, 24 Beav. 365; *Green v. Otte*, 1 Sim. & St. 250; *Giacometti v. Prodgers*, L. R. 14 Eq. 253; 8 Ch. 338.

⁵ A fund of money in England, the parties domiciled in Prussia: *Campbell v. French*, 3 Ves. 321, 323; where the fund was governed by Scotch law; *Anstruther v. Adair*, 2 Mylne & K. 513; *Hitchcock v. Clendinen*, 12 Beav. 534; *In re Todd*, 19 Beav. 582; *McCormick v. Garnett*, 5 De Gex, M. & G. 278.

⁶ Her *adultery* is, in general, a bar: *Carr v. Estabrook*, 4 Ves. 146; unless the circumstances are very special, as her want of any other means of maintenance, or her husband’s adultery: See *In re Lewin’s Trust*, 20 Beav. 378; *Greedy v. Lavender*, 13 Beav. 62; *Ball v. Montgomery*, 2 Ves. 191; see

(a) This section is cited to this effect in *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976.

agreement in respect of her equity, unless a fixed and certain provision for the benefit of her children would be thereby abrogated.⁷ She may, by examination and consent in court, waive her equity, and permit the property to be paid or transferred to her husband, unless she is an infant.⁸

§ 1117. *Amount of the Settlement.*—With respect to the amount of the fund settled upon the wife, there is no settled rule. Each case must depend upon its own circumstances. Sometimes even the whole of the fund in question is allowed to her as against assignees of the husband.¹ One half of

Eedes v. Eedes, 11 Sim. 569. Her *fraud* is also a bar: *In re Lush's Trusts*, L. R. 4 Ch. 591. Her *debts contracted before marriage*, if unpaid, may prevent a settlement: *Barnard v. Ford*, L. R. 4 Ch. 247; *Bonner v. Bonner*, 17 Beav. 86; and see *Knight v. Knight*, L. R. 18 Eq. 487.

⁷ *Fenner v. Taylor*, 2 Russ. & M. 190; *Ex parte Gardner*, 2 Ves. Sr. 671.

⁸ *Dimmoch v. Atkinson*, 3 Brown Ch. 195; *Beaumont v. Carter*, 32 Beav. 586; *Shipway v. Ball*, L. R. 16 Ch. Div. 376; the court will not take the consent of an infant wife: *Stubbs v. Sargon*, 2 Beav. 496; *Abraham v. Newcombe*, 12 Sim. 566; as to recalling a consent given by mistake or otherwise, see *Watson v. Marshall*, 17 Beav. 363; *Penfold v. Mould*, L. R. 4 Eq. 562. If a man marries an infant ward of the court without obtaining the consent of the court, the property belonging to her in custody of the court will not be paid out until a settlement is made on her, even if she should assent to such a payment: *Martin v. Foster*, 7 De Gex, M. & G. 98; *Biddles v. Jackson*, 3 De Gex & J. 544.^b

¹ The circumstances must be special, in order that the whole should be settled; the smallness of the fund, the entire absence of other means of support, the misconduct of the husband, his adultery, desertion, etc., have been important facts in such cases, on which the court has exercised its discretion:^a *Taunton v. Morris*, L. R. 8 Ch. Div. 453; 11 Ch. Div. 779; *Scott v. Spashett*, 3 Macn. & G. 599; *Gilchrist v. Cator*, 1 De Gex & S. 188; *Dunkley v. Dunkley*, 2 De Gex, M. & G. 390; *Barrow v. Barrow*, 5 De Gex, M. & G. 782, 794; *Gent v. Harris*, 10 Hare, 383; *Layton v. Layton*, 1 Smale & G. 179; *Smith v. Smith*, 3 Giff. 121; *In re Kincaid's Trusts*, 1 Drew. 326; *In re Cutler*, 14 Beav. 220; *Marshall v. Fowler*, 16 Beav. 249; *Watson v. Marshall*, 17 Beav. 363; *Francis v. Brooking*, 19 Beav. 347; *Duncombe v. Greenacre*, 29 Beav. 578; *In re Ford*, 32 Beav. 621; *In re Lewin's Trust*, 20 Beav. 378; *Johnson v. Lander*, L. R. 7 Eq. 228; *In re Cordwell's Estate*, L. R. 20 Eq. 644; *White v. Gouldin's Ex'rs*, 27 Gratt. 491.

(b) See, also, § 1310, as to the marriage of infant wards.

(a) See, also, *Boxall v. Boxall*, 27

Ch. Div. 220 (husband having deserted wife, capital as well as income settled); *Fowke v. Draycott*, 29 Ch.

the fund was formerly regarded as the general rule, and that amount is still generally given, in the absence of special circumstances. The later decisions declare that there is no rule; that the amount rests in the sound judicial discretion of the court, which looks at the total situation and environment of both the parties.²

§ 1118. *Form of the Settlement.*—There is no absolute rule applicable to all cases. In the absence of special circumstances, provision is made for the wife for her life, and on her death the fund goes to the issue, if any. On default of issue, the alternate limitation should be to the husband or wife, whichever should be the survivor. The latest decisions have settled the rule that the husband's marital rights should not be interfered with any further than is necessary to protect the wife's equity for herself and her children.¹

§ 1119. *Maintenance.*—The power of courts of equity to compel a provision to be made for the maintenance of a

² *Brown v. Clark*, 3 Ves. 166; *Ex parte Pugh*, 1 Drew. 202, 203; *Carter v. Taggart*, 1 De Gex, M. & G. 286, 289; *Spirett v. Willows*, L. R. 1 Ch. 520; *In re Suggitt's Trusts*, L. R. 3 Ch. 215; *Giacometti v. Prodgers*, L. R. 14 Eq. 253; 8 Ch. 338; *Green v. Otte*, 1 Sim. & St. 250; *In re Erskine's Trusts*, 1 Kay & J. 302; *Coster v. Coster*, 9 Sim. 597; *Napier v. Napier*, 1 Dru. & War. 407; *Ex parte Pugh*, 1 Drew. 202; *In re Grove's Trusts*, 3 Giff. 575; *White v. Gouldin's Ex'rs*, 27 Gratt. 491.

¹ *Carter v. Taggart*, 1 De Gex, M. & G. 286; *Croxton v. May*, L. R. 9 Eq. 404; *Spirett v. Willows*, L. R. 1 Ch. 520; 4 Ch. 407; *In re Suggitt's Trusts*, L. R. 3 Ch. 215; *Walsh v. Wason*, L. R. 8 Ch. 482. Where a settlement under the wife's equity is ordered, provision will always be made for the children of the marriage: *Murray v. Lord Elibank*, 13 Ves. 1; 14 Ves. 496; *Johnson v. Johnson*, 1 Jacob & W. 472, 475;^a and this rule includes the wife's children by any former marriage: *Croxton v. May*, *supra*. But where no settlement had been directed during the lifetime of the wife, her children have no independent right to enforce her equity and to claim a settlement after her death: *Lloyd v. Williams*, 1 Madd. 450; *De la Garde v. Lemprière*, 6 Beav. 344; *Hodgens v. Hodgens*, 4 Clark & F. 323, 372; *Wallace v. Auldjo*, 1 De Gex, J. & S. 643; *McCaleb v. Crichfield*, 5 Heisk. 288.

Div. 996 (rents being small, whole fund given); *Reid v. Reid*, 33 Ch. Div. 220 (on account of husband's misconduct, whole fund settled).

(^a) See, also, *Salter v. Salter*, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

married woman by her husband is somewhat analogous to that of enforcing her equity to a settlement, but still not identical; it is only exercised under special circumstances of her actual need, and then without regard to any equity to a settlement on her part; it is confined to *her* property, and does not extend to the property originally and exclusively belonging to the husband. If a husband has deserted his wife, leaving her unprovided for, a court of equity will order her maintenance out of her fortune, though neither settled nor agreed to be settled, — that is, although the husband's common-law rights over it remain unrestricted.¹ When the husband has deserted his wife, or has by his cruelty compelled her to leave him, the court will order her maintenance out of the interest of her fortune, even though, by the marriage settlement, it was payable to him for his life.² There is no jurisdiction in courts of equity to compel a husband generally to maintain his wife out of his own property or by his own labor. Such power, if it existed at all, belonged to the ecclesiastical courts, or was regulated by statute.

§ 1120. *Alimony*.— The subject of maintenance naturally suggests that of alimony, although the two have really nothing in common, except their being granted for the benefit of a wife. In its proper and only true sense, “ alimony ” is not a separate estate, nor is it a provision for maintenance generally, as described in the preceding paragraph. It is an incident of divorce; it is merely a provision for maintenance from day to day, decreed by a competent court to a wife legally separated from her husband, either by

¹ *Watkins v. Watkins*, 2 Atk. 96, 98; *Cecil v. Juxon*, 1 Atk. 278; *Guy v. Pearkes*, 18 Ves. 196; *Coster v. Coster*, 1 Keen, 199; *Newsome v. Bowyer*, 3 P. Wms. 37; *Nicholls v. Danvers*, 2 Vern. 671; *Dumond v. Magee*, 4 Johns. Ch. 318, 322.

² *Ibid.*; *Oxenden v. Oxenden*, 2 Vern. 493; *Williams v. Callow*, 2 Vern. 752; *Eedes v. Eedes*, 11 Sim. 569; *Peters v. Grote*, 7 Sim. 238. If the wife refuses to live with her husband, who is willing to receive her, or if she elopes from him, she is not entitled to any such maintenance: *Bullock v. Menzies*, 4 Ves. 798; *Watkins v. Watkins*, 2 Atk. 96.

a divorce *a mensa et thoro* or *ex vinculis*. Under the judicial system originally prevailing in England, it was granted and regulated solely by the ecclesiastical courts, which had exclusive jurisdiction of divorce.¹ It is very clear that the original jurisdiction of equity did not include the power to decree alimony as an incident of divorce; nor is there any jurisdiction to grant alimony to a wife as a provision to be made by her husband for her maintenance, unconnected with proceedings for a divorce.² The American courts have generally conformed to this view, and have denied the existence of any jurisdiction to award alimony as a provision for the maintenance of a wife by her husband.³ In several states, however, such a power has been asserted and exercised as belonging to the general jurisdiction of equity.^{4 a}

¹ In many of the states, jurisdiction over divorce has been given by statute to the courts of equity, and the suit for a divorce is treated as a suit in equity. The jurisdiction to grant alimony as an incident of divorce may, perhaps, have been sometimes confounded with the general jurisdiction of equity. This may explain some American decisions concerning alimony cited in a subsequent note.

² *Ball v. Montgomery*, 2 Ves. 191, 195; *Vandergucht v. De Blaquiére*, 8 Sim. 315; 5 Mylne & C. 229. The only jurisdiction which the court of chancery exercises is to issue a writ of *ne exeat*, where a husband who has been ordered by the ecclesiastical court to pay alimony is about to leave the country.

³ *Trotter v. Trotter*, 77 Ill. 510; *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 362; *Pomeroy v. Wells*, 8 Paige, 406; *Rees v. Waters*, 9 Watts, 90; *Yule v. Yule*, 10 N. J. Eq. 138, 143 (but see *Paterson v. Paterson*, 5 N. J. Eq. 389); *Peltier v. Peltier*, Harr. (Mich.) 19, 29; *McGee v. McGee*, 10 Ga. 477, 482; *Fischli v. Fischli*, 1 Blackf. 360; 12 Am. Dec. 251; *Doyle v. Doyle*, 26 Mo. 545, 549; *Shannon v. Shannon*, 2 Gray, 285; *Sheafe v. Sheafe*, 24 N. H. 564, 567; *Chapman v. Chapman*, 13 Ind. 396, 397; *Lawson v. Shotwell*, 27 Miss. 630, 633; *Cory v. Cory*, 11 N. J. Eq. 400; *Helms v. Franciscus*, 2 Bland, 544, 568; 20 Am. Dec. 402; *Wallingsford v. Wallingsford*, 6 Har. & J. 485.

⁴ *Garland v. Garland*, 50 Miss. 694; *Almond v. Almond*, 4 Rand. 662; 15 Am. Dec. 781; *Purcell v. Purcell*, 4 Hen. & M. 507; *Prather v. Prather*, 4

(a) The text is cited in *Hinds v. Hinds*, 80 Ala. 225, following earlier Alabama cases, but admitting that the weight of authority is *contra*. See, also, *Pearce v. Pearce*, 132 Ala. 221,

31 South. 85, 90 Am. St. Rep. 901; *Dye v. Dye*, 9 Colo. App. 320, 48 Pac. 313; *In re Popejoy*, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. Rep. 222; *Tolman v. Tolman*, 1 App. D. C. 299;

SECTION III.

THE CONTRACTS OF MARRIED WOMEN.

ANALYSIS.

- § 1121. The general doctrine.
- § 1122. *Rationale* of the doctrine.
- § 1123. Extent of the liability.
- § 1124. For what contracts her separate estate is liable.
- § 1125. The same; the American doctrine.
- § 1126. To what contracts the American doctrine applies.

§ 1121. The General Doctrine.—At the common law the contracts of married women are absolutely void. Equity has never attempted to invade this fundamental policy of

Desaus. Eq. 33; Rhame v. Rhame, 1 McCord's Eq. 197; 16 Am. Dec. 597; Glover v. Glover, 16 Ala. 440, 446; Butler v. Butler, 4 Litt. 201; Logan v. Logan, 2 B. Mon. 142; Graves v. Graves, 36 Iowa, 310; 14 Am. Rep. 525; Galland v. Galland, 38 Cal. 265; Sanderson and Sprague, JJ., dissenting. This conclusion seems to have been reached by a mistaken view as to the extent of the power to grant maintenance described in the preceding paragraph, by regarding it as including the husband's property as well as the wife's. In fact, these decisions seem to grant "maintenances" under the improper name of "alimony."

Finn v. Finn, 62 Iowa 482, 17 N. W. 739; Farber v. Farber, 64 Iowa 362, 20 N. W. 472; Platner v. Platner, 66 Iowa 378, 23 N. W. 764; Verner v. Verner, 62 Miss. 260; McFarland v. McFarland, 64 Miss. 449, 1 South. 508; Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 33 Am. St. Rep. 557, 16 L. R. A. 94 (citing the text); Earle v. Earle, 27 Nebr. 277, 43 N. W. 118; Cochran v. Cochran, 42 Nebr. 612, 60 N. W. 942; Bueter v. Bueter, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 562; Milliron v. Milliron, 9 S. Dak. 181, 68 N. W. 286, 62 Am. St. Rep. 863. A number of the states reach the same result by reason of statute. See monographic note, 77 Am. St. Rep. 228ff. In Tolman

v. Tolman, 1 App. D. C. 299, the reason for the rule was stated as follows: "It being the duty of the husband to support his wife, his failure or refusal to do so without justification is a wrong at the common law, but inasmuch as the common law furnishes no remedy, because the wife cannot sue the husband, courts of equity will and do supply the remedy." In analogy with the above cases it is held that the statutory duty imposed upon the wife to support the husband under certain circumstances may be enforced in equity, since there is no adequate legal remedy: Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175.

the law; it has never clothed married women with the capacity to bind themselves personally by contract. Their contracts, as recognized by equity, are only contracts *sub modo*; the indebtedness which they create is not a legal indebtedness, but only an equitable liability, enforced in a peculiar manner by courts of equity. After it was settled that a married woman might hold property as a separate estate to her own separate use, free from the claims and interest of her husband, for some time the common-law incapacity of contracting was still applied to her. The glaring injustice of this condition soon became apparent. To permit a wife to hold separate property to her own use, to enjoy its benefits, to deal with it in many respects as though she were a *feme sole*, and thus to be clothed with many *indicia* of complete ownership, but at the same time to withhold from her creditors all claim against it or against her, was in the highest degree inequitable. The wife might, by her own act, directly dispose of her separate estate, and for the same reasons she ought to be able to render it liable for her obligations. Influenced by these considerations, the courts of equity gradually, by progressive steps, introduced and developed the doctrine, that although a married woman can create no *personal* liability against herself, her separate estate may be liable for her contracts made with reference to it. Her contracts thus become equitable obligations, and may be enforced in equity against her separate estate. No other doctrine of equity jurisprudence better illustrates its wonderful freedom and power in modifying legal dogmas. Without attempting to trace the progress of the general doctrine through its whole course of development as it is now settled by the English courts, it is correctly formulated as follows: "If a married woman, having separate property, enters into an engagement, which if she was a *feme sole* would constitute a personal obligation against her, and in entering into such engagement she purports to contract, not for her husband [i. e., not on behalf of her husband as his agent], but for

herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable.”^{1 a}

§ 1122. *Rationale of the Doctrine.*^a—It was once supposed that the doctrine was properly explained by regarding the wife’s contract as in reality the execution of her power of appointment, so that the contract, being an appointment, created an equitable charge or lien in the nature of a disposition upon her separate estate. This theory has been abandoned as utterly untenable.¹ The true *rationale* of

§ 1121, ¹ *Mrs. Matthewman’s Case*, L. R. 3 Eq. 781, 787, per Kindersley, V. C.; *Johnson v. Gallagher*, 3 De Gex, F. & J. 494, 509–520, per Turner, L. J. See *Hulme v. Tenant*, 1 Brown Ch. 16; 1 Lead. Cas. Eq. 679, 692–700, 703–705, 735–765, and the elaborate collection of English and American authorities in the editors’ notes. It should be remarked that the doctrine is here stated in its most general form. *How* the wife must purport to contract on the credit of her estate, and *how* she must show such an intention, I do not now inquire. These requisites, however, must exist, in order that her separate estate shall be liable. Upon this point all the cases, English and American, are agreed. Whenever her separate estate is liable for her bond, note, or other written engagement, although the instrument, *in terms*, is her own personal obligation, and makes no reference to her separate property, this is so held because the writing conclusively implies the intention, and purports to be made on the credit of her separate estate. The marked difference between the conclusions reached by the English cases and a large class of the American decisions does not arise from any dispute as to the general doctrine, which they all alike adopt; it relates solely to the proper mode of applying this doctrine; it turns only upon the question whether the intent to deal upon the credit of her separate property *must expressly appear* in the very terms of the contract or from its essential nature, or whether it may be *implied* from the mere *form* of the contract as being under seal or in writing, or be inferred from the circumstances of the case.

§ 1122, ¹ *Owens v. Dickenson*, Craig & P. 48, 53, 54, per Lord Cottenham; *Murray v. Barlee*, 3 Mylne & K. 209, 223. The true *rationale* of the doctrine has been admirably explained by eminent English judges in several recent cases, and I add a few extracts from their opinions. In the very recent and most carefully considered case of *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, Brett, L. J., said (p. 461): “At common law, for reasons of high social

§ 1121, (a) This portion of the text is quoted in *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235.

§ 1122, (a) This section is cited in *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529.

the doctrine is, that the liability of a wife's separate property for her engagements is a mere equitable incident of her separate estate, which is itself a creature of equity.^b In the language of Lord Justice James: "In equity, the liability is to have her separate estate taken from her for the benefit of a person with whom she has contracted on the faith of it. It is a special equitable remedy, arising out of a special equitable right." In the pointed language of

policy, a married woman is not allowed to make any contract binding upon herself or upon any property of hers; in fact, the common law did not recognize that she had any property, or could do any act binding herself. It seems to me that it is not true to say that equity has recognized or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever said that what is now called a contract is a binding contract upon a married woman. What equity seems to me to have done is this: it has recognized a settlement as putting a married woman into the position of having what is called a separate estate, *and has attached certain liabilities, not to her, but to that estate*. The decisions appear to me to come to this, that certain *promises* (I use the word 'promises' in order to show that, in my opinion, they are not contracts) made by a married woman, and acted upon by the persons to whom they are made on the faith of the fact, known to them, of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered." In the same case, James, L. J., said (p. 460): "It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, she has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of *that* separate estate, but in respect of *any* separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge *that* estate and to contract debts payable out of it, therefore she is released altogether, in the contemplation of equity, from the disability of coverture, and is enabled in a court of equity to contract debts to be paid and satisfied out of any estate settled to her separate use, which she may afterwards acquire. In my opinion, there is no authority for that contention." In *Shattock v. Shattock*, L. R. 2 Eq. 182, Lord Romilly, M. R., stated the general doctrine and its *rationale*, as it seems to me, in a most admirable manner, accurately giving not only its grounds, but its exact extent and limits (pp. 188, 189): "The principle of the courts of equity relating to this subject, in my opinion, is, that, as regards her separate estate, a married woman is a *feme sole*, and can act as such, but only so

(b) This portion of the text is quoted in *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513; *Groves v. Osburn*, (Oreg.) 79 Pac. 500.

Lord Justice Cotton: "It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a *debtor*; and liable to satisfy the engagement." The same theory is more fully expressed in the words of Lord Cottenham: "The view taken of the matter by Lord Thurlow in *Hulme v. Tenant* is correct. According to that view, the separate property of a married woman being a

far as is consistent with the other principle, namely, that a married woman cannot enter into a contract. These principles are reconciled in this way: Equity attaches to the separate estate of the married woman a quality incidental to that property, viz., a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit; but the power of disposition is confined to that property, and the property must be the subject-matter that she deals with; and therefore, if she makes a contract, the contract is nothing, unless it has reference, directly or indirectly, to that property. This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note, and promise to pay given by a married woman has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle, that where a married woman has separate estate, she may bind herself by contract exactly as if a *feme sole*; or in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole*, and makes them equally able to contract debts." In *Ex parte Jones*, L. R. 12 Ch. Div. 484, the nature of the liability was very clearly explained by the court of appeal. The question for decision was, whether a married woman, having a separate estate, could be proceeded against as a bankrupt, and the answer turned upon the further question whether she was a "debtor." James, L. J., said (p. 488): "In equity, the liability was to have her separate estate taken from her for the benefit of a person with whom she had contracted on the faith of it. That was a special equitable remedy arising out of a special equitable right. But the married woman who contracts in that way is not a debtor, in any sense of the word." Brett, L. J., said (p. 489): "The procedure of courts of equity for making the separate estate of a married woman available to satisfy her engagements did not enable any one to sue a married woman as upon and for a debt in a court of equity, and certainly not in a court of common law. It was a peculiar remedy *against the separate property* of the married woman, but it was not a remedy against her as upon and for a debt." Cotton, L. J., said (p. 490): "A debtor must be a person who can be sued personally for a debt, and who is liable to all the consequences of a personal judgment against him. But that is not at all the position of a married

creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied.^{2c}

woman, even though she has separate estate; proceedings cannot be taken against her personally to enforce payment of a debt. Formerly, courts of equity compelled the satisfaction of her general engagements out of her separate property, and now that is done by all the divisions of the high court. But it is only a proceeding to compel the satisfaction out of her separate property of *engagements made with reference to and upon the credit of it*. As Lord Justice James said in *London Chartered Bank of Australia v. Lempière*, L. R. 4 P. C. 597: 'The married woman intended to contract so as to make herself—that is to say, her separate property—the debtor.' It is not the woman, as a woman, who becomes a debtor, but *her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement*." In the great and leading case of *Johnson v. Gallagher*, 3 De Gex, F. & J. 494, Turner, L. J., after an elaborate examination of authorities, speaking of the effect of the wife's contracts upon her separate property, said (p. 519): "The doctrine of appointment seems to me, however, to be exploded; and it is scarcely less clear that the transactions do not create any lien or charge on the separate estate. It may well be asked, then how do they operate? I think the answer to this question is to be found in *Hulme v. Tenant*, 1 Brown Ch. 16. When a man contracts debt, both his person and his property are, by law, liable to the payment of it. A court of equity, having created the separate estate, has enabled married women to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This court, therefore, as I conceive, gives execution against the property just as a court of law gives execution against the property of other debtors." See also *Hooton v. Ransom*, 6 Mo. App. 19.

² *Owens v. Dickenson*, Craig & P. 48, 54, per Lord Cottenham. The mistaken notion that the wife's contract creates an equitable *lien* or distinct charge upon her separate property is found in some of the American decisions, but is wholly rejected by others. This notion is utterly inconsistent with the well-settled rules concerning the extent of the liability and its enforcement. If there were a lien, it would follow the property into the hands of purchasers with notice from the wife.

(c) This statement from *Owens v. Groves v. Osburn*, (Oreg.) 79 Pac. Dickenson is quoted in *Eckerly v. Mc- 500.*
Ghee, 85 Tenn. 661, 4 S. W. 386;

§ 1123. **Extent of the Liability.**^a— The restraint upon anticipation, when inserted in the instrument creating the separate estate, applies to the wife's contracts as well as to her alienations. The separate property, therefore, which she holds subject to the restraint upon alienation or anticipation is not liable for any contracts or engagements which she can make.^{1 b} Furthermore, it is now settled that her contracts can only be enforced against the separate estate, free from such restraint, which she held at the time of entering into the engagement, or so much thereof as remains in her ownership at the time when the judgment is rendered, and not against separate estate which she acquired after the time of making the engagement.^{2 c} It is also now settled, contrary to the view which formerly prevailed, that when the wife has a life interest only to her own separate use, with power of appointment over the *corpus*, either by deed or by will, such separate property is liable for her contracts, as well as when her interest is

¹ *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, 459, 462, 463; overruling L. R. 14 Ch. Div. 837; *In re Sykes's Trusts*, 2 Johns. & H. 415; *Roberts v. Watkins*, 46 L. J. Q. B. 552. By parity of reasoning, in those states where the separate estate itself is regarded as a restraint upon alienation, and the wife can only dispose of it when and in the manner affirmatively permitted by the instrument creating it, it should also follow that her separate property is only liable for her contracts when and to the extent as affirmatively provided for in such instrument.

² *Pike v. Fitzgibbon*, L. R. 17 Ch. Div. 454, 460, 462, 465; *In re Sykes's Trusts*, 2 Johns. & H. 415; *Roberts v. Watkins*, 46 L. J. Q. B. 552. This view has not been adopted by some of the American courts, at least in regard to the liability of the wife's *legal* separate estate under the statutes.

(a) This section is cited in *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *Price v. Planters' Nat. Bank*, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; *Kocher v. Cornell*, 59 Nebr. 315, 80 N. W. 911.

(b) This portion of the text is quoted in *Eckerly v. McGhee*, 85 Tenn. 661, 4 S. W. 386.

(c) So far as regards after-acquired separate estate, the law is changed in England by the express provision of the Married Women's Property Act, 1882, s. 1, sub-s. 4, and subsequent amendments: *Hood-Barrs v. Cathcart*, [1894] 2 Q. B. 562. See in support of the text *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128.

absolute.^{3 d} With regard to the remedy, of course no personal decree can be made against a married woman.⁴ So far as the separate estate is personalty, its *corpus* may be reached by the decree, and applied in discharge of the wife's engagement; so far as it is land, the remedy was confined by the earlier cases to the rents and profits, unless the contract enforced be a specialty; and this is the ordinary form of the decree in England.⁵

§ 1124. For What Contracts her Separate Estate is Liable.—Although the fundamental doctrine of liability is that the contract purported or was intended to be made on the credit of the separate estate, yet this intention need not be expressed in the terms of the contract itself. The rule is firmly settled, and may be regarded as the peculiar feature of the English law on this subject, which distinguishes it from that prevailing in many of our states, that the intent to contract on the credit of the separate estate is conclusively inferred from the very form and nature of many kinds of engagements, including at least all those in the form of written instruments.¹ It is thus settled be-

³ London Chartered Bank of Australia v. Lemprière, L. R. 4 P. C. 572; Godfrey v. Harben, L. R. 13 Ch. Div. 216; Hughes v. Wells, 9 Hare, 749, 772; Mayd v. Field, L. R. 3 Ch. Div. 587.

⁴ Francis v. Wigzell, 1 Madd. 258, 264.

⁵ Hulme v. Tenant, 1 Brown Ch. 16, per Lord Thurlow; Francis v. Wigzell, 1 Madd. 258; Aylett v. Ashton, 1 Mylne & C. 105, 112; Radford v. Carwile, 13 W. Va. 572; Frank v. Lilienfeld, 33 Gratt. 377. Since the modern decisions that the wife may alien her separate real estate by an informal instrument, there seems to be no reason why the *corpus* of the land held to her separate use should not be liable to be taken and sold under a decree in satisfaction of all her engagements, whenever necessary. The early English rule, as given in the text, is followed in some of the American states, especially in those which treat the wife's general power of alienation as only limited and partial. In those states where the wife's contracts are enforced in equity against her legal statutory separate property, land which she thus owns in fee is generally liable to be sold under the decree, and the proceeds applied in satisfaction of the demand.

¹ In other words, although the wife's contract be in the ordinary form, without mentioning or referring to her separate property, it is enforceable against such property.

yond dispute, by the English decisions, that the wife's separate estate is liable for her contracts under seal;² for her bills of exchange and promissory notes;³ and for all her written agreements.⁴ Finally, after some fluctuation in the decisions, the liability is extended to her ordinary general verbal engagements and implied promises, if it appear that they were made with reference to and on the faith and credit of her separate property; and whether so made, will be determined by a consideration of all the surrounding circumstances.⁵

§ 1125. The American Doctrine.— The general doctrine established by the English court of chancery, that the wife's separate estate is liable for her engagements which purport to be with reference to it, and are intended to be made upon its faith and credit, has been accepted in all the American states where the system of equity jurisprudence prevails. The divergence in many of the states from the conclusions reached by the English courts relates, not to this general doctrine, but to its applications; it is wholly confined to the

² And this, although her husband or a stranger may have joined with her in the instrument: *Hulme v. Tenant*, 1 Brown Ch. 16; *Heatley v. Thomas*, 15 Ves. 596; *Pike v. Fitzgibbon*, L. R. 14 Ch. Div. 837; 17 Ch. Div. 454 (her covenant).

³ *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Lord Kirkwall*, 3 Madd. 387; *Field v. Sowle*, 4 Russ. 112; *Vandergucht v. De Blaquiére*, 5 Mylne & C. 229; *Owen v. Homan*, 4 H. L. Cas. 997; *McHenry v. Davies*, L. R. 10 Eq. 88; *Davies v. Jenkins*, L. R. 6 Ch. Div. 728 (note by herself and husband for money loaned him).

⁴ *Master v. Fuller*, 4 Brown Ch. 19; 1 Ves. 513; *Owens v. Dickenson*, Craig & P. 48; *Murray v. Barlee*, 3 Mylne & K. 209; *Owen v. Homan*, 4 H. L. Cas. 997; *Picard v. Hine*, L. R. 5 Ch. 274; *Morrell v. Cowan*, L. R. 6 Ch. Div. 166 (her guaranty for her husband).

⁵ This conclusion is sustained by the most recent decisions. If, at the time when her engagement was made, there was no other means from which payment could reasonably be expected but her separate estate, then the intent to contract on its credit will be presumed: *Johnson v. Gallagher*, 3 De Gex, F. & J. 494; *Mrs. Matthewman's Case*, L. R. 3 Eq. 781; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Butler v. Cumpston*, L. R. 7 Eq. 16; *Wainford v. Heyl*, L. R. 20 Eq. 321, 324; *Picard v. Hine*, L. R. 5 Ch. 274, 277; *Mayd v. Field*, L. R. 3 Ch. Div. 587; *Hodgson v. Williamson*, L. R. 15 Ch. Div. 87 (money loaned to her for her support when living apart from her husband).

question what kinds and forms of contracts *do* thus purport to be entered into with reference to the separate estate, and *are* intended to be made on its faith and credit? As described in a preceding paragraph, the equitable jurisdiction in enforcing the contracts of married women has been greatly enlarged by modern legislation in this country. Wherever the statutes have declared that the wife's property, real and personal, belonging to her in her own right, and by a legal title, shall constitute her legal or statutory separate estate, but have not further provided that her contracts shall create personal liabilities against her to be enforced by ordinary legal actions and judgments, it is settled that her contracts shall be enforced in equity against this *legal* separate estate in the same manner and subject to the same rules as against an equitable separate estate.¹

§ 1126. To What Contracts the American Doctrine Applies.^a — It should be observed that, under the New York type of legislation concerning express trusts in land, where the express trust which is permitted for the benefit of a wife is created, the beneficiary takes no estate, has no power of disposition, and, as a consequence, cannot charge her interest by contract, however express.¹ With regard to the applications of the general doctrine there is a great variety of opinion and wide divergence of decision among the American cases.² These cases, however, when classified

§ 1125, ¹This was undoubtedly a remarkable extension of the equitable jurisdiction, but it was necessary to prevent a failure of justice. It is a most instructive example of the mode in which established principles and doctrines may be applied to entirely new conditions of fact: *Colvin v. Currier*, 22 Barb. 371; *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; 22 N. Y. 450; 78 Am. Dec. 216; 68 N. Y. 329; *Ogden v. Guice*, 56 Miss. 330; *Levi v. Earl*, 30 Ohio St. 147; and see collection of cases in the last note under § 1126, *post*.

§ 1126, ¹See *ante* vol. 2, §§ 1003–1005; *Noyes v. Blakeman*, 6 N. Y. 567; 3 Sand. 531; *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113.

§ 1126, ²The decisions are so very numerous, and the conclusions which they reach are so various, that I shall make no attempt to analyze them and to formulate distinct rules for each state or class of states. Indeed, it would be

(a) This section is cited in *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488.

according to broad lines of division, will be found to fall under three general types. *First type*: This includes a comparatively few states, in which the wife has no power of disposition over her separate estate, except such as is expressly or by necessity given in the instrument creating it. Her separate estate is liable for those contracts which are made for its benefit, and for those which benefit the wife, if expressly and in terms charged upon it or made upon its credit, but is not, in general, liable for her contracts of suretyship made entirely for the benefit of another.³ In order, however, that any contract may be thus

impossible to arrange the states in any general classes. I have, therefore, collected the most important cases in each state, and have placed them in order in a subsequent note.

³ The view which belongs to this type is clearly expressed in *Willard v. Eastham*, 15 Gray, 328, 77 Am. Dec. 366, as follows: "The rule adopted by most of the courts in the United States has been materially different from that established in England; and the general current of American authorities supports the principle that a married woman has no power in relation to her separate estate but such as is expressly conferred in the creation of the estate; and that her separate estate is not chargeable with her debts or obligations, unless where a provision for that purpose is contained in the instrument creating the separate estate." I would remark that the foregoing statement that this narrow view is adopted by most of the courts in the United States, and is supported by the general current of the American authorities, is clearly and entirely erroneous as a matter of fact. On the contrary, as shown in previous paragraphs, the great majority of the state courts have adopted the English doctrine that a wife has a power of disposition over her separate property, unless such power is taken away or curtailed by the instrument creating it. The Massachusetts court is, in reality, uttering the sentiments of a comparatively very small minority of the state tribunals. The opinion further proceeds: "We think, upon mature and full consideration, that the whole doctrine of the liability of her separate estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications which are too subtle and refined. Our conclusion is, that when, by the contract, the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it." The general tenor of this passage is one example, among very many, of the tendency often exhibited by the Massachusetts court to limit, and even

enforceable, it must be within the express or necessarily implied permission of the instrument creating the estate. *Second type:* In the states belonging to this type, with perhaps a very few exceptions, the English doctrine concerning the wife's power of alienation is substantially adopted. The peculiar feature which distinguishes the type is, that the intent to contract upon the faith and credit of the separate estate, and thus to render it liable, must affirmatively and expressly appear, and will not be implied or presumed from any mere external form of the engagement. The separate property is liable for all contracts of the wife made directly for *its* benefit, for all her contracts made for her own benefit, if expressly and in terms purporting to be on its faith and credit, and for her contracts of suretyship for the benefit of another, if the intention to charge the separate property thereby is clearly and unequivocally expressed.⁴ *Third type:* In the states of this type the conclusions reached by the English courts have been more closely followed. Its distinguishing feature is, that the intent to deal on the credit of the separate estate need not be expressed, but will be inferred from the nature or form of the contract. The wife's separate estate is liable for all

abrogate, well-settled doctrines of equity, sometimes even to emasculate equitable principles which are elementary and fundamental. The Massachusetts decisions would often, therefore, be very misleading in other states where the equity jurisprudence prevails in its entirety, and the great learning and high ability of the court *may* sometimes render its decisions only the more dangerous as guides and precedents. See also *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 710; *Tracy v. Keith*, 11 Allen, 214; *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86; *Adams v. Mackey*, 6 Rich. Eq. 75; *James v. Mayrant*, 4 Desaus. Eq. 591; 6 Am. Dec. 630; *Cater v. Eveleigh*, 4 Desaus. Eq. 19; 6 Am. Dec. 596; *Magwood v. Johnston*, 1 Hill Eq. 228; for other examples of this type, see the decisions in Mississippi and Tennessee, cited *post*, in the last note under this paragraph.

⁴ If the contract is in writing, and is not directly for the benefit of the separate estate, the intention to make it liable should appear in the writing itself: *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; 22 N. Y. 450, 456; 78 Am. Dec. 216; 68 N. Y. 329; for further illustrations of this type, see the decisions in Indiana, Kentucky, Maryland, New Jersey, Rhode Island, and Vermont, cited in the last foot-note under this paragraph.

her contracts entered into for its own benefit, and for all her written contracts made for her own benefit, such as her bonds, notes, bills of exchange, and the like, even though no intention to bind it is expressed in their very terms. In many, and probably most, of the states belonging to this class, the wife's contracts of suretyship must be expressly charged upon her separate property, in order to bind it, and her general verbal engagements must likewise appear in some affirmative manner to be made on its faith and credit; with regard to such contracts no intent is generally presumed.⁵ As it would be impossible to determine with accuracy the rules on this subject which prevail in any particular state without examining the decisions of its own courts, I have collected the more recent and important cases, and have arranged them in the foot-note under their respective states.⁶ It has been uniformly held that the

⁵ As illustrations of this type, see the decisions in Alabama, Missouri, Ohio, Virginia, and West Virginia, cited in the next following note.

⁶ The reader will be able from an examination of these cases to ascertain the exact position occupied by the courts of each state. I have not attempted to distinguish between decisions relating to a married woman's equitable separate property, and those relating to her legal statutory separate property, since both are governed by the same rules. The latter class have become much the more numerous. In several of the states I have cited decisions rendered prior to their recent statutes which make her contracts personally binding upon the wife, and enforceable by ordinary legal actions and judgments.

Alabama:^b *Sprague v. Tyson*, 44 Ala. 338 (her bill of exchange); *Brame v. McGee*, 46 Ala. 170 (her note); *Jones v. Reese*, 65 Ala. 134 (her mortgage to secure a debt of her husband); *Miller v. Voss*, 62 Ala. 122; *Sprague v. Shields*, 61 Ala. 428; *Lee v. Tannenbaum*, 62 Ala. 501; *Shulman v. Fitzpatrick*, 62 Ala. 571; *Short v. Battle*, 52 Ala. 456; *Williams v. Baldrige*, 66 Ala. 338; *Paulk v. Wolfe*, 34 Ala. 541; *Fry v. Hammer*, 50 Ala. 52; *Riley v. Pierce*, 50 Ala. 93; *Booker v. Booker's Adm'r*, 32 Ala. 473; *Drake v. Glover*, 30 Ala. 382; *Gunter v. Williams*, 40 Ala. 561, 572; *Smyth v. Oliver*, 31 Ala. 39; *Canty v. Sanderford*, 37 Ala. 91; *Rogers v. Boyd*, 33 Ala. 175; *Pickens v.*

(b) *Alabama*.—By statute of Feb. 28, 1887, Code 1886, secs. 2341–2351, she may contract with reference to her separate estate only in writing, with the assent or concurrence of her husband expressed in writing: *Rooney*

v. Michael, 84 Ala. 585, 4 South. 421; *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 South. 578; *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. Rep. 117, 21 South. 320; *Equitable B. & L. Ass'n v. King*, (Fla.) 37 South. 181.

wife's equitable separate estate, and the equitable rules which govern it, do not come within the purview of the

Oliver, 29 Ala. 528; Ozley v. Ikelheimer, 26 Ala. 332; Bradford v. Greenway, 17 Ala. 797; 52 Am. Dec. 203.

Arkansas:^c Collins v. Underwood, 33 Ark. 265 (must be for her own benefit, or for that of the separate estate); Stillwell v. Adams, 29 Ark. 346; Collins v. Wassell, 34 Ark. 17; Roberts v. Wilcoxon, 36 Ark. 355; Ward v. Estate of Ward, 36 Ark. 586; Scott v. Ward, 35 Ark. 480; Dyer v. Arnold, 37 Ark. 17; Henry v. Blackburn, 32 Ark. 445.

California (prior to present statute): Drais v. Hogan, 50 Cal. 121, 128; Friedberg v. Parker, 50 Cal. 103; Terry v. Hammonds, 47 Cal. 32; Miller v. Newton, 23 Cal. 554; Maclay v. Love, 25 Cal. 367. For cases under present statute, see *post*.

Connecticut:^d Donovan's Appeal, 41 Conn. 551 (money borrowed and used by her for the benefit of her separate property, on her verbal promise to repay); Hitchcock v. Kiely, 41 Conn. 611; Gore v. Carl, 47 Conn. 291; Whiting v. Beckwith, 31 Conn. 596; Jennings v. Davis, 31 Conn. 134; Jackson v. Hubbard, 36 Conn. 10; Imlay v. Huntington, 20 Conn. 146, 175.

Delaware:^e State v. Gorman, 4 Houst. 624; Ross v. Singleton, 1 Del. Ch. 149; 12 Am. Dec. 86 (a contract made by a wife through fraud, enforced against her after she became a widow).

Florida:^f Alston v. Rowles, 13 Fla. 117; Tison v. Mattair, 8 Fla. 107; Lignoski v. Bruce, 8 Fla. 269; Sanderson v. Jones, 6 Fla. 430; 63 Am. Dec.

(c) *Arkansas.*—Bundy v. Cocke, 128 U. S. 188, 9 Sup. Ct. 242, 32 L. ed. 396.

(d) *Connecticut.*—The statutes permit suits against a married woman, jointly with her husband, upon any contract entered into jointly with him for the benefit of her estate or of their joint estate, or made by her, upon her personal credit, for the benefit of herself, her family, or her separate or joint estate; and, in such actions, executions may be levied on her property as if she were unmarried: Gen. St. §§ 984, 985, 987. See Shelton v. Hadlock, 62 Conn. 143, 25 Atl. 483; Belden v. Sedgwick, 68 Conn. 560, 37 Atl. 417.

(e) *Delaware.*—Kohn v. Collison, 1 Marv. (Del.) 109, 27 Atl. 834 (a married woman can make any and all manner of contracts necessary to be made with respect to her own property. "In no case has the wife been

permitted to contract generally in respect to matters other than her own property unless expressly authorized so to act as a *feme sole*." She is not liable upon an indorsement of her husband's promissory note, which is used for the security or payment of his debts).

(f) *Florida.*—Thrasher v. Doig, 18 Fla. 809 (intent to charge separate estate may be shown by parol); Staley v. Hamilton, 19 Fla. 275 ("in the case of the separate statutory property, especially under our statutes regulating alienation, the equitable rule cannot prevail, and it cannot be inferred that a married woman intends to alienate her property, except by the prescribed method, when the contract is not for the benefit of herself or her separate property, for the law will not permit her to do indirectly what it forbids her to do directly"); Schnabel v. Betts, 23 Fla.

recent legislation concerning married women's property, and are not affected by its provisions. These modern

217; *Maiben v. Bobe*, 6 Fla. 381; *Lewis v. Yale*, 4 Fla. 418; *Adm'r of Smith v. Poythress*, 2 Fla. 92; 48 Am. Dec. 176.

Georgia:² *Dallas v. Heard*, 32 Ga. 604; *Robert v. West*, 15 Ga. 123; *Cherokee Lodge v. White*, 63 Ga. 742; *Kent v. Plumb*, 57 Ga. 207; *Humphrey v. Copeland*, 54 Ga. 543; *Clark v. Valentino*, 41 Ga. 143; *Huff v. Wright*, 39 Ga. 41.

h

Illinois:¹ *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 22 (her contracts concerning her separate real estate, void at law, may be enforced in equity); *Thompson v. Scott*, 1 Ill. App. 641 (her own mortgage on land is void at law, but the lien may be enforced in equity); *McCullough v. Ford*, 96 Ill. 439; *Robinson v. Brems*, 90 Ill. 351; *Emmert v. Hays*, 89 Ill. 11; *Elder v. Jones*, 85 Ill. 384; *Whitford v. Daggett*, 84 Ill. 144; *Yazel v. Palmer*, 81 Ill. 82; *Husband v. Epling*, 81 Ill. 172; 25 Am. Rep. 273; *Harrer v. Wallner*, 80 Ill. 197; *Doyle v. Kelly*, 75 Ill. 574; *McDavid v. Adams*, 77 Ill. 155; *Kase v. Painter*, 77 Ill. 543; *Indianapolis etc. R'y v. McLaughlin*, 77 Ill. 275; *Bauman v. Street*, 76 Ill. 526; *Patten v. Patten*, 75 Ill. 446; *Williams v. Hugunin*, 69 Ill. 214; 18 Am. Rep. 607; *Haight v. McVegh*, 69 Ill. 624; *Halley v. Ball*, 66 Ill. 250; *Cookson v. Toole*, 59 Ill. 515.

Indiana:³ *Kantrowitz v. Prather*, 31 Ind. 92; 99 Am. Dec. 587; *Lindley v. Cross*, 31 Ind. 106; 99 Am. Dec. 610; *O'Daily v. Morris*, 31 Ind. 111; *Mont-*

178, 1 South. 692 (real estate of wife charged with value of improvements which she procures to be erected thereon); *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 South. 12 (mortgage to secure debt of husband is valid); *Nutt v. Codington*, 34 Fla. 77, 15 South. 667; *Halle v. Einstein*, 34 Fla. 589, 16 South. 554; *Halle v. Meinhard*, 34 Fla. 607, 16 South. 559; *Fritz v. Fernandez*, (Fla.) 34 South. 315; *Macfarlane v. Southern Lumber & Supply Co.*, (Fla.) 36 South. 1029.

(2) *Georgia*.—Section 1783 of the Code provides: "The wife is a *feme sole*, unless controlled by the settlement. Every restriction upon her power in it must be complied with; but while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate, made to a creditor of her hus-

band, in extinguishment of his debts, shall be absolutely void." See *Howard v. Simkins*, 70 Ga. 322; *Wingfield v. Rhéa*, 73 Ga. 477.

(h) *Idaho*.—A married woman cannot bind herself personally for the debt of her husband, or for a community debt, and it is error to render judgment jointly against the husband and wife, on a note signed by both, in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate: *Jaeckel v. Pease*, 6 Idaho 131, 53 Pac. 399.

(i) *Illinois*.—*Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. 978.

(j) *Indiana*.—Section 5115, Rev. St. 1881, provides that "all the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." The exceptions prohibit a married

statutes giving to the wife a legal separate estate have, in combination with the equitable doctrine concerning married

gomery v. Sprankle, 31 Ind. 113; Bellows v. Rosenthal, 31 Ind. 116; Putnam v. Tennyson, 50 Ind. 456 (these cases hold that the wife's separate property is liable for her contracts made directly for its improvement, but is not liable for her general engagements, although made for her own benefit and on the credit of her separate property, when they were not expressly, in very terms, charged upon it); Miller v. Albertson, 73 Ind. 343; Vail v. Meyer, 71 Ind. 159; Smith v. Smith, 80 Ind. 267; Wooden v. Wampler, 69 Ind. 88; Jackman v. Nowling, 69 Ind. 188; Patton v. Rankin, 68 Ind. 245; 34 Am. Rep. 254; Williams v. Wilbur, 67 Ind. 42; Smith v. Howe, 31 Ind. 233.

Kansas: Miner v. Pearson, 16 Kan. 27; Tallman v. Jones, 13 Kan. 438; Faddis v. Woollomes, 10 Kan. 56; Larimer v. Kelley, 10 Kan. 298; Wicks v. Mitchell, 8 Kan. 80; Deering v. Boyle, 8 Kan. 525; 12 Am. Rep. 480; Going v. Orns, 8 Kan. 85; Knaggs v. Mastin, 9 Kan. 532; Monroe v. May, 9 Kan. 466.

Kentucky:^k Young v. Smith, 9 Bush, 421 (income of her separate estate liable for her debts contracted for support of herself and children); Penn v. Young, 10 Bush, 626; Hannon v. Madden, 10 Bush, 664; Moreland v. Myall, 14 Bush, 474; Uhrig v. Horstman, 8 Bush, 172; Lillard v. Turner, 16 B. Mon. 374; Burch v. Breckinridge, 16 B. Mon. 482; 63 Am. Dec. 553.

woman from conveying or mortgaging her real estate and from becoming a surety. It is held, however, that a husband seeking to enforce a contract against his wife must resort to equity. "The contract is not valid in the sense that it can be enforced strictly as a contract. This is so because in strict law the husband cannot recover solely upon a contract made with his wife, since the theory of the unity of the person still exists. But while the husband cannot enforce the contract as contracts between other parties than husband and wife may be enforced, still the express contract may constitute an essential element of an equitable claim that the courts will enforce." Harrell v. Harrell, 117 Ind. 94, 19 N. E. 621; Bowles v. Trapp, 139 Ind. 55, 38 N. E. 406 (wife cannot become surety for husband); Leschen v. Guy, 149 Ind. 17, 48 N. E. 344 (same).

(^k) *Kentucky*.—Section 2127 of the statutes provides: "No part of a

married woman's estate shall be subjected to the payment or satisfaction of any liability, upon a contract made after marriage, to answer for the debt, default of mis-doing of another, including her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance, but her estate shall be liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage, except as in this act provided." See Miller v. Sanders, 98 Ky. 535, 33 S. W. 621; Quisenberry v. Thompson, 19 Ky. Law Rep. 723, 43 S. W. 723 ("We take it to be a well-settled rule of law that the separate estate of a married woman is not liable for her debts, contracted even for necessities, unless such be the agreement at the time of the contract, or evidenced by writing showing that such was the contract executed by her").

women's contracts, created a very anomalous condition in the jurisprudence of most of the states,—an extension of

*Maine:*¹ *Sampson v. Alexander*, 66 Me. 182; *Mayo v. Hutchinson*, 57 Me. 546; *Bean v. Boothby*, 57 Me. 295; *Hanson v. Millett*, 55 Me. 184; *Duren v. Getchell*, 55 Me. 241; *Beals v. Cobb*, 51 Me. 348; *Winslow v. Gilbreth*, 50 Me. 90; *Brookings v. White*, 49 Me. 479; *Springer v. Berry*, 47 Me. 330; *Eaton v. Nason*, 47 Me. 132; *Beale v. Knowles*, 45 Me. 479; *Hancock Bank v. Joy*, 41 Me. 568; *Merrill v. Smith*, 37 Me. 394; *Southard v. Piper*, 36 Me. 84; *Southard v. Plummer*, 36 Me. 64; *Johnson v. Stillings*, 35 Me. 427; *Howe v. Wildes*, 34 Me. 566; *Motley v. Sawyer*, 34 Me. 540; *Eldridge v. Preble*, 34 Me. 148; *Clark v. Viles*, 32 Me. 32; *McLellan v. Nelson*, 27 Me. 129.

Maryland:^m *Wilson v. Jones*, 46 Md. 349 (it must affirmatively appear that her contracts were made with direct reference to her separate estate, and with the intention to charge it); *Kerchner v. Kempton*, 47 Md. 568; *Trader v. Lowe*, 45 Md. 1; *Plummer v. Jarman*, 44 Md. 632; *Oswald v. Hoover*, 43 Md. 360; *Hoffman v. Rice*, 38 Md. 284; *Rice v. Hoffman*, 35 Md. 344; *Warner v. Dove*, 33 Md. 579; *Barton v. Barton*, 32 Md. 214; *Kuhn v. Stansfield*, 28 Md. 210; 92 Am. Dec. 681; *Smith v. McAtee*, 27 Md. 420; 92 Am. Dec. 641; *Niller v. Johnson*, 27 Md. 6; *Six v. Shaner*, 26 Md. 415; *Buchanan v. Turner*, 26 Md. 1; *Cooke v. Husbands*, 11 Md. 492.

*Massachusetts:*ⁿ (Liability very restricted: See quotations *ante*, in note 3 under § 1126): *Nourse v. Henshaw*, 123 Mass. 96; *Merriam v. Boston etc. R. R.*, 117 Mass. 241; *Pierce v. Kittredge*, 115 Mass. 374; *Towle v. Towle*, 114 Mass. 167; *Stevens v. Reed*, 112 Mass. 515; *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86; *Faucett v. Currier*, 109 Mass. 79; *McCluskey v. Provident Inst.*, 103 Mass. 300; *Labaree v. Colby*, 99 Mass. 559; *Eastabrook v. Earle*, 97 Mass. 302; *Tracy v. Keith*, 11 Allen, 214; *Rogers v. Ward*, 8 Allen, 387; 85 Am. Dec. 710; *Willard v. Eastham*, 15 Gray, 328; 77 Am. Dec. 366; *Commonwealth v. Williams*, 7 Gray, 337; *Conant v. Warren*, 6 Gray, 562; *Beal v. Warren*, 2 Gray, 447.

Michigan:^o *Burdeno v. Amperse*, 14 Mich. 91; 90 Am. Dec. 225; *Glover v.*

(1) *Maine*.—*Haggett v. Hurley*, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362 (the statute makes the wife liable for debts contracted in her own name. "The words 'in her own name' seem to indicate that the wife's power to contract is not unlimited; that it is confined to her separate business or estate").

(m) *Maryland*.—*Girault v. Adams*, 61 Md. 1 (where money is borrowed for the improvement of the wife's property, with her knowledge, and is so applied, the separate property is answerable for the amount actually

advanced); *Fowler v. Jacob*, 62 Md. 326 (intent to charge may be shown by circumstances); *Wingert v. Gordon*, 66 Md. 106, 6 Atl. 581.

(n) *Massachusetts*.—*Fowle v. Torrey*, 135 Mass. 90 (contract between husband and wife void); *Porter v. Wakefield*, 146 Mass. 25, 14 N. E. 792; *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466 (separate estate bound by indorsement of husband's note).

(o) *Michigan*.—*Mutual Ben. Life Ins. Co. v. Wayne Co. Bank*, 68 Mich. 116, 35 N. W. 853 (contract must

a jurisdiction most distinctively equitable to an ordinary legal ownership of property. When the common-law

Alcott, 11 Mich. 470; Watson v. Thurber, 11 Mich. 457; Farr v. Sherman, 11 Mich. 33; Starkweather v. Smith, 6 Mich. 377; Durfee v. McClurg, 6 Mich. 223.

Minnesota: Northwestern etc. Co. v. Allis, 23 Minn. 337; Wampach v. St. Paul etc. R. R., 22 Minn. 34; Spencer v. St. Paul etc. R. R., 22 Minn. 29; Leighton v. Sheldon, 16 Minn. 243; Williams v. McGrade, 13 Minn. 46; Rich v. Rich, 12 Minn. 468; Wilder v. Brooks, 10 Minn. 50; 88 Am. Dec. 49; Carpenter v. Wilverschied, 5 Minn. 170; Carpenter v. Leonard, 5 Minn. 155.

Mississippi: Musson v. Trigg, 51 Miss. 172 (the instrument creating the wife's *equitable* separate estate is the measure of the extent and mode by which he may bind it by contract; the statutes regulating her power to make contracts concerning her *legal* separate property have no application); Morrison v. Kinstra, 55 Miss. 71 (her contract to purchase land on credit creates no liability against her separate estate); Ogden v. Guice, 56 Miss. 330.

Missouri: (The English doctrine seems to be accepted to its full extent. Her separate estate is liable for her notes and other written contracts, the intent to charge it thereby being necessarily inferred; even in her general verbal engagements the intent will be presumed, unless the circumstances show that credit was not given to it): De Baun v. Van Wagoner, 56 Mo. 347, 349 (her note or other written form of promise); Gay v. Ihm, 69 Mo. 584 (her covenant to pay rent in a lease); Hooton v. Ransom, 6 Mo. App. 19; Morrison v. Thistle, 67 Mo. 596 (her note); Nash v. Norment, 5 Mo. App. 545 (her general engagements are presumed to be on the credit of her separate property); Dameron v. Jamison, 4 Mo. App. 299 (her deed, in which her husband does not join); Pratt v. Eaton, 65 Mo. 157 (her general engagements and promises); Maguire v. Maguire, 3 Mo. App. 458 (her written contract); Meyers v. Van Wagoner, 56 Mo. 115 (her note); Lincoln v. Rowe, 15 Mo. 571 (note by herself and her husband); Kimm v. Weippert, 46 Mo. 532; 2 Am. Rep. 541 (the same); Schafroth v. Ambs, 46 Mo. 114 (the same); Pemberton v. Johnson, 46 Mo. 342 (note for the price of land purchased); Miller v. Brown, 47 Mo. 504; 4 Am. Rep. 345 (her verbal contract); Boeckler v. McGowan, 9 Mo. App. 373 (damages for the breach of her written agreement); Metropolitan Bank v. Taylor, 53 Mo. 444; 62 Mo. 338 (her notes); Clark v. National Bank, 47 Mo. 17; Burnley v. Thomas, 63 Mo. 390; Eystra

clearly appear to have been made with intent to bind her separate estate); Naylor v. Minock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. Rep. 595 (has power "only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in con-

sideration of it"); Detroit Chamber of Commerce v. Goodman, 110 Mich. 498, 68 N. W. 295, 35 L. R. A. 96.

(P) *Mississippi.*—McDougal v. People's Savings Bank, 62 Miss. 663.

(Q) *Missouri.*—Macfarland v. Heim, 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629.

dogmas were to be invaded, when the wife's legal estate and title were to be removed from all interest and control of

v. Capelle, 61 Mo. 578; Gage v. Gates, 62 Mo. 412; Davis v. Smith, 75 Mo. 219; Klenke v. Koeltze, 75 Mo. 239; Boatmen's Sav. Bank v. Collins, 75 Mo. 280; Staley v. Howard, 7 Mo. App. 377.

Nebraska:^r McCormick v. Lawton, 3 Neb. 449; Webb v. Hoselton, 4 Neb. 308; 19 Am. Rep. 638; Davis v. First Nat. Bank, 5 Neb. 242; 25 Am. Rep. 484; Aultman v. Obermeyer, 6 Neb. 260; Hall v. Christy, 8 Neb. 264; Savings Bank v. Scott, 10 Neb. 83; Barnum v. Young, 10 Neb. 309.

New Hampshire:^s Cooper v. Alger, 51 N. H. 172; Bachelder v. Sargent, 47 N. H. 262; George v. Cutting, 46 N. H. 130; 88 Am. Dec. 195; Hill v. Pine River Bank, 45 N. H. 300; Patterson v. Patterson, 45 N. H. 164; Shannon v. Canney, 44 N. H. 592; Ames v. Foster, 42 N. H. 381; Woodward v. Seaver, 38 N. H. 29; Albin v. Lord, 39 N. H. 196; Bailey v. Pearson, 29 N. H. 77; Blake v. Hall, 57 N. H. 373; Muzzey v. Reardon, 57 N. H. 378; Whipple v. Giles, 55 N. H. 139; Hammond v. Corbett, 51 N. H. 311.

New Jersey:^t Homœopathic Mut. Life Ins. Co. v. Marshall, 32 N. J. Eq. 103 (her mortgage, to secure a debt contracted for the benefit of her separate estate, although not acknowledged in any way, creates a charge enforceable in equity); Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504 (her contract to pay off a mortgage on land conveyed to her); Pierson v. Lum, 25 N. J. Eq. 390 (debt for benefit of the estate); Perkins v. Elliott, 23 N. J. Eq. 526 (not liable for her contract of suretyship, unless it appears that she or the estate is benefited thereby); Merchant v. Thompson, 34 N. J. Eq. 73 (her mortgage to secure a debt of her husband, or of a third person); Porch v. Fries, 18 N. J. Eq. 204; Dilts v. Stevenson, 17 N. J. Eq. 407; Beals's Ex'r v. Storm, 26 N. J. Eq. 372; Vreeland v. Vreeland, 16 N. J. Eq. 512; Belford v. Crane, 16 N. J. Eq. 265; 84 Am. Dec. 155; Vreeland's Ex'rs v. Ryno's Ex'r,

(^r) *Nebraska*.—Only contracts made with reference to and upon the faith and credit of her separate property, trade, or business are valid. A wife may, however, mortgage her separate property to secure a loan to her husband: Holmes v. Hull, 50 Nebr. 656, 70 N. W. 241; Stenger Benev. Ass'n v. Stenger, 54 Nebr. 427, 74 N. W. 846.

(^s) *New Hampshire*.—"Every married woman shall have the same rights and remedies, and shall be subject to the same liabilities, in relation to property held by her in her own right as if she were unmarried, and may make contracts, and sue and be sued in all matters in law and equity, and upon any contract by her made, or

for any wrong by her done, before marriage, as if she were unmarried: provided, however, that the authority hereby given to make contracts shall not affect the laws heretofore in force as to contracts between husband and wife: and provided, also, that no contract or conveyance by a married woman of property held by her in her own right, as surety or guarantor for her husband, nor any undertaking by her for him, or in his behalf, shall be binding on her." Gen. Laws, c. 183, § 12. See Parsons v. McLane, 64 N. H. 478, 13 Atl. 588.

(^t) *New Jersey*.—Contracts between husband and wife are still enforceable only in equity: Farmer v. Farmer, 39 N. J. Eq. 211; Wood v. Chetwood, 44

her husband, and she was to be permitted to make contracts based upon its ownership, the better policy would have been

26 N. J. Eq. 160; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Compton v. Pierson*, 28 N. J. Eq. 229; *Johnson v. Vail*, 4 N. J. Eq. 423; *Johnson v. Cummins*, 16 N. J. Eq. 97; 84 Am. Dec. 142.

New York: *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; 22 N. Y. 450; 78 Am. Dec. 216; 68 N. Y. 329 (this leading case holds that the separate estate is liable for the wife's contracts,—1. When the consideration is directly for the benefit of the separate property and on its credit, although nothing is expressly said in the contract about its being thus a charge; and 2. Any other contract, whatever be its nature or purpose, and although it does not benefit her separate property, when in the very terms of the contract she expressly charges it upon her separate estate, and if the contract is written this intent must be expressed in the writing); *Ballin v. Dillaye*, 37 N. Y. 35; *Owen v. Cawley*, 36 N. Y. 600; *Vanderheyden v. Mallory*, 1 N. Y. 452; *Jaques v. Meth. Epis. Church*, 17 Johns. 548; 8 Am. Dec. 447; *Dyett v. North Am. Coal Co.*, 20 Wend. 570; 32 Am. Dec. 598; *Gardner v. Gardner*, 7 Paige, 112; *Knowles v. McCamly*, 10 Paige, 342. For decisions under the existing statute, see *post*.

North Carolina:^u *Hall v. Short*, 81 N. C. 273; *Pippen v. Wesson*, 74 N. C. 437; *Webb v. Gay*, 74 N. C. 447; *Manning v. Manning*, 79 N. C. 300; 28 Am. Rep. 324; *Kirkman v. Bank of Greensboro*, 77 N. C. 394; *Knox v. Jordan*, 5 Jones Eq. 175; *Harris v. Harris*, 7 Ired. Eq. 111; 53 Am. Dec. 393; *Frazier v. Brownlow*, 3 Ired. Eq. 237; 42 Am. Dec. 165.

Ohio:^v *Avery v. Vansickle*, 35 Ohio St. 270 (is liable for deficiency arising at a foreclosure sale, on her mortgage to secure her note); *Williams v.*

N. J. Eq. 66, 14 Atl. 21; affirmed in *Chetwood v. Wood*, 45 N. J. Eq. 369, 19 Atl. 622; *Harrison v. Patterson*, (N. J. Ch.) 50 Atl. 113. Executory contracts for payment of debts of third persons cannot, under the statute, be enforced, but after they have become executed, she cannot rescind: *Warwick v. Lawrence*, 43 N. J. Eq. 179, 3 Am. St. Rep. 299, 10 Atl. 376; *Walker v. Dixon Crucible Co.*, 47 N. J. Eq. 342, 20 Atl. 885.

(^u) *North Carolina*.—*Dougherty v. Sprinkle*, 88 N. C. 300; *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567 (limitations or special provisions in the deed of settlement or statute must be construed as giving no powers beyond those expressly given or implied); *Thurber v. La Roque*, 105 N.

C. 301, 11 S. E. 460; *Farthing v. Shields*, 106 N. C. 295, 10 S. E. 998; *Thompson v. Smith*, 106 N. C. 357, 11 S. E. 273; *Wood v. Wheeler*, 106 N. C. 513, 11 S. E. 590; *Blake v. Blackley*, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566 (the statutes "impose no limit upon the wife's power to acquire property by contracting with her husband or any other person, but only operate to restrain her from or protect her in disposing of property already acquired by her"); *Harvey, Blair & Co. v. Johnson*, 133 N. C. 352, 45 S. E. 644; *Jones v. Craigmiles*, 114 N. C. 613, 19 S. E. 638; *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 785.

(^v) *Ohio*.—By section 3109 of the Revised Statutes (Act April 14, 1884; 81 Ohio Laws, 209) "the separate

to abrogate her common-law incapacities entirely, and to render her contracts enforceable against her as though she

Urmston, 35 Ohio St. 296; 35 Am. Rep. 611 (her note as surety, her intention to charge her separate property thereby is presumed); Rice v. Railroad Co., 32 Ohio St. 380; 30 Am. Rep. 610 (in her general engagement, an intent to deal on the credit of her separate estate must be shown); Levi v. Earl, 30 Ohio St. 147 (the same, and her separate estate not liable for her mere accommodation indorsement, without any further evidence of an intent); Phillips v. Graves, 20 Ohio St. 371; 5 Am. Rep. 675 (liable for her note given for her own debt); Patrick v. Littell, 36 Ohio St. 79; 38 Am. Rep. 552; Fallis v. Keys, 35 Ohio St. 265; Swasey v. Antram, 24 Ohio St. 87; Jenz v. Gugel, 26 Ohio St. 527; Mciley v. Butler, 26 Ohio St. 535; Westerman v. Westerman, 25 Ohio St. 500; Logan v. Thrift, 20 Ohio St. 62; Clark v. Clark, 20 Ohio St. 123; Allison v. Porter, 29 Ohio St. 136; Machir v. Burroughs, 14 Ohio St. 519.

Oregon: Kennard v. Sax, 3 Or. 263, 267; Brummet v. Weaver, 2 Or. 168; Starr v. Hamilton, 1 Deady, 268; Fed. Cas. No. 13,314; Dick v. Hamilton, 1 Deady, 322; Fed. Cas. No. 3,890.

Pennsylvania: Bower's Appeal, 68 Pa. St. 126; Speakman's Appeal, 71 Pa. St. 25; Silveus's Ex'rs v. Porter, 74 Pa. St. 448; Berger v. Clark, 79 Pa. St. 340; Lippincott v. Leeds, 77 Pa. St. 420; Wright v. Brown, 44 Pa. St. 224; Bear's Adm'r v. Bear, 33 Pa. St. 525; Walker v. Reamy, 36 Pa. St. 410; Trimble v. Reis, 37 Pa. St. 448; Thorndell v. Morrison, 25 Pa. St. 326; Peck v. Ward, 18 Pa. St. 506; Shnyder v. Noble, 94 Pa. St. 286; Appeal of Germania Sav. Bank, 95 Pa. St. 329; Innis v. Templeton, 95 Pa. St. 262; 40 Am. Rep. 643; Sawtelle's Appeal, 84 Pa. St. 306.

Rhode Island: Elliott v. Gower, 12 R. I. 79 (a wife may charge her equitable separate estate by any written contract which expressly states her intention to charge, or by a verbal declaration, if the contract is for the benefit

property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of her husband, or be in any manner conveyed or incumbered by him; and she may, in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried." By section 4996 (Act March 20, 1884; 81 Ohio Laws, 65) she may sue and be sued as if unmarried. See Elliott v. Lawhead, 43 Ohio St. 171, 1 N. E. 577; Card Fabrique Co. v. Stanage, 50 Ohio St. 417, 34 N. E. 410.

(w) *Pennsylvania.*—Act June 3, 1887, authorizes a married woman to acquire property, and to contract in

regard to her separate property as if unmarried. See Latrobe B. & L. Ass'n v. Fritz, 152 Pa. St. 224, 25 Atl. 558, 31 Wkly. Notes Cas. 330; Steffen v. Smith, 159 Pa. St. 207, 28 Atl. 295, 33 Wkly. Notes Cas. 520; McNeal v. McNeal, 161 Pa. St. 109, 28 Atl. 997, 34 Wkly. Notes Cas. 259; Mitchell v. Richmond, 164 Pa. St. 566, 30 Atl. 486; Moore v. Copeley, 165 Pa. St. 294, 44 Am. St. Rep. 664, 30 Atl. 829, 35 Wkly. Notes Cas. 563; Patrick v. Smith, 165 Pa. St. 526, 30 Atl. 1044, 36 Wkly. Notes Cas. 10 (wife cannot become a surety).

(x) *Rhode Island.*—Fallon v. McAlonen, 15 R. I. 223, 2 Atl. 213.

were single by legal actions and pecuniary recoveries of judgment. In a few states the legislatures have carried this legal reform to its logical results, and have thus produced

of herself or of her separate estate); *Angell v. McCullough*, 12 R. I. 47 (her legal statutory separate estate is not liable to such equitable charge); *Petition of O'Brien*, 11 R. I. 419; *Berry v. Teel*, 12 R. I. 267, 268; *Warner v. Peck*, 11 R. I. 431.

South Carolina: *Adams v. Mackey*, 6 Rich. Eq. 75; *Magwood v. Johnston*, 1 Hill Eq. 228; *Cater v. Eveleigh*, 4 Desaus. Eq. 19; 6 Am. Dec. 596; *James v. Mayrant*, 4 Desaus. Eq. 591; 6 Am. Dec. 630. For decisions under existing statute, see *post*.

Tennessee:^γ *Owens v. Johnson*, 8 Baxt. 265 (not liable for her debt for money borrowed to pay off a mortgage on her land); *Myers v. James*, 2 Lea, 159 (the authority expressly given in the instrument creating her equitable separate estate measures her power to bind it by contract; when such instrument gave her power "to sell, mortgage, or lease," her mortgage or trust deed to secure a debt contracted for the benefit of her separate estate creates a valid charge); *Robertson v. Wilburn*, 1 Lea, 633 (in absence of express authority as above, she cannot bind her separate property by her note as surety); *Davis v. Jennings*, 3 Tenn. Ch. 241 (in absence of express authority as above, her contract to sell land will not be enforced); *Arrington v. Roper*, 3 Tenn. Ch. 572 (in absence of express authority as above, her notes, although expressly charged, create no liability); *Chatterton v. Young*, 2 Tenn. Ch. 768; *Moseby v. Partee*, 5 Heisk. 26; *Shacklett v. Polk*, 4 Heisk. 104; *Head v. Temple*, 4 Heisk. 34; *Hughes v. Peters*, 1 Cold. 67; *Young v. Young*, 7 Cold. 461; *Sherman v. Turpin*, 7 Cold. 382.

Texas: *Hutchinson v. Underwood*, 27 Tex. 255; *Hamilton v. Brooks*, 51 Tex. 142; *Hall v. Dotson*, 55 Tex. 520; *Bradford v. Johnson*, 44 Tex. 381; *Wallace v. Finberg*, 46 Tex. 35; *Rhodes v. Gibbs*, 39 Tex. 432; *Ferguson v. Reed*, 45 Tex. 574; *Gregory v. Van Vleck*, 21 Tex. 40; *Cartwright v. Hollis*, 5 Tex. 152; *Hollis v. Francois*, 5 Tex. 195; 51 Am. Dec. 760.

Vermont:^z *Dale v. Robinson*, 51 Vt. 20; 31 Am. Rep. 669 (is liable for debts contracted for its benefit, or for her benefit on its credit); *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695 (contracts to obtain necessities for her

(^γ) *Tennessee*.—*Bedford v. Burton*, 106 U. S. 341, 1 Sup. Ct. 98, 27 L. ed. 112; *Menees v. Johnson*, 12 Lea 561; *Warren v. Freeman*, 85 Tenn. 513, 3 S. W. 513; *Eckerly v. McGhee*, 85 Tenn. 661, 4 S. W. 386 (there must be an express promise or engagement to create a charge, and the method in which such engagement is expressed or created must be within the express or necessarily implied powers of the instrument creating the estate);

Theus v. Dugger, 93 Tenn. 41, 23 S. W. 135; *Wehster v. Helm*, 93 Tenn. 322, 24 S. W. 488; *National Exchange Bank v. Cumberland Lumber Co.*, 100 Tenn. 479, 47 S. W. 85 (married woman may charge her separate estate for payment of debt for which she is liable only as a surety).

(^z) *Vermont*.—*Sargeant v. French*, 54 Vt. 384 (credit must be given to the estate, and not to the individual).

a system which is, in my opinion, consistent with itself, and simple and practical in its operation. To furnish some illustrations of the workings of this system, and to present

separate estate, or for herself and family on its credit); Webster v. Hildreth, 33 Vt. 457; 78 Am. Dec. 632; White v. Hildreth, 32 Vt. 265; Peck v. Walton, 26 Vt. 82.

Virginia:^{aa} Harshberger's Adm'r v. Alger, 31 Gratt. 52 (the intention to charge her separate estate must appear); Garland v. Pamplin, 32 Gratt. 305 (her equitable separate estate is liable for her bond; the intention to charge it will be presumed); Burnett v. Hawpe's Ex'r, 25 Gratt. 481 (the same as to her bond as surety for her husband); Muller v. Bayly, 21 Gratt. 521 (and her deed of trust or mortgage to secure her husband); Frank v. Lilienfeld, 33 Gratt. 377 (the *corpus* of the personalty, and the rents and profits only of her realty, belonging to her equitable separate estate, are liable for her *general* debts; but it seems the land itself may be liable for a contract specifically charged upon it); Triplett v. Romine's Adm'r, 33 Gratt. 651; Penn v. Whitehead, 17 Gratt. 503; 94 Am. Dec. 478.

West Virginia:^{bb} Radford v. Carwile, 13 W. Va. 572 (only the rents and profits of her separate real estate are liable. Her equitable separate estate is liable for any engagement which would create a debt if she were a *feme sole*, except on a bond or covenant without consideration. Her engagement, in order to bind such separate estate, need not be for her own benefit, or for that of the separate estate, but her contract of suretyship must be in writing, in order to bind it); Weinberg v. Rempe, 15 W. Va. 829.

(^{aa}) *Virginia*.—French v. Waterman, 79 Va. 619 (following Frank v. Lilienfeld); Jones v. Degge, 84 Va. 685, 5 S. E. 799; Crockett v. Doriott, 85 Va. 240, 3 S. E. 128 (her contracts cannot bind her after-acquired separate estate, either statutory or equitable); Price v. Planters' Nat. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214 ("When it is once established that the contract which it is sought to enforce is hers, it is presumed, as a matter of law, that she intended to make liable for it such separate estate as she owned, free from restraint, at the time of entering into the engagement, unless the contrary intention is expressed in the contract; and a court of equity will so subject it, or so much of it as may then be owned by her").

(^{bb}) *West Virginia*.—Section 15 of

chapter 66 of the Code, as found in chapter 3, Acts 1893, provides that "a married woman may sue and be sued in any court of law or chancery in this state, which may have jurisdiction of the subject-matter, the same in all cases as if she were a *feme sole*; and any judgment rendered against her in any such suit shall be a lien against the *corpus* of her separate real estate, and an execution may issue thereon and be collected against the separate personal property of a married woman as though she were a *feme sole*." See Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; Camden v. Hiteshew, 23 W. Va. 236 ("The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction, out of which a debt would have arisen, if she had been a

a complete view of the reformatory legislation dealing with married women's property, I have placed at the end of the

Wisconsin:^{cc} *Beard v. Dedolph*, 29 Wis. 136; *Todd v. Lee*, 15 Wis. 365; 16 Wis. 480; *Krouskop v. Shontz*, 51 Wis. 204; 37 Am. Rep. 817; 8 N. W. 241; *McKesson v. Stanton*, 50 Wis. 297; 36 Am. Rep. 850; 6 N. W. 881; *Meyers v. Rahte*, 46 Wis. 655; 1 N. W. 353; *Conway v. Smith*, 13 Wis. 125.

United States: *Bank of America v. Banks*, 101 U. S. 240; 25 L. ed. 850; *Cheever v. Wilson*, 9 Wall. 108, 119; 19 L. Ed. 604.

States in which the wife is personally liable on her contracts, where she has a legal or statutory separate estate. For the purpose of completing the view of the modern legislation on this subject, I add a few decisions illustrating the statute which renders such contracts enforceable against her, as though she was a *feme sole*, by ordinary legal actions and pecuniary judgments. These decisions do not belong to equity, but they may throw some light on the question, What contracts *do* charge her separate estate?

California:^{dd} *Wood v. Orford*, 52 Cal. 412; *Parry v. Kelley*, 52 Cal. 334; *Marlow v. Barlew*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 15.

Colorado: *Wells v. Caywood*, 3 Colo. 487; *Coon v. Rigden*, 4 Colo. 275.

Iowa: *Mitchell v. Smith*, 32 Iowa, 484, 487; *First Nat. Bank v. Haire*, 36 Iowa, 443; *Miller v. Hollingsworth*, 36 Iowa, 163; *Spafford v. Warren*, 47 Iowa, 47; *Sweazy v. Kammer*, 51 Iowa, 642; 2 N. W. 506.

New Jersey: *Hinkson v. Williams*, 41 N. J. L. 35; *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243.

Nevada:^{ee} *Darrenberger v. Haupt*, 10 Nev. 43; *Beckman v. Stanley*, 8 Nev. 257.

New York:^{ff} *Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613; 1 Am. Rep. 601; *Maxon v. Scott*, 55 N. Y. 247; *Hier v. Staples*, 51 N. Y. 136; *Hinckley*

feme sole, except that her separate estate is, not bound by a bond or covenant based on no consideration"); *Howe v. Stortz*, 27 W. Va. 555.

(cc) *Wisconsin.*—*Ritter v. Bruss*, 116 Wis. 55, 92 N. W. 361 (there can be no recovery against her in an action at law unless it is shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her separate business, or in relation to her personal services); *Kriz v. Peege*, 119 Wis. 105, 95 N. W. 108 ("The conclusion from the foregoing is irresistible that the possession by a married woman of a separate estate or business, or contemplation by her

to engage in business, is not essential to her statutory right to contract, as regards the acquirement of property; that while separate estate is essential to the making of a contract by her merely to charge her separate estate, binding in equity, it is not to make a contract authorized by the statute.")

(dd) *California.*—*Goad v. Moulton*, 67 Cal. 537, 8 Pac. 63; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 642; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 803, 11 Am. St. Rep. 235.

(ee) *Nevada.*—*Cartan v. David*, 18 Nev. 310, 4 Pac. 61.

(ff) *New York.*—*Saratoga Co. Bank v. Pruyn*, 90 N. Y. 256; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *Dickerson v. Rogers*, 114 N. Y. 406,

foot-note a few important decisions based upon these statutes, although their subject-matter does not strictly belong to equity jurisprudence.

v. Smith, 51 N. Y. 21; *Frecking v. Rolland*, 53 N. Y. 422, 426; *Blanke v. Bryant*, 55 N. Y. 649; *Loomis v. Ruck*, 56 N. Y. 462; *Manhattan etc. Co. v. Thompson*, 58 N. Y. 80; *Cashman v. Henry*, 75 N. Y. 103; 31 Am. Rep. 437; *Tiemeyer v. Turnquist*, 85 N. Y. 516; 39 Am. Rep. 674; *Ackley v. Westervelt*, 86 N. Y. 448; *McKeon v. Hagan*, 18 Hun, 65; *Williamson v. Duffy*, 19 Hun, 312; *Embree v. Franklin*, 23 Hun, 203; *People v. Williams*, 8 Daly, 264.

South Carolina: *ss* *Belzer v. Campbell*, 15 S. C. 581; 40 Am. Rep. 705; *Clinkscales v. Hall*, 15 S. C. 602; *Ross v. Linder*, 12 S. C. 592.

hh

21 N. E. 992; *Hendricks v. Isaacs*, 117 N. Y. 411, 22 N. E. 1029, 15 Am. St. Rep. 524, 6 L. R. A. 559; *Manchester v. Tibbetts*, 121 N. Y. 219, 24 N. E. 304, 18 Am. St. Rep. 816; *Third Nat. Bank v. Guenther*, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780.

(*ss*) *South Carolina*.—*Habenicht v. Rawls*, 24 S. C. 461, 58 Am. Rep. 268; *Gwynn v. Gwynn*, 27 S. C. 525, 4 S. E. 229; *Greig v. Smith*, 29 S. C. 426, 7 S. E. 610; *Brown v. Thomson*, 31 S. C. 436, 10 S. E. 95, 17 Am. St. Rep. 40; *Gwynn v. Gwynn*, 31 S. C. 482, 10 S. E. 221; *Building & Loan*

Ass'n v. Jones, 32 S. C. 308, 10 S. E. 1079.

(*hh*) *Washington*.—Section 2406 of the Code of 1881 provides: "Contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried." A woman cannot, however, make a contract of partnership with her husband: *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. Rep. 919, 16 L. R. A. 530.

CHAPTER THIRD.

ESTATES AND INTERESTS ARISING FROM SUC-
CESSION TO A DECEDENT.

SECTION I.

LEGACIES.

ANALYSIS.

- § 1127. Jurisdiction of equity.
- § 1128. The same: where originally **exclusive**.
- § 1129. The same: in the United States.
- §§ 1130–1134. Kinds of legacies.
 - § 1130. Specific legacies.
 - § 1131. Ademption of specific legacies.
 - § 1132. General legacies.
 - § 1133. Demonstrative legacies.
 - § 1134. Annuities.
- §§ 1135–1143. Abatement of legacies.
 - § 1135. Abatement in general: order of appropriating **assets**.
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 - § 1139. Abatement of general legacies.
 - § 1140. Limitations; intention of testator.
 - § 1141. Exceptions; legacies to near relatives.
 - § 1142. The same; legacy for a valuable consideration.
 - § 1143. Appropriation of a fund.
 - § 1144. Lapsed legacies.
 - § 1145. The same; statutory changes.

§ 1127. Jurisdiction of Equity.— At the common law no action could be maintained to recover a legacy, unless it was a specific legacy of goods, and the executor had assented to it so that the property therein had vested in the legatee.¹

¹ Deeks v. Strutt, 5 Term Rep. 690; Doe v. Guy, 3 East, 120. Although each individual creditor might recover a judgment at law for the amount of his demand, and although there is nothing in the nature of things to make it

The power of the ancient ecclesiastical courts over the subject-matter of successions and administration was also very limited and imperfect, and was at best but a lame jurisdiction.² The court of chancery, therefore, took and exercised a concurrent jurisdiction over legacies, as a part of its broader jurisdiction over administrations. This jurisdiction, as well over legacies as administrations, is based upon the trust relation existing between an executor or administrator and the creditors, legatees, and distributees; upon the necessity of a discovery, an accounting or a distribution of assets in order to determine the rights of all interested parties; and upon the fact that the remedies given by all other courts are inadequate, incomplete, and uncertain. The jurisdiction, originally concurrent, but necessarily exclusive in certain species of legacies, became, and still continues to be, practically exclusive in England over the entire subject of legacies.³

§ 1128. Where Jurisdiction of Equity was Exclusive.—Over certain species of legacies the jurisdiction of chancery

impossible for a general legatee to recover judgment at law for the amount of his legacy, yet the legal procedure furnished absolutely no means by which the rights and claims of *all* creditors, legatees, and distributees could be ascertained and ratably adjusted, the assets proportionably distributed among those having demands of an equal degree as to priority, and the estate finally settled. There are a few early cases which seem to authorize an action at law to recover a general legacy when the executor has expressly assented thereto, but these decisions have long been disregarded, and their doctrine has become obsolete in England. Such action is permitted by certain early American cases: See *Dewitt v. Schoonmaker*, 2 Johns. 243; *Beecker v. Beecker*, 7 Johns. 99; 5 Am. Dec. 246; and an action at law is given to the legatee, under various conditions of fact, by the statutes of several states.

² See *Pamplin v. Green*, 2 Cas. Ch. 95; *Matthews v. Newby*, 1 Vern. 133; *Petit v. Smith*, 5 Mod. 247.

³ See *Adair v. Shaw*, 1 Schoales & L. 243, 262, per Lord Redesdale; *Anonymous*, 1 Atk. 491, per Lord Hardwicke; *Hurst v. Beach*, 5 Madd. 351, 360; *Farrington v. Knightly*, 1 P. Wms. 544, 549, 554; *Atkins v. Hill*, Cowp. 284, 287; *Franco v. Alvares*, 3 Atk. 342, 346; *Pratt v. Northam*, 5 Mason, 95, 105; *Prescott v. Morse*, 62 Me. 447.^a

(^a) Also, § 156. The text is cited in *Domestic & Foreign Missionary Society v. Gaither*, 62 Fed. 422, holding that a bill to recover a legacy

was originally and necessarily exclusive, since the ecclesiastical courts possessed no jurisdiction in such cases. These were legacies charged upon land,¹ and legacies given in trust, or which involve the carrying into effect of a trust, either express or arising by operation of law.² In certain other cases the equitable jurisdiction was necessarily exclusive, because the relief given by the ecclesiastical courts was wholly inadequate to protect the rights of all the parties interested in the legacy or in the estate.³ Among the most important of these cases were the following: Where a discovery of assets or a final settlement of the whole estate is required;⁴ when a legacy is given to a married woman,⁵ or is given to an infant,⁶ and where a general legacy is given payable at a future day, since the court of equity, for purposes of security, can direct the executor to pay the amount into court, or such security to be given as the circumstances may require;⁷ and finally, when a specific legacy is given to one person for life, and on his death to another person absolutely, since a court of equity can protect the

¹ *Reynish v. Martin*, 3 Atk. 330, 333; *Sherman v. Sherman*, 4 Allen, 392. The jurisdiction of the ecclesiastical courts was confined to personal legacies.

² *Anonymous*, 1 Atk. 491; *Hill v. Turner*, 1 Atk. 515; *Farrington v. Knightly*, 1 P. Wms. 544, 549; *Prescott v. Morse*, 62 Me. 447.

³ In such cases the court of chancery would, as a matter of course, restrain by injunction the proceedings begun in the ecclesiastical courts.

⁴ *Pratt v. Northam*, 5 Mason, 95, 105, Fed. Cas. No. 11,376.^a

⁵ Because if the husband sues for it in the ecclesiastical court there was no power to compel him to make a settlement, and thus to protect the wife's equity: *Anonymous*, 1 Atk. 491; *Hill v. Turner*, 1 Atk. 515; *Meals v. Meals*, 1 Dick. 373.

⁶ Because the ecclesiastical court could not provide for investing, securing, or accumulating the fund: *Horrell v. Waldron*, 1 Vern. 26.

⁷ See *Slanning v. Style*, 3 P. Wms. 334; *Blake v. Blake*, 2 Schoales & L. 26; *Johnson v. Mills*, 1 Ves. Sr. 282; *Phipps v. Annesley*, 2 Atk. 57, 58; thus where a legacy is given upon a contingency, the court may order the entire sum out of which it would be payable to be handed over to the residuary

which the executor has refused to pay is within the equitable jurisdiction of the federal courts. See, also, *Brendel v. Charch*, 82 Fed. 262.

(^a) As to discovery, see §§ 235, 236, 346.

remainderman by requiring the life owner to give security where there is waste or danger of waste and consequent loss of the property.⁸ None of these incidents connected with a decree for the payment of legacies came within the cognizance of the ecclesiastical courts.

§ 1129. **Equitable Jurisdiction in the United States.**—Such being the original jurisdiction as exercised by the English court of chancery, it exists to its full extent, unabridged by statutes, in but a few of the states; in very many states it has been largely restricted, in some it has become practically obsolete, and in a few it has been expressly abrogated. The general nature, scope, and powers of the probate courts in this country have already been described.¹ These courts have generally the power to decree payment of legacies, on the application of individual legatees, during the pendency of an administration, and to call the executor to a final account, and to decree a final settlement and distribution of the estate, and therein to determine and protect the rights of legatees, at least in all ordinary cases. In such proceedings the probate courts follow the settled doctrines of equity, and are able to grant some of the remedies originally peculiar to the court of chancery.² While the equitable jurisdiction is thus rendered unnecessary under ordinary circumstances, it nevertheless still exists in all those special cases which are not embraced

legatee upon his giving security for its payment upon the happening of the contingency: *Webber v. Webber*, 1 Sim. & St. 311.

⁸ *Foley v. Burnell*, 1 Brown Ch. 274, 279; *Slanning v. Style*, 3 P. Wms. 334, 336; *Leeke v. Bennett*, 1 Atk. 470; and see *Randall v. Russell*, 3 Mer. 190, 193; *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Mills v. Mills*, 7 Sim. 501; *Fryer v. Buttar*, 8 Sim. 442; *Benn v. Dixon*, 10 Sim. 636; *Neville v. Fortescue*, 16 Sim. 333; *Cafe v. Bent*, 5 Hare, 24, 36; *Hunt v. Scott*, 1 De Gex & S. 219; *Covenhoven v. Shuler*, 2 Paige, 122, 132.

¹ See vol. 1, § 347.

² See *ante*, vol. 1, §§ 348, 349, and cases cited in the notes. In addition to these extensive powers conferred upon the probate courts, the jurisdiction of the common-law courts has been enlarged by statute in several of the states; in some, an action at law against the executor is given to the legatee; in others, after a decree of distribution by the probate court, the legatee is permitted to sue the executor and his surties on his official bond. In the face of such legis-

within the legislation, and in some of the states it remains in its original extent, entirely unabridged.³ I purpose to add a very brief outline only of the equitable doctrines concerning legacies,⁴—doctrines which control the action of probate courts, and which are embodied in the modern statutes upon the subject enacted in several of the states.

§ 1130. **Kinds of Legacies — Specific Legacies.**—With regard to their intrinsic nature and qualities, legacies are of three kinds: specific, general, and demonstrative. A specific legacy is a bequest of a specific article of the testator's estate, distinguished from all others of the same kind; as, for example, a particular horse, or piece of plate, or money in a certain purse or chest, a particular stock in the public funds, a particular bond or other instrument for the payment of money.¹ Whether a legacy is specific de-

lation, the equity jurisdiction has naturally fallen into disuse, even where it is not expressly abrogated by the statutory language.

³ The equitable jurisdiction remains unrestricted in the United States courts in all cases of federal cognizance on account of the citizenship of the parties: *Ante*, § 293; *Pratt v. Northam*, 5 Mason, 95, 105, Fed. Cas. No. 11,376; and in certain states it is unaffected by the statutes: See *Frey v. Demarest*, 16 N. J. Eq. 236, 238, 239, and cases cited; and *ante*, § 350. For a more extended examination of the present condition of the equitable jurisdiction over the general subject of administrations in the various states, see *ante*, vol. 1, §§ 348–352, and *post*, sec. iii. of this present chapter, §§ 1152–1154.

⁴ The subject is so extensive that it requires volumes for its full discussion. I shall attempt nothing more than the barest outline, and for an exhaustive treatment must refer the reader to such works as *Roper on Legacies*, *Jarman on Wills*, *Redfield on Wills*, and the like.

¹ If the article is sufficiently distinguished from all others of the same kind, it is immaterial whether it is described as being part of the testator's estate at the time of making the will or at the time of his death; it is essential, however, that the article should form a part of his estate at the death of the testator: *Stephenson v. Dowson*, 3 Beav. 342, 347, 349, per Lord Langdale; *Ashburner v. Macguire*, 2 Brown Ch. 108; 2 Lead. Cas. Eq., 4th Am. ed., 600, 605, 646. In *Tift v. Porter*, 8 N. Y. 516, the testator at the date of his will owned 360 shares of the stock of the Cayuga County Bank. His will gave "240 shares of Cayuga County Bank stock" to A, and 120 shares of the same stock to B, not adding any further words to indicate the testator's intent. The court held that a legacy is general and not specific, unless by its terms it indicates a particular part of the testator's estate as the thing bequeathed. These legacies were therefore general. If the testator had said "240 shares of *my* Cayuga County Bank stock," the legacy would have been specific. **In**

pendes wholly upon the language of the will. Unless the language described points out and identifies the particular thing given as a part of the testator's estate, distinguishing it from all other things of the same kind, then it is not specific. Although the testator may, at the time of executing the will, have an article or articles of the same kind as that which he purports to give, still, unless his language is sufficient to refer to, designate, and identify the very article itself as forming a part of his estate, which he thereby gives, the legacy is not specific, but general. Under these circumstances, the word "my" is often operative in identifying the article.² A specific legacy only be-

Loring v. Woodward, 41 N. H. 391, 394, 395, the will gave to a legatee "one half of all *my* stock in the following railroads [naming them], and one half of my stock in the Webster Bank." At the time, the testator owned these stocks. The court, after giving the definition as in the text, held that the legacy was specific, adding: "A legacy of *my* stock, or in my stock, or a part of my stock, is deemed specific"; citing *Wallace v. Wallace*, 23 N. H. 149; *Ford v. Ford*, 23 N. H. 212; *Kirby v. Potter*, 4 Ves. 750; *Guy v. Sharp*, 1 Mylne & K. 589; *Sibley v. Perry*, 7 Ves. 529; and see *Kunkel v. Macgill*, 56 Md. 120. In *Farnum v. Bascom*, 122 Mass. 282, a testatrix gave her wearing apparel to a legatee; held, a specific legacy. She gave "the use, improvement, and income" of a certain piece of land to A for life, remainder in fee to B; held, a specific devise. She also gave a certain mortgage, and note secured thereby, for two thousand five hundred dollars to H. F., in trust to pay the amount when collected to two of her nephews, one half to each on their coming of age. Held, a specific legacy; and the court said (p. 285): "Where the intent is to bequeath a certain sum (say \$1,000 or \$5,000) and the circumstance that it is then out on mortgage or other security is incidental merely, and does not constitute an ingredient in the gift, the legacy is general: *Le Grice v. Pinch*, 3 Mer. 50. But if the gift be of the sum due upon a mortgage of particular premises, or upon a certain note described, the legacy is specific: *Sidebotham v. Watson*, 11 Hare, 170; *Gillaume v. Adderley*, 15 Ves. 384; *Chaworth v. Beech*, 4 Ves. 555; *Innes v. Johnson*, 4 Ves. 568; *Giddings v. Seward*, 16 N. Y. 365. So if the gift is the proceeds of a certain mortgage, or all the money due on the bond of A B, or all the money standing to the testator's credit in a particular bank, such legacy is specific: *Stout v. Hart*, 6 N. J. Eq. 414. Where the bequest is not of the sum of money due on a particular security, but of a particular security described, the gift is not the less specific, for nothing will fulfill the terms of the bequest but the very thing itself." In *Towle v. Swasey*, 106 Mass. 100, the will gave to a legatee "whatever sum may be on deposit in the Provident Institution for Savings"; held, a specific legacy.

² The following abstract of decisions will furnish illustrations of these rules under a great variety of circumstances: *Gifts of money*: While legacies of par-

comes operative in case the very article given continues to form a part of the testator's estate at the time of his death. In such case the legatee acquires a title to the article at the death, by virtue of the will, although the payment

ticular sums not expressly identified — e. g., \$1,000, \$5,000 — are general, a bequest of certain money which is identified as the money in a certain bag, or deposited in a certain bank, and the like, is specific: *Lawson v. Stitch*, 1 Atk. 507; *Towle v. Swasey*, 106 Mass. 100; *Smith v. McKitterick*, 51 Iowa, 548; *Beck v. McGillis*, 9 Barb. 35; *Cagney v. O'Brien*, 83 Ill. 72. *Chattels*: A bequest of personal chattels described so as to be identified and separated from the rest of the testator's estate, as the furniture in a particular house, and also gifts of all other personal property thus identified by description, are specific: *Gayre v. Gayre*, 2 Vern. 538; *Clarke v. Butler*, 1 Mer. 304; *Robinson v. Webb*, 17 Beav. 260; *Powell v. Riley*, L. R. 12 Eq. 175; *Golder v. Littlejohn*, 30 Wis. 344; *Stall v. Wilbur*, 77 N. Y. 158 (bequest of a growing crop on land devised); *Spencer v. Higgins*, 22 Conn. 521; *Lilly v. Curry's Ex'r*, 6 Bush, 590; *McGuire v. Evans*, 5 Ired. Eq. 269.^a *Stock*: Bequests of the whole or part of shares, stocks, bonds, and such securities, either governmental or issued by corporations, given in language which "marks the specific thing, the very *corpus*," are specific; e. g., when the testator says "my stock," so much "in" or "of" "my stock," "my shares," "invested by me" in a company named, "which I have," or "possess," or "standing in my name," or "all my property in the funds," and the like:^b *Sibley v. Perry*, 7 Ves. 522, 529; *Barton v. Cooke*, 5 Ves. 461; *Kirby v. Potter*, 4 Ves. 748, 750; *Measure v. Carleton*, 30 Beav. 538; *Shuttleworth v. Greaves*, 4 Mylne & C. 35; *Miller v. Little*, 2 Beav. 259; *Kermode v. Macdonald*, L. R. 3 Ch. 584; 1 Eq. 457; *Humphreys v. Humphreys*, 2 Cox, 184; *Gordon v. Duff*, 3 De Gex, F. & J. 662; *Hayes v. Hayes*, 1 Keen, 97; *Vincent v. Newcombe*, 1 Younge, 599; *In re Jeffery's Trusts*, L. R. 2 Eq. 68 ("the pink coupons in the pigeon-hole for £3,666"); *In re Gibson*, L. R. 2 Eq. 669; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Davies v. Fowler*, L. R. 16 Eq. 308; *Pollock v. Pollock*, L. R. 18 Eq. 329; *Page v. Young*, L. R. 19 Eq. 501; *Bothamley v. Sherson*, L. R. 20 Eq. 304; *Loring v. Woodward*, 41 N. H. 391; *Wallace v. Wallace*, 23 N. H. 149; *Ford v. Ford*, 23 N. H. 212; *Ludlam's Estate*, 3 Pa. L. J. Rep. 332; *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9; *Brainerd v. Cowdrey*, 16 Conn. 1; *Blackstone v. Blackstone*, 3 Watts, 335; 27 Am. Dec. 359; *Alsop's Appeal*, 9 Pa. St. 374; *Manning v. Craig*, 4 Pa. St. 436; 41 Am. Dec. 739; *McGuire v. Evans*, 5 Ired. Eq. 269.^c A bequest of certain stock, *part of a larger amount owned by the testator*, is specific: *Morley v. Bird*, 3 Ves. 628; *Hosking v. Nicholls*, 1

(^a) See, also, *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675, 5 S. E. 812.

(^b) See, also, *McClellan v. Clark*, 50 L. T. (N. S.) 616; *In re Pratt*, [1894] 1 Ch. 491; *In re Nottage*, [1895] 2 Ch. 657.

(^c) *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464; *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390; *Hood v. Haden*, 82 Va. 588; but see *Mahoney v. Holt*, 19 R. I. 660, 36 Atl. 1.

may be deferred, and must be obtained from the executor. Since his right of property is thus fixed, he is entitled to all income, profits, and proceeds arising or accruing on the

Younge & C. Ch. 478; Hill v. Hill, 11 Jur., N. S., 806; but a bequest of money merely, *out of stock*, is general: Ibid.; Kirby v. Potter, 4 Ves. 748. *General gifts of stock*: On the other hand, where the bequest is merely *descriptive generally* of the stock, shares, etc., given, the legacy is not specific, although the testator may at the time own stock answering to the description, and even may own the exact number of shares given; e. g., as where he gives so much stock, or so many shares, and the like, *not using* additional words pointing to any identical shares, as "my" stock, or the stock which "I now possess," etc.:^d Partridge v. Partridge, Cas. t. Talbot, 226; Wilson v. Brownsmith, 9 Ves. 180; Lambert v. Lambert, 11 Ves. 607; Johnson v. Johnson, 14 Sim. 313; Boys v. Williams, 2 Russ. & M. 689; Mullins v. Smith, 1 Drew. & S. 204; Robinson v. Addison, 2 Beav. 515; Bishop of Peterborough v. Mortlock, 1 Brown Ch. 565; Webster v. Hale, 8 Ves. 410; Fielding v. Preston, 1 De Gex & J. 438; Tift v. Porter, 8 N. Y. 516. The reason is, that in all such cases the testator may mean that stocks, or shares, or securities of *such a kind and amount* are to be purchased and paid for out of his assets by the executor for the legatee; the bequest is therefore, in effect, the gift of a sum of money equivalent in value to the specified amount of stock, etc., and the legacy is strictly general. *Debts and evidences of debt*: Bequests of particular debts owing by named persons or otherwise identified, or of particular securities for the payment of money, or of the money due on them, are specific; e. g., notes, bonds, mortgages, a debt owing on a mortgage, and the like: Chaworth v. Beech, 4 Ves. 555; Fryer v. Morris, 9 Ves. 360; Innes v. Johnson, 4 Ves. 568; Davies v. Morgan, 1 Beav. 405; Nelson v. Carter, 5 Sim. 530; Duncan v. Duncan, 27 Beav. 386; Sidebotham v. Watson, 11 Hare, 170; Walpole v. Aphorp, L. R. 4 Eq. 37 (the amount due on a policy of life insurance); Farnum v. Bascom, 122 Mass. 282; Titus v. McLanahan, 2 Del. Ch. 200; Gardner v. Printup, 2 Barb. 83; Stout v. Hart, 6 N. J. Eq. 414; Mellon's Appeal, 46 Pa. St. 165; Sparks v. Weedon, 21 Md. 156; Howell v. Hooks, 4 Ired. Eq. 188; Le Grice v. Finch, 3 Mer. 50, which seems to be contrary, has been overruled.^e *Land*: As a devise of land is always specific: Forrester v. Lord Leigh, Amb. 171; Mirehouse v. Scaife, 2 Mylne & C. 695; Hensman v. Fryer, L. R. 3 Ch. 420; so the bequest of a lease or term of years is also specific: Long v. Short, 1 P. Wms. 403; Fielding v. Preston, 1 De Gex & J.

(d) Evans v. Hunter, 86 Iowa 413, 41 Am. St. Rep. 503, 53 N. W. 277, 17 L. R. A. 308.

(e) See, also, Georgia Infirmary v. Jones, 37 Fed. 750; Gelbach v. Shively, 67 Md. 498, 10 Atl. 247 (a bequest of one thousand dollars "out of the portion or share of my father's estate that may come to me" is

specific and not demonstrative); Hayes v. Hayes, 45 N. J. Eq. 461, 17 Atl. 634; Davis v. Crandall, 101 N. Y. 311, 4 N. E. 721; Rogers v. Rogers, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721 (bequest of all the claims held by the testator against his father and all his interest in his father's estate).

article after the testator's death, and before its delivery or payment to himself.³

§ 1131. **Ademption of Specific Legacies.**—Specific legacies are governed by certain rules which distinguish them from other kinds, and which determine the rights of the legatees with respect to them. Of these rules the most particular and distinctive is that of ademption.¹ Ademption is the taking away or removal of the legacy; or in other words, the extinguishment of it *as a legacy*, so that the legatee's rights under or claim to it are gone. The doctrine of ademption results from the very nature of a specific legacy as already defined. By its very nature as the gift of a specific, identified thing, operating as the mere gratuitous transfer of the thing without any *executory* obligation resting on the testator or his personal representatives, it follows that unless the very thing bequeathed is in existence at the death of the testator, and *then forms a part of his estate*, the legacy is wholly inoperative; the legatee has no right or claim; the executors are under no obligation to replace the thing by purchasing another one of the same kind as

438; *Sampson v. Sampson*, L. R. 8 Eq. 479; *Farquhar v. Hadden*, L. R. 7 Ch. 1. *Residuary bequests*: A specific legacy *may* be included in a residuary bequest: *Mills v. Brown*, 21 Beav. 1; *Davies v. Fowler*, L. R. 16 Eq. 308; *Golder v. Littlejohn*, 30 Wis. 344. It will appear in the sequel that where a testator gives a bequest not of or a part of specific property, but the property is merely designated as the particular fund out of which the legacy is payable, such a legacy is or may be demonstrative, not specific; but where the testator deals with specific property belonging to himself, not by giving legacies or sums of money *out of it*, but by dividing and apportioning out the very property itself, or the proceeds of it if it is directed to be sold and converted into money, then the bequests of the parts thus apportioned among the legatees will be specific: *Page v. Leapingwell*, 18 Ves. 463; *Newbold v. Roadknight*, 1 Russ. & M. 677; *Elwes v. Causton*, 30 Beav. 554; *Walpole v. Apthorp*, L. R. 4 Eq. 37.

³ A will operates upon a specific legacy somewhat in the manner of an assignment or transfer of property; it does not merely create a right of action in favor of the legatee against the testator: *Kirby v. Potter*, 4 Ves. 748, 751; *Jacques v. Chambers*, 2 Coll. C. C. 435, 440; *Loring v. Woodward*, 41 N. H. 391, 395; *Smith v. McKitterick*, 51 Iowa, 548.

¹ This word, derived from the Latin verb *adimere*, *ademptum*, literally signifies a taking away or removal of the legacy.

described in the will by means of other assets in their hands belonging to the estate.² If the testator never had the article purported to be specifically bequeathed, or if he had it at the time of making the will, but has afterwards con-

² *Ashburner v. Macguire*, 2 Brown Ch. 108; 2 Lead. Cas. Eq., 4th Am. ed., 600, 620-634, 662-674; *Badrick v. Stevens*, 3 Brown Ch. 431; *Barker v. Rayner*, 2 Russ. 122; *Sidebotham v. Watson*, 11 Hare, 170; *Hayes v. Hayes*, 1 Keen, 97; *Gilliat v. Gilliat*, 28 Beav. 481; *Jones v. Southall*, 32 Beav. 31; *Ford v. Ford*, 23 N. H. 212; *Walton v. Walton*, 7 Johns. Ch. 258; 11 Am. Dec. 456; *Blackstone v. Blackstone*, 3 Watts, 335, 337; 27 Am. Dec. 359; *Ludlam's Estate*, 1 Pars. Cas. 116; 13 Pa. St. 188; 3 Pa. L. J. Rep. 332; *Philson v. Moore*, 23 Hun, 152; and cases cited in the next note. Where the testator has actually used the thing, or has parted with it completely, so that neither the thing nor any of its proceeds remains in the estate at his death, there is clearly an ademption. The only questions of doubt or difficulty arise when the testator, having given some specific thing, or a thing described in some specific shape or condition, afterwards changes its shape, form, or condition, so that the very identical thing which he bequeathed no longer exists, although the proceeds thereof, or some other thing perhaps of the same kind substituted in its place, still remain, and form a portion of the testator's assets at his death; for example, having bequeathed a debt due from A, the debt is afterwards paid by A to the testator; or having bequeathed a certain mortgage given by A, the debt thus secured is afterwards paid by A and the mortgage is canceled; or, having bequeathed certain shares of stock in a named corporation, the testator sells those identical shares, but with the proceeds he buys other shares, either in the same or in another company, which he still owns at his death; or, having bequeathed the furniture in a certain specified house, the testator afterwards removes the furniture from that house, and puts it in some other place where it remains at the time of his death; — in all these instances, the corporeal thing (as the furniture) or the proceeds of the thing (as the money paid on the debt, mortgage, etc., or the shares of stock substituted) remain in the testator's estate at his death; yet there is *generally* an ademption, because the specific character of the thing given, as described in the bequest, is wholly lost. It should be observed, however, that such changes, in order to work an ademption, must be effected by the testator himself, or by his procurement, or with his knowledge and consent, or be afterwards assented to by him. If the changes should be effected by a fraud as against the testator, or without his knowledge or consent, expressed or implied from all the circumstances, then there would be no ademption which would operate to cut off the rights of the legatee. It is proper to notice, in this connection, certain legislation adopted in several of the states, and perhaps in most of them, of which sections 1301-1303 of the California Civil Code may be taken as the type. These sections, and the similar statutes of other states, provide that when property is specifically devised or bequeathed, the testator's *executory* agreement to sell it, or his charge or encumbrance put upon it, or his "conveyance, settlement, or other act" whereby *his interest* in the property is altered, but not wholly divested, shall not work a *revocation*, — that is, an

sumed it, or used it, or sold, assigned, or otherwise parted with it, or if with his knowledge and consent its specific form and character have been wholly altered, so that the identical thing given by the will has ceased to exist, then the legacy is gone, extinguished, and the legatee's rights to it are destroyed. Whatever thus puts an end to the existence of the specific thing given by the will, so that at the testator's death it does not form a part of his estate, is an ademption of the legacy. There may be a partial as well as a total ademption, when a portion of the thing only remains in its original specific character among the testator's assets at his death.³ The doctrine of ademption does

ademption of the gift,—but the devisee or legatee shall still take the property subject to the rights of the third person thus created. These statutory provisions do not seem to interfere with the general doctrine concerning the ademption of specific legacies. The last of them, by its terms, applies only to a partial alteration *in the testator's interest* in the thing bequeathed; it does not apply to an alteration *in the nature or condition of the thing itself*, by which its specific character as described in the bequest is wholly changed. These settled doctrines concerning ademption seem to be untouched by these statutes; in fact, the statutes are merely declaratory of equitable rules with respect to the revocation of wills: See *Beck v. McGillis*, 9 Barb. 35.

³ The following abstract will furnish illustrations of the doctrine, and will show circumstances under which an ademption does or does not take place. Where the thing bequeathed formed no part of the testator's estate at the date of the will or at his death: *Gordon v. Duff*, 3 De Gex, F. & J. 662; where the thing, debt, security, stock, etc., has been totally or partly sold, transferred, or otherwise disposed of by the testator before his death, there is an ademption total or partial; and this result is the same even though with the proceeds of the thing sold—say stock, and the like—he purchases others of the same kind which he holds at his death. If the testator, having sold shares of stock, should repurchase the same identical shares, perhaps there would be no ademption: See the English cases cited in the last preceding note, and also *In re Gibson*, L. R. 2 Eq. 669; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Watts v. Watts*, L. R. 17 Eq. 217; *Macdonald v. Irvine*, L. R. 8 Ch. Div. 101; *Castle v. Fox*, L. R. 11 Eq. 542, 551; *Miles v. Miles*, L. R. 1 Eq. 462; *Douglas v. Douglas*, Kay, 400, 404; *Drinkwater v. Falconer*, 2 Ves. Sr. 623, 625; *Partridge v. Partridge*, Cas. t. Talb. 226; *Philson v. Moore*, 23 Hun, 152; *Newcomb v. Trustees of St. Peter's Ch.*, 2 Sand. Ch. 636; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9, 37; *Blackstone v. Blackstone*, 3 Watts, 335; 27 Am. Dec. 359; *Alsop's Appeal*, 9 Pa. St. 374; *Whitlock v. Vaun*, 38 Ga. 562. Again, where a particular debt, or the security for a debt, such as a mortgage, bond, or note, or a public debt secured by governmental bonds or other governmental security, has been specifically bequeathed, and the same has been paid to the testator,

not apply to demonstrative legacies, since they are payable out of the general assets if the fund out of which they are primarily payable fails. Nor does it apply to general or

so that *the debt is discharged*, there is an ademption; and it is wholly immaterial whether the payment is voluntary on the part of both creditor and debtor, or has been compelled by the creditor, or has been compelled by the debtor by operation of law, as in case of a public debt paid off pursuant to statute. The distinction between a voluntary and a compulsory payment in such case has been entirely abrogated. The result is the same whether the proceeds are mingled up with other moneys of the testator, or are invested by him in other securities, even in those of the same kind as the original, which are retained by him until his death: *Innes v. Johnson*, 4 Ves. 568, 574; *Gardner v. Hatton*, 6 Sim. 93; *Sidney v. Sidney*, L. R. 17 Eq. 65; *Harrison v. Jackson*, L. R. 7 Ch. Div. 339; *In re Lane*, L. R. 14 Ch. Div. 856 (exercising an option and surrendering up the stock bequeathed and accepting an entirely different stock of the same company in lieu thereof); *Ludlam's Estate*, 3 Pa. L. J. Rep. 332; 1 Pars. Cas. 116; 13 Pa. St. 188; *Cuthbert v. Cuthbert*, 3 Yeates, 486; *Walton v. Walton*, 7 Johns. Ch. 258; 11 Am. Dec. 456; *Beck v. McGillis*, 9 Barb. 35.^a Again, where a specific bequest is made of goods *situated or being in or at a particular place*, a removal of them to another place by the act or consent of the testator will, in general, operate as an ademption, since it destroys the specific character of the thing as bequeathed: *Green v. Symonds*, 1 Brown Ch. 129, note; *Heseltine v. Heseltine*, 3 Madd. 276; *Colleton v. Garth*, 6 Sim. 19; *Spencer v. Spencer*, 21 Beav. 548; *Blagrove v. Coore*, 27 Beav. 138. But there are important exceptions. No ademption is produced by a removal merely for purposes of use by the testator: *Land v. Devaynes*, 4 Brown Ch. 537; or for purpose of repair: *Lord Brooke v. Earl of Warwick*, 2 De Gex & S. 425; or for purpose of safe custody: *Domville v. Taylor*, 32 Beav. 604; or for purpose of preservation from fire: *Chapman v. Hart*, 1 Ves. Sr. 271, 273. If articles specifically bequeathed are destroyed by fire during testator's lifetime, the legatee is not entitled to their insurance money: *Durrant v. Friend*, 5 De Gex & S. 343. A wrongful removal, or conversion of the form, or change in the nature of goods or funds specifically bequeathed, done without the procurement, or knowledge, or consent of the testator, and in order to cut off the legatee, will not operate as an ademption, nor destroy his rights: *Shaftsbury v. Shaftsbury*, 2 Vern. 747; *Domville v. Taylor*, 32 Beav. 604. For a like reason, if a testator becomes insane after making his will, the acts of persons having no lawful authority to deal with his property, which interfere with specific bequests, will not affect the rights of the specific legatees: *Taylor v. Taylor*, 10 Hare, 475; *Jenkins v. Jones*, L. R. 2 Eq. 323; but it seems that the acts of those who are lawfully appointed as representatives of the insane testator produce the same effect as the acts of the testator himself; where shares specifically bequeathed by a testator who was afterwards judicially found to be a lunatic, and a committee appointed,

(a) *Georgia Infirmary v. Jones*, 37 168, 45 S. E. 176, 100 Am. St. Rep. Fed. 750; *Rogers v. Rogers*, 67 S. C. 721.

pecuniary legacies. The "satisfaction" of general legacies, which is sometimes improperly called their "ademption," depends upon entirely different principles, and

were ordered by the court to be sold, an ademption was wrought: *Jones v. Green*, L. R. 5 Eq. 555;^b and payment of a debt bequeathed, to the committee of the testator, works an ademption: *Hoke v. Herman*, 21 Pa. St. 301. *Acts which do not work an ademption*: While an actual transfer by the testator amounts to an ademption, there is no ademption where stock standing in the name of trustees for the testator at the date of the will was afterwards simply transferred into the testator's own name: *Dingwell v. Askew*, 1 Cox, 427; *Lee v. Lee*, 27 L. J. Ch. 824; *Moore v. Moore*, 29 Beav. 496; nor where stock has been mortgaged by the testator: *Ashburner v. Macguire*, 2 Brown Ch. 108, 113; *Knight v. Davis*, 3 Mylne & K. 358; or pledged by him; but, on the contrary, the executors should redeem it: *Bothamley v. Sherson*, L. R. 20 Eq. 304; nor where the fund bequeathed has been changed by an agent of the testator without his authority: *Basan v. Brandon*, 8 Sim. 171; or changed by a corporation, as where common shares in a railway company were converted by the action of the company into consolidated stock: *Oakes v. Oakes*, 9 Hare, 666. The same general limitation extends to payment of a debt specifically bequeathed. While a payment which *discharges the debt* operates as an ademption, there is no ademption where the payment is *merely one in form*, where the original debt is left remaining, and there is nothing but a *new investment of the same debt*, or a mere change in the form of the security, leaving the same debt still existing: *Morgan v. Thomas*, L. R. 6 Ch. Div. 176; *In re Johnstone's Settlement*, L. R. 14 Ch. Div. 162; *Ford v. Ford*, 23 N. H. 212; *Havens v. Havens*, 1 Sand. Ch. 324; *Gardner v. Printup*, 2 Barb. 83, 88, 93; *Doughty v. Stillwell*, 1 Bradf. 300, 309; *Stout v. Hart*, 6 N. J. Eq. 414, 418. There appears to be some slight tendency in some of the American cases not to press the doctrine of ademption, and to favor the claims of the legatee, although the doctrine of the English courts is avowedly adopted. In a few cases, following some early Massachusetts decisions, it has been held that ademption is a matter of actual intention, and the result might be defeated by extrinsic evidence of the testator's real intention. The more recent cases are unanimous against this departure from the true doctrine. An ademption which would otherwise have taken place may always be prevented by the testator's express language in his will declaring, in substance, that the legatee is to have the proceeds of the debt if paid, or of the stock or other things if sold, and the like. Such a provision in fact amounts to a gift of a fund to be acquired in future: *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 461; *Clark v. Browne*, 2 Smale & G. 524; *Spencer v. Higgins*, 22 Conn. 521; *Langdon v. Astor's Ex'rs*, 3 Duer, 477; *Gardner v. Printup*, 2 Barb. 83, 88; *Doughty v. Stillwell*, 1 Bradf. 300, 309; *Corbin v. Mills's Ex'rs*, 19 Gratt. 438. In order that a

(b) See, also, *Freer v. Freer*, 22 Ch. Div. 622. But a transfer, under an order in lunacy, of stock into the name of the Paymaster-General out

of the name of the testatrix who had become of unsound mind, is not an ademption: *In re Wood*, [1894] 2 Ch. 577.

should not be confounded with ademption proper of specific legacies.^{4c} They may, of course, be a "revocation" of demonstrative and of general legacies.

§ 1132. General Legacies.—The term "general" legacies comprises all those which are not either specific or demonstrative,—that is, those which are not gifts of some identical article or fund forming part of the testator's estate, nor gifts of a sum payable out of such an identified fund. They are, therefore, rather gifts of *amounts* than of things or pieces of property specially described and identified. Since all general legacies are, in their legal effect, equivalent to gifts of money equal in amount to the value of the thing actually described in the bequest, the term "pecuniary" is also sometimes used as synonymous with "general."¹ Gifts of sums of money, the amounts of which only are stated, are always general; as, for example, "I bequeath to A B five hundred dollars." A gift of any chattel or chattels — as a white horse, or furniture, or goods, or of any kind of securities, such as shares in any stock, or governmental bonds, and the like — *may* be general, and

specific thing bequeathed may pass by a will, it must belong to the testator at his death, and therefore stocks which were directed to be purchased, but which were not purchased, will not pass by a bequest in general terms of all his stock: *Thomas v. Thomas*, 27 Beav. 537; but stocks would pass under such a gift which had actually been purchased, although not yet delivered or not fully transferred on the corporation books at the time of the death: *Ellis v. Eden*, 25 Beav. 482; *Field v. Peckett*, 29 Beav. 573, 575.

⁴ As to "satisfaction" of general legacies, see vol. 2, §§ 520–526, 544–564. As to demonstrative legacies, see *Mann v. Copland*, 2 Madd. 223; *Vickers v. Pound*, 6 H. L. Cas. 885, and *post*, §§ 1133, 1138.

¹ "Pecuniary legacies" are therefore "general legacies." The term is not, however, strictly accurate as descriptive of a class, since specific legacies may be, and often are, gifts of nothing but money.

(c) The doctrine of ademption applies to an appointment by will, whether made under a general or under a special power. An appointment by will fails in case of the non-existence at the death of the testator of either the object or the subject

of the appointment: *In re Moses*, [1902] 1 Ch. 100; *Dawsitt v. Meakin*, [1901] 1 Ch. 398, explaining *Gale v. Gale*, 21 Beav. 349; *Blake v. Blake*, 15 Ch. Div. 481; *Collinson v. Collinson*, 24 Beav. 269, and *In re Johnstone's Settlement*, 14 Ch. Div. 162.

will be general, even though the testator owns at the time articles of the same kind, or even owns an article precisely answering to the description, unless the language of the bequest describes and certainly points out as *the* thing given some identical article, horse, furniture, goods, or some identical shares of stocks, bonds, or fund, existing as a part of the testator's estate.² The peculiar effect of a general legacy is, that, instead of operating as a voluntary assignment of the identical thing to the legatee, and so taking effect only when the specific thing or fund remains in existence as a part of the testator's estate, it creates an

² *Ashburner v. Macguire*, 2 Lead. Cas. Eq., 4th Am. ed., 605-612, 646-652; *Fielding v. Preston*, 1 De Gex & J. 438; *Macdonald v. Irvine*, L. R. 8 Ch. Div. 101; *Hawthorn v. Shedden*, 3 Smale & G. 293; *Fairer v. Park*, L. R. 3 Ch. Div. 309; *Tift v. Porter*, 8 N. Y. 516; *Bliven v. Seymour*, 88 N. Y. 469; *Pearce v. Billings*, 10 R. I. 102; *Parker's Ex'rs v. Moore*, 25 N. J. Eq. 228; *Harper v. Bibb*, 47 Ala. 547; *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9; *Randle v. Carter*, 62 Ala. 95; *Brown v. Grimes*, 60 Ala. 647; *Scofield v. Adams*, 12 Hun, 366; *England v. Vestry of Prince George's Parish*, 53 Md. 466; *Osborne v. McAlpine*, 4 Redf. 1; *Enders v. Enders*, 2 Barb. 362; *Corbin v. Mills's Ex'rs*, 19 Gratt. 438; *Davis v. Cain's Ex'r*, 1 Ired. Eq. 304;^a that a gift of so much stock, etc., is general, although the testator at the time owns the same kind, or even the very same amount, in the absence of further descriptive and identifying language, see *ante*, cases cited in note 2 under § 1130; but see *Kunkel v. Macgill*, 56 Md. 120, in which, under the special circumstances, such a legacy was held to be specific. A gift of a specified amount or sum of money is none the less general because the testator may add the particular purpose for which he makes the bequest; as, to buy a ring: *Apreece v. Apreece*, 1 Ves. & B. 364; or to purchase an annuity: *Gibbons v. Hills*, 1 Dick. 324; or land: *Hinton v. Pinke*, 1 P. Wms. 359; or stock: *Edwards v. Hall*, 11 Hare, 1, 23. "If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee, upon failure of such objects, so that the prescribed mode of enjoyment become impossible, then the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it": *Lassence v. Tierney*, 1 Macn. & G. 551, 561, 562, per Lord Cottenham; *Kellett v. Kellett*, L. R. 3 H. L. 160, 169; *Campbell v. Brownrigg*, 1 Phill. Ch. 301; *Churchill v. Churchill*, L. R. 5 Eq. 44; *Palmer v. Fowler*, L. R. 13 Eq. 250.

(^a) See, also, *Robertson v. Broadbent*, 8 App. Cas. (H. L.) 812; affirming same case *sub nom.* *Broadbent v.*

Barrow, 20 Ch. Div. 676; *Miller v. Cooch*, 5 Del. Ch. 161.

obligation resting upon the executor to pay to the legatee the amount specified, if there are sufficient assets left in the estate. It takes effect, therefore, and creates a right in the legatee to the payment, if there are sufficient assets, even though the particular thing, fund, stock, or security mentioned in the bequest is not left existing as a part of the testator's estate at his death, and even though it had never belonged to the testator during his lifetime. If the assets are not sufficient to pay the legacy in full, the legatee is entitled to a ratable portion thereof. This obligation, or executory right of the legatee, created by a general legacy, renders it in this respect much more advantageous to him than the specific legacy. For this reason it is an established rule of construction of wills to lean strongly in favor of an interpretation which makes a legacy general rather than specific.³

§ 1133. **Demonstrative Legacies.**—Demonstrative legacies are a peculiar kind which partake of the nature of both specific and general legacies, and combine the advantages of each. Demonstrative legacies are bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, but made payable *primarily* out of a particular designated fund or piece of property belonging, or assumed to belong, to the testator.¹

³ Where the language is at all doubtful, the courts will always hold a legacy to be general rather than specific, if the terms of the bequest will admit of that interpretation: *Tift v. Porter*, 8 N. Y. 516; *Norris v. Ex'rs of Thomson*, 16 N. J. Eq. 222, 542; and see cases in last preceding note.

¹ In *Robinson v. Geldard*, 3 Macn. & G. 735, 744, 745, Lord Truro, quoting the definition of Mr. Justice Williams, said: "A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment; this kind of legacy is called by the civilians a demonstrative legacy, and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets." See also *Tempest v. Tempest*, 7 De Gex, M. & G. 470, 473, per Lord Cranworth. In *Paget v. Huish*, 1 Hem. & M. 663, 668, the testator gave five annuities for various amounts, describing them, and

Their effect is peculiar. Although made primarily payable out of a particular fund, these legacies do not fail — are not adeemed — because such fund may not exist as a part of the testator's estate at his death, but they are then payable out of his general assets, like general legacies. On the other hand, if such particular fund is in existence as a part of the testator's estate at his death, they are not liable to abate-

added: "I declare that each of the said five annuities shall be paid out of the rents of my real estate hereby devised, half-yearly." Held, demonstrative. Page Wood, V. C., after defining "general" and "specific" legacies, added: "The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable." In *Giddings v. Seward*, 16 N. Y. 365, the will said: "I give unto Antha Seward the sum of twelve hundred dollars and interest on the same, contained in a bond and mortgage given to me by O. W. S., dated," etc. The bond and mortgage referred to was for the payment of twelve hundred dollars and interest in ten years from its date. Held, a demonstrative legacy, and not adeemed by assignment, or payment, or other extinguishment of the bond and mortgage during the testator's lifetime. See also *Gillaume v. Adderley*, 15 Ves. 384; *Campbell v. Graham*, 1 Russ. & M. 453; *Vickers v. Pound*, 6 H. L. Cas. 885; *Gordon v. Duff*, 3 De Gex, F. & J. 662; *Disney v. Crosse*, L. R. 2 Eq. 592; *Hodges v. Grant*, L. R. 4 Eq. 140; *Mytton v. Mytton*, L. R. 19 Eq. 30; *Pierrepont v. Edwards*, 25 N. Y. 128; *Florence v. Sands*, 4 Redf. 206; *Manice v. Manice*, 1 Lans. 348; *Enders v. Enders*, 2 Barb. 362; *Armstrong's Appeal*, 63 Pa. St. 312; *Knecht's Appeal*, 71 Pa. St. 333; *Gallagher v. Gallagher*, 6 Watts, 473; *Corbin v. Mills's Ex'rs*, 19 Gratt. 438; *Smith v. Lampton*, 8 Dana, 69; *Snow v. Foley*, 119 Mass. 102.^a In this class the bequest is not of or of a part of specific property, so as to operate as an assignment of that specific property, but the property is simply pointed out, *demonstrated*, as a particular fund, out of which it is payable. The following are examples of what bequests are thus demonstrative: Gifts of specified sums or amounts payable *out of* a mass of property real or personal: *Savile v. Blacket*, 1 P. Wms. 777; *Disney v. Crosse*, L. R. 2 Eq. 592; gifts of a particular sum out of or from a specified amount of stock: *Kirby v. Potter*, 4 Ves. 748; *Attwater v. Attwater*, 18 Beav. 330;^b or out of or a share of the capital employed in a certain business: *Sparrow v. Josselyn*, 16 Beav. 135; *Bevan v. Att'y-Gen.*, 4 Giff. 361; a bequest of money now vested in particular bonds or securities: *Gillaume v. Adderley*, 15 Ves. 384; or of a sum to be paid by and out of moneys due to the testator on a bond or other security: *Roberts v. Pocock*, 4 Ves. 150; *Acton v. Acton*, 1 Mer. 178; *Smith v. Fitzgerald*, 3 Ves. & B. 2.

(^a) *Bradford v. Brinley*, 145 Mass. 41 N. J. Eq. 39, 2 Atl. 778; *Morris* 81, 13 N. E. 1; *Tichenor v. Tichenor*, v. *Garland's Adm'r*, 78 Va. 215.

(^b) *Ives v. Canby*, 48 Fed. 718.

ment in common with general legacies, but are entitled to payment under the circumstances in exactly the same manner as true specific legacies.²

§ 1134. **Annuities.**—An annuity, when given by will, is the bequest of some certain specified amount of money to be paid at prescribed recurring intervals of time during some period, which may be any definite number of years, or for life, or perpetual.¹ When an annuity is given *simpliciter*,—that is, given to the annuitant without specifying its duration,—it is for life, and not perpetual.² The mere gift of the interest on a certain sum of money is not an annuity.³ An annuity may be given in general terms, so as to be payable out of the general assets of the estate. It is then a “general” legacy, governed by all the rules applicable to that kind of legacy, and subject to abatement with them.⁴ It is ordinarily, however, made payable out of some designated fund; as, for example, out of certain

§ 1133, ² If the particular fund fails in whole or in part, or ceases to exist as a part of the estate, the demonstrative legacies then become in all respects like general legacies, and are payable out of the general assets, in full if such assets are sufficient, ratably if insufficient. If the fund continues in existence and is sufficient, then the demonstrative legacies are not liable to abatement *with* the general legacies; but like specific legacies, they are payable in full in preference to the general legacies, even though the latter wholly fail. They plainly possess the advantages and are free from the defects belonging to each of those kinds: *Mann v. Copland*, 2 Madd. 223; *Vickers v. Pound*, 6 H. L. Cas. 885; *Mullins v. Smith*, 1 Drew. & S. 204, 210; *Acton v. Acton*, 1 Mer. 178; *Paget v. Huish*, 1 Hem. & M. 663; *Armstrong's Appeal*, 63 Pa. St. 312; *Welch's Appeal*, 28 Pa. St. 363; *Walls v. Stewart*, 16 N. J. Eq. 275, 281; *Giddings v. Seward*, 16 N. Y. 365; *Pierrepont v. Edwards*, 25 N. Y. 128; *Newton v. Stanley*, 28 N. Y. 61; *Manice v. Manice*, 1 Lans. 348; and cases in last preceding note.

§ 1134, ¹ In construing a will, annuities will, as a general rule, be comprised within the word “legacies”: *Duke of Bolton v. Williams*, 4 Brown Ch. 297; *Sibley v. Perry*, 7 Ves. 522, 534; *Swift v. Nash*, 2 Keen, 20; thus where “legacies” are directed to be paid out of real estate, an annuity will also be included: *Mullins v. Smith*, 1 Drew. & S. 204, 211.

§ 1134, ² *Yates v. Maddan*, 3 Macn. & G. 532; *Lett v. Randall*, 2 De Gex, F. & J. 388; *Kerr v. Middlesex Hospital*, 2 De Gex, M. & G. 576, 583.

§ 1134, ³ *Whitson v. Whitson*, 53 N. Y. 479.

§ 1134, ⁴ *Alton v. Medlicot*, cited 2 Ves. Sr. 417.^a

(a) *Emery v. Batchelder*, 78 Me. 233, 3 Atl. 733.

stock, or the interest arising from certain mortgages, or the rents and profits of certain lands. Such an annuity is in all respects a "demonstrative" legacy, and is governed by the rules regulating that species of legacies.⁵

§ 1135. *Abatement of Legacies.*—The order in which the different kinds of property and funds belonging to an estate should be appropriated in the payment of debts, legacies, and other claims may, of course, be determined by the testator, and these directions contained in his will are followed in the final settlement and distribution. In the absence of any such directions by the testator, courts of equity have adopted certain fundamental principles, and have established a certain order upon the basis of these principles, by which the rights of all claimants upon the estate, as among themselves, are to be finally settled, and in accordance with which the estate is to be applied in the discharge of their claims. These fundamental principles may be stated as follows: Creditors are entitled to be paid in full out of all assets subject to their debts, in preference to all mere volunteers, whether heirs, next of kin, legatees, or devisees.¹ In the absence of contrary directions in the will, the personalty is the primary fund for the payment of debts and legacies. Property undisposed of by the will is primarily liable in preference to that which is expressly bequeathed or devised.² By applying these principles, in combination with the general classes of directions which the testator *may* prescribe, the order has been established as given in the foot-note.²

⁵ Mann v. Copland, 2 Madd. 223; Paget v. Huish, 1 Hem. & M. 663; Attwater v. Attwater, 18 Beav. 330; Pierrepont v. Edwards, 25 N. Y. 128.^b For further particulars concerning annuities, see 2 Lead. Cas. Eq., 4th Am. ed., 613-619.

¹ In the states of this country, and at present in England, the land of the deceased testator or intestate is an asset liable for his debts.

² This order has been modified to a greater or less extent by the statutes of

(^b) Additon v. Smith, 83 Me. 551,
22 Atl. 470.

(a) The text is quoted in Hope v.
Wilkinson, 14 Lea 21, 52 Am. Rep.
149.

§ 1136. **Nature of Abatement.**—“Abatement” literally means a subtraction from the legacy, so that the full amount given by the will is not actually received by the legatee. It assumes that the total estate left by the testator is not sufficient to pay all the debts and other charges upon it, and all of the gifts which he has made in the will. If the estate is sufficient for both these purposes, there can be no place for any diminution of legacies or devises. When all the expenses and charges and debts have been paid or provided for, and there are not assets enough left to

various states. It forms, however, the *basis* of the legislation, and its fundamental principles have been *substantially* followed in the statutory system of most of the states which have legislated on the subject. In a few,—as, for example, in California,—all discrimination between real and personal property has been practically abrogated. So far as the statutes have not interfered, the principles and order established by the court of chancery have been followed by the American courts: See *Hoover v. Hoover*, 5 Pa. St. 351; *Armstrong's Appeal*, 63 Pa. St. 312. The true meaning of the doctrine involved in this order should not be misapprehended. It furnishes a rule by which the rights of claimants and of those entitled to the different classes of funds, *as among themselves*, are to be adjusted in the final apportionment and distribution of the whole estate. It does not necessarily and under all circumstances compel creditors or legatees to resort to the various classes of funds in the order laid down for the satisfaction of their demands. On the contrary, so far as the rights of creditors are alone concerned, *all the classes of funds* are in general liable; and so far as the rights of general legatees are alone concerned, several of the classes are certainly liable. The doctrine simply means that whenever subsequent classes of funds (e. g., the fourth or fifth) have been appropriated for the payment of debts or legacies which are primarily chargeable upon prior classes (e. g., the first, second, or third), so that the persons properly entitled to those subsequent classes would be disappointed, then such disappointed claimants may have the assets composing those prior classes *marshaled* in their own favor,—in other words, they then become entitled to resort to those prior classes (first, second, or third, as the case may be) for the satisfaction of their own demands which were otherwise primarily chargeable upon the subsequent classes (the fourth or fifth). In this manner the doctrine secures, as far as possible, the *equitable* rights of all classes of claimants upon the estate, and an equitable appropriation of all the classes of funds of which it is composed. The order in which the different classes of assets are to be appropriated and administered, so as to secure, if possible, the equitable rights of all claimants, creditors, and volunteers, is the following: 1. The general personal property not disposed of at all by the will, or only disposed of by being included in the residuary clause: *Davies v. Topp*, 1 Brown Ch. 524, 526; *Duke of Ancaster v. Mayer*, 1 Brown Ch. 454. It should be noticed that a disposition of the

pay all the legacies and devises in full, plainly there must be some subtraction from the amounts specified in the will. Does this abatement extend to all alike? or are some entitled to a preference over others? Must *all* be diminished by a *pro rata* deduction? or must the abatement be first applied to a certain class, even so far as to wholly absorb and extinguish it if necessary, before resort is made to another and more favored class? There is such a preference based upon the distinction between *specific* gifts — legacies and devises — and those which are general. The

“residue,” in the residuary clause, does not change the nature of the personal property included in it,— does not make it different from that which is not disposed of at all; *for there really is no residue until all the debts and all the legacies mentioned have been paid*: See *Lyne’s Estate*, L. R. 8 Eq. 482. 2. Real estate expressly devised *to be sold* for the payment of debts, and not merely *charged* with the payment of debts: *Lanoy v. Duke of Athol*, 2 Atk. 444; *Davies v. Topp*, 1 Brown Ch. 524, 527; *Harmood v. Oglander*, 8 Ves. 106, 124, 125; *Manning v. Spooner*, 3 Ves. 114, 117; *Phillips v. Parry*, 22 Beav. 279. 3. Real estate descending to the heir, not charged with debts: *Davies v. Topp*, *supra*; *Harmood v. Oglander*, *supra*; *Row v. Row*, L. R. 7 Eq. 414;^b 4. Real estate devised and personal property specifically bequeathed *charged* with the payment of debts; that is, specifically given to devisees or legatees subject to the payment of debts: *Harmood v. Oglander*, *supra*; *Barnewell v. Lord Cawdor*, 3 Madd. 453; *Irvin v. Ironmonger*, 2 Russ. & M. 531; *Wood v. Ordish*, 3 Smale & G. 125; *Harris v. Watkins*, Kay, 438. 5. General pecuniary legacies, or, to speak more accurately, the personal property which would otherwise be needed to pay the general legacies. All the property of this class must contribute ratably.^c 6. Real estate devised, not charged with debts, including the real estate embraced in a residuary devise, since *every* devise of land is essentially specific, and personal property specifically bequeathed; that is, articles or funds given as specific legacies. These kinds of property, being *specifically* given, stand on the same footing, and they all contribute ratably with each other in case of a deficiency; as to lands, see *Hensman v. Fryer*, L. R. 3 Ch. 420; 2 Eq. 627; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Collins v. Lewis*, L. R. 8 Eq. 708; *Pearmain v. Twiss*, 2 Giff. 130; as to legacies, see *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. C. C. 490; *Gervis v. Gervis*, 14 Sim. 654; *Young v. Hassard*, 1 Jones & L. 466, 472; *Fielding v. Preston*, 1 De Gex & J. 438; of course, one kind may be made primarily liable by the will:

(b) *Hope v. Wilkinson*, 14 Lea 21, 52 Am. Rep. 149.

(c) That general pecuniary legacies are to be resorted to after a devise of real estate charged with the pay-

ment of debts, see *In re Roberts*, [1902] 2 Ch. 834, following *In re Stokes*, [1892] 67 L. T. 223, and *In re Salt*, [1895] 2 Ch. 203.

doctrine of "abatement" determines the priority among the classes, and the order in which the necessary subtraction must be made, so that the preferred class shall not be abated until the assets appropriate for the legacies of the inferior class have been exhausted; and it also determines the rule by which all the legacies of the same class, as between themselves, shall be reduced, whenever a deficiency of assets occurs. This latter rule is a striking application of the maxim, Equality is equity.¹

§ 1137. **Abatement of Specific Legacies.**—Among legacies, the specific constitute the preferred class. Specific legacies do not abate in common with general legacies; they only abate if the deficiency of assets is so great as to render a resort to them necessary when the fund representing the general legacies is exhausted. Whenever it becomes necessary to resort to the class composed of the specific legacies and devises, all the legacies and devises in that class will abate *pro rata*. Specific legacies and devises stand upon the same footing, are subject to the same liability, are

Bateman v. Hotchkin, 10 Beav. 426.^d 7. Property which the testator appoints, under a *general* power of appointment, in favor of volunteers: *Thompson v. Towne*, 2 Vern. 319; *Bainton v. Ward*, 2 Atk. 172; *Fleming v. Buchanan*, 3 De Gex, M. & G. 976; *Hawthorn v. Shedden*, 3 Smale & G. 293, 305; *In re Davies's Trusts*, L. R. 13 Eq. 163.^e

¹ See *ante*, vol. 1, § 411.

(d) A few cases hold that specific legacies are liable before specific devises: See *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675; and see 2 *Jarman on Wills*, Perkins's ed. (547) 391, 392; but the great weight of authority supports the rule as given above: *Maybury v. Grady*, 67 Ala. 147, 159, per Stone, J.; *Armstrong's Appeal*, 63 Pa. St. 312; *Cranmer v. McSwords*, 24 W. Va. 594. Pecuniary legacies charged on residuary real and personal estate are not liable to

contribute to the payment of debts, but the residuary real estate must contribute to the debts ratably with the specific devisees and legatees, according to its full value without deducting the amount of the pecuniary legacies: *In re Bawden*, [1894] 1 Ch. 693, following *In re Saunders-Davies*, 34 Ch. Div. 482; *Raikes v. Boulton*, 29 Beav. 41.

(e) As to who is a volunteer, see *In re Lawley*, [1902] 2 Ch. 673, 799; affirmed, *sub nom.* *Beytus v. Lawley*, [1903] App. Cas. 411.

abated together under the same circumstances, and contribute ratably for the payment of debts and charges.¹

§ 1138. **Abatement of Demonstrative Legacies.**—If the fund out of which they are primarily made payable exists as a part of the testator's estate at his death, demonstrative legacies are governed by the same rules as specific legacies, and abate only with them *ratably*; but if the fund does not so exist, they become, in effect, general legacies, and must contribute *pro rata* with all the other general legacies.¹

§ 1139. **Abatement of General Legacies.**—The rule is settled, that, with one or two particular exceptions, and in the absence of a contrary intention expressed by the testator, *all* general legacies are liable to be abated to the extent of complete obliteration, in order to pay the debts in full, before resort is had to the specific legacies and devises, if the deficiency of assets is so great as to require such an entire appropriation of the funds otherwise applicable to the payment of these legacies. When the deficiency is only partial, so that a complete abatement is unnecessary, all the general legacies must contribute ratably; in other words, they are all subject to a *pro rata* abatement. General annuities stand upon the same footing, and abate *pari passu* with other general legacies.¹

§ 1137, ¹Long v. Short, 1 P. Wms. 403; Sleech v. Thorington, 2 Ves. Sr. 560, 561, 564; Page v. Leapingwell, 18 Ves. 463; Harley v. Moon, 1 Drew. & S. 623; Wright v. Weston, 26 Beav. 429; Fielding v. Preston, 1 De Gex & J. 438; Walpole v. Apthorp, L. R. 4 Eq. 37; Powell v. Riley, L. R. 12 Eq. 175; In re Jeffery's Trusts, L. R. 2 Eq. 68; Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9; Lightfoot v. Lightfoot's Ex'r, 27 Ala. 351; Bevan v. Cooper, 7 Hun, 117; Bonham v. Bonham, 33 N. J. Eq. 476; Towle v. Swasey, 106 Mass. 100; Brainerd v. Cowdrey, 16 Conn. 1, 498; Nash v. Smallwood, 6 Md. 394; Alexander v. Worthington, 5 Md. 471; Armstrong's Appeal, 63 Pa. St. 312.

§ 1138, ¹Mullins v. Smith, 1 Drew. & S. 204, 210; Acton v. Acton, 1 Mer. 178; Armstrong's Appeal, 63 Pa. St. 312; Manice v. Manice, 1 Lans. 348; Florence v. Sands, 4 Redf. 206; and see cases cited *ante*, under § 1133. When annuities are demonstrative, they are, of course, governed by the same rule.

§ 1139, ¹This general doctrine is accurately stated in Titus's Adm'r v. Titus, 26 N. J. Eq. 111, as follows: "The rule in regard to bequests in the form of general legacies and of pure bounty, where there are no expressions in the will, or inferences to be drawn therefrom, manifesting an intention to give them priority, is, that in the event of an insufficiency of assets to pay them in full,

§ 1140. **Limitations — Intention of the Testator.**—This doctrine, although nearly universal, may still be overcome by a contrary intention of the testator plainly expressed in the will. If a testator uses language sufficiently showing an intention that a certain legacy or legacies otherwise general shall have preference, and be paid in full before the others, and not abate *pro rata* with them, such intention will be carried out, and the legacy or legacies will be preferred, although general.¹ Some additional rules, showing what

they shall abate ratably. Neither the relationship of certain legatees to the testator, nor a provision against lapse of the legacies, nor a direction that all the legacies shall be paid 'in the order in which they are stated in the will, and out of the first moneys that shall come into the executor's hands after payment of debts and funeral expenses,' where the will shows that the testator contemplated a residue after payment of all the legacies in full, constitutes any ground for preference." The doctrine is also concisely expressed in the very recent case of *Appeal of Trustees of the University of Pennsylvania*, 97 Pa. St. 187: "Where there is a deficiency after payment of debts, expenses, and specific legacies, the loss shall be borne entirely and proportionally by pecuniary legacies which are in their nature general. A general legacy to a volunteer will not be entitled to any exemption from abatement on the ground of its being applied to any particular object, as a bequest to a wife or child, or charity. Where, however, there is a valuable consideration for a testamentary gift, such legacy is entitled to a preference over those which are mere bounties. Although a testator may exempt a legacy from abatement at the expense of the others, yet among legacies which are in their nature mere bounties, the presumption of intended equality exists and governs, unless overcome by unequivocal evidence to the contrary." See also *Miller v. Huddleston*, 3 Macn. & G. 513; *Thwaites v. Foreman*, 1 Coll. C. C. 409; *Brown v. Brown*, 1 Keen, 275; *Coore v. Todd*, 7 De Gex, M. & G. 520; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; *Hensman v. Fryer*, L. R. 3 Ch. 420; *Bonham v. Bonham*, 33 N. J. Eq. 476; *Osborne v. McAlpine*, 4 Redf. 1; *Alsop v. Bowers*, 76 N. C. 168; *Bliven v. Seymour*, 88 N. Y. 469.

¹ *Lewin v. Lewin*, 2 Ves. Sr. 415; *Marsh v. Evans*, 1 P. Wms. 668; *Att'y-Gen. v. Robins*, 2 P. Wms. 23; *Beeston v. Booth*, 4 Madd. 161, 170; *Stammers v. Halliley*, 12 Sim. 42; *Brown v. Brown*, 1 Keen, 275; *Haynes v. Haynes*, 3 De'Gex, M. & G. 590; *McLean v. Robertson*, 126 Mass. 537; *Bancroft v. Bancroft*, 104 Mass. 226; *Appeal of Trustees of the University of Pennsylvania*, 97 Pa. St. 187.^a But this intention must be clear; there will be no deviation from the general rule, where the testator has left it doubtful whether he intended to give such a preference: *Blower v. Morret*, 2 Ves. Sr. 420; *Beeston v. Booth*, *supra*; *Eavestaff v. Austin*, 19 Beav. 591; *Appeal of Trustees of the University of Pennsylvania*, *supra*.^b

(a) In *re Hardy*, 17 Ch. Div. 798; dissented from, In *re Schweder's Estate*, [1891] 3 Ch. 44.

(b) *Additon v. Smith*, 83 Me. 551, 22 Atl. 470.

language will or will not sufficiently express such an intention, will be found in the foot-note.

§ 1141. **Exceptions — Legacies to Near Relatives.**— It is the settled rule of equity, independent of statutes, that among general legacies there is no precedence, no exemption from *pro rata* or complete abatement, in favor of legacies to a wife, child, or other near relative of the testator.¹ If, however, the testator shows an intent to give such legacies the preference, his intention will be followed; and a court of equity would easily discover such intention in favor of a widow, child, or descendant.² This general rule has been changed in several states by statutes which give legacies to

A general legacy acquires no preference over others of the same class, and no exemption from the liability of abatement *pro rata* with all the others, from the fact that the will directs it to be paid at once, or to be paid out of the first moneys in the executor's hands, or that the legacies should be paid in the order in which they are given by the will, or the like: *Blower v. Morret*, 2 Ves. Sr. 420; *Beeston v. Booth*, 4 Madd. 161, 168; *Brown v. Brown*, 1 Keen, 275; *Thwaites v. Foreman*, 1 Coll. C. C. 409; *Titus's Adm'r v. Titus*, 26 N. J. Eq. 111.^c But if a testator gives a general legacy, and adds a direction that it "shall be paid in full" or "shall be paid at all events," or other direction to the same effect, such legacy will have precedence, and will not abate in common with the others, but must be paid in full, if possible, even though all the other general legacies should wholly fail: *Marsh v. Evans*, 1 P. Wms. 668; *Johnson v. Johnson*, 14 Sim. 313; *McLean v. Robertson*, 126 Mass. 537. But if two or more general legacies are accompanied with such directions, and there are not assets sufficient to pay them all in full, they will, of course, abate *pro rata* as among themselves, while all the other general legacies not thus preferred fail entirely: *Ibid.*; *Bancroft v. Bancroft*, 104 Mass. 226. An intention may also be inferred to give priority to one legacy or class of legacies, where the testator, after giving them, adds that as there will be a *surplus*, he gives further legacies; the former will in such case have a priority; they will, however, abate ratably *as among themselves*; and in all these and similar cases the result is a matter of intention: *Att'y-Gen. v. Robins*, 2 P. Wms. 23; *Brown v. Brown*, 1 Keen, 275; *Stammers v. Halliley*, 12 Sim. 42.

¹ *Blower v. Morret*, 2 Ves. Sr. 420; *Titus's Adm'r v. Titus*, 26 N. J. Eq. 111; *Appeal of Trustees of the University of Pennsylvania*, 97 Pa. St. 187; see *Bliven v. Seymour*, 88 N. Y. 469.^a

² *Lewin v. Lewin*, 2 Ves. Sr. 415. The court leans in favor of such an inten-

(c) See, also, *In re Schweder's Estate*, [1891] 3' Ch. 44 (legacy to wife for immediate requirements abates, though directed to be paid

within three months after testator's decease).

(a) See, also, *In re Schweder's Estate*, [1891] 3 Ch. 44 (legacy to wife).

near family relatives the preference over all other general legacies, and perhaps over those which are special or demonstrative.³

§ 1142. **The Same. Legacy for a Valuable Consideration.**—One exception to the general rule of abatement has always been admitted by courts of equity. A general legacy given for a valuable consideration — as, for example, to a widow in lieu and satisfaction of her dower, or to a creditor in payment or discharge of a debt — has priority, and does not abate with the other legacies, provided the dower right or the debt still exists at the testator's death.¹

§ 1143. **Appropriation of a Fund.**—If a particular fund has been set apart and appropriated by the executor for the payment of a legacy, *with the consent of the legatee*, and afterwards, through the wrongful act of the executor or otherwise, this fund becomes deficient, the legatee is not entitled to contribution from the other legatees of the same class, in order to make up the deficiency, but can only resort to the residue, if there be any. It is otherwise if the appropriation was made without the consent of the legatee; in that case he is entitled to call upon the other legatees, so that the loss should be borne by all of them ratably.¹

tion in case of a widow or child, but against it in case of legatees who are wholly volunteers and *strangers*.

§ 1141, ³ See Cal. Civ. Code, sec. 1361 (husband, widow, children, or other family kindred); *Scofield v. Adams*, 12 Hun, 366 (husband).

§ 1142, ¹ *Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. Sr. 420; *Heath v. Dendy*, 1 Russ. 543; *Davies v. Bush*, 1 Younge, 341; *Potter v. Brown*, 11 R. I. 232 (dower); *Sanford v. Sanford*, 4 Hun, 753 (legacy in lieu of dower is only entitled to preference in payment out of the personal property, and is not a charge on the real estate); *Matter of Dolan*, 4 Redf. 511 (dower); *McLean v. Robertson*, 126 Mass. 537 (for a debt).^a

§ 1143, ¹ *Baker v. Farmer*, L. R. 3 Ch. 537, reversing L. R. 4 Eq. 382; *Ex parte Chadwin*, 3 Swanst. 380; *Willmott v. Jenkins*, 1 Beav. 401; *Page v. Leap-*

(a) *Harper's Appeal*, 111 Pa. St. 243, 2 Atl. 861; *Brown v. Brown*, 79 Va. 648. In lieu of dower: *Security Co. v. Bryant*, 52 Conn. 311, 52 Am. Rep. 599; *Moore v. Alden*, 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203, citing this paragraph of the

text; *Borden v. Jenks*, 140 Mass. 565, 54 Am. Rep. 507, 5 N. E. 623; *Estate of Gotzian*, 34 Minn. 159, 57 Am. Rep. 43, 24 N. W. 920. For a limitation on the general rule, see *In re Greenwood*, [1892] 2 Ch. 295.

§ 1144. **Lapsed Legacies.**— When the legatee is dead at the time of making the will, or dies afterwards during the testator's lifetime, by the common-law rule the legacy to him is said "to lapse"; the gift to him wholly fails; it does not pass to *his* personal representatives, next of kin, or heirs, nor has he the power to dispose of it by his own will. In short, the legacy becomes entirely nugatory. The same general rule of the common law applies to a devise of any real estate.¹ Where a gift is made to a number of persons *as a class*, such class to be ascertained and fixed as it exists at the death of the testator or at any other specified time, the predecease of any member of the class will not occasion a lapse of his share; the class as it exists at the time designated will take the whole property.^{2 a} Whenever a legacy lapses, the specific property bequeathed, if it was specific, or the amount of assets which would be requisite for its payment if it was general, falls into the residue, and

ingwell, 18 Ves. 463, 466; *Humphreys v. Humphreys*, 2 Cox, 184; *Fonnereau v. Poyntz*, 1 Brown Ch. 472, 478. The reason of this distinction is, that where the legatee has consented to such an appropriation, he has made the executor his *personal* debtor; he has, as it were, received payment of his legacy, and then loaned it back to the executor; but in the other case, the act is that of the executor alone.

¹ *Maybank v. Brooks*, 1 Brown Ch. 84; *Goodright v. Wright*, 1 P. Wms. 397; *Elliott v. Davenport*, 1 P. Wms. 83; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Browne v. Hope*, L. R. 14 Eq. 343. This common-law rule is very stringent. No mere words of the will, however express, showing an intent of the testator that a lapse should not take place, would prevent it: *Appleton v. Rowley* and *Browne v. Hope*, *supra*. The only possible mode of preventing the lapse was for the testator to substitute some other legatee or devisee, in place of the one first named, to whom the property should go on his death. There must be an actual gift over to another legatee or devisee in case the first-named dies: *Aspinall v. Duckworth*, 35 Beav. 307; *Browne v. Hope*, *supra*.

² *Shuttleworth v. Greaves*, 4 Mylne & C. 35; *Lee v. Pain*, 4 Hare, 201, 250; *Leigh v. Leigh*, 17 Beav. 605; *Fitz Roy v. Duke of Richmond*, 27 Beav. 186; *Sanders v. Ashford*, 28 Beav. 609; *Aspinall v. Duckworth*, 35 Beav. 307. There are one or two other particular exceptions to the general rule. The most important is a bequest for *payment of debts* to the creditors themselves,

(a) See, also, *In re Moss*, [1899] 2 Ch. 314; *Hall v. Smith*, 61 N. H. 144. Where the intention of the testator is not merely bounty to the

legatee, but to discharge a moral obligation recognized by the testator, the legacy does not lapse: *Stevens v. King*, [1904] 2 Ch. 30.

passes by the residuary clause, if there be one; but if there be no residuary clause, then as to such property the testator would in fact die intestate; the amount would be actually undisposed of by will. Where a devise lapsed, by the common-law rule the land given by it would not fall into any residuary clause of the testator's real estate, but would descend to his heir or heirs at law. This latter rule of the common law has been altered in England and generally in the American states by statute.³

§ 1145. **The Same. Statutory Changes.**—The foregoing rules of the common law were generally adopted in this country, and still form a part of our jurisprudence, except in the particular cases or under the particular circumstances where they have been altered by statute. Such modifying legislation, within certain well-defined limits, has been extensively enacted. One common type seems to have been followed. In England the modification is confined to a legacy or devise to a child or other descendant of the testator who shall predecease leaving *issue* living at the testator's death. The gift in such case shall not lapse.¹ American statutes have sometimes made the alteration of the old rule a little broader in its operation, but still have confined it

which will not lapse, but will go to their representatives upon their predecease: *Phillips v. Phillips*, 3 Hare, 281.

³ 1 Vict., c. 26, sec. 25. A lapsed devise is made to fall into the residue like a lapsed legacy. The reason of the common-law rule was found in the doctrine that a will of land, unlike that of personal property, speaks as from the date of its execution, and not from the testator's death. This distinction has been generally abrogated by statute, so that in England and in most of our states wills of real and of personal property alike speak as at the time of the testator's death.

¹ 1 Vict., c. 26, sec. 33: "Where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, . . . shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator." It is held, under this section, that the *same* issue need not be living at the death of the legatee or devisee, and of the testator. It is enough if one person is living at the death of the legatee or devisee, and another person at the death of the testator, but both belonging to the same line of *issue*: *In the Goods of Parker*, 1 Swab. & T. 523.

to gifts bestowed upon near family relatives of the testator.² Under the language of the English statute, it is held that the issue are not *substituted* in place of their deceased parent, but the legacy or devise actually *vests* in the original legatee or devisee to whom the testator gave it, so that it will pass by a will made by such legatee or devisee who dies before the original testator.³ It would seem, however, that the language of some of the American statutes does not admit such an interpretation.

SECTION II.

DONATIONS CAUSA MORTIS.

ANALYSIS.

- § 1146. General nature.
- § 1147. Is not testamentary.
- § 1148. The subject-matter of a valid gift.
- § 1149. Delivery.
- § 1150. Revocation.
- § 1151. Equitable jurisdiction.

§ 1146. General Nature.—A donation *causa mortis* is a gift absolute in form, made by the donor in anticipation of

² The provision is also generally retained, that a lapse is only prevented when the legatee or devisee leaves "issue" or "descendants," or perhaps only in behalf of such issue or "descendants." As illustrations, in New York, a legacy or devise to "a descendant, or a brother, or sister" of the testator does not lapse if such legatee or devisee predecease leaving "a descendant or descendants" who survive the testator: 2 Rev. Stats., p. 66. sec. 52. In construing this provision, it is held that the "descendants" of the legatee or devisee, in order to prevent a lapse, must be lineal descendants,—issue; that the word is used in its ordinary, popular meaning, and not in its purely technical sense of "heirs," either collateral or lineal: Van Beuren v. Dash, 30 N. Y. 393. In California, the provision prevents a lapse "when any estate is devised to any child or other relative of the testator, and the devisee dies before the testator, leaving lineal descendants": Civ. Code, sec 1310. It is very remarkable that the language of this section is confined to "devisee" and "devise," and no mention is made of "legatee," "legacy," or "bequest." It is to be presumed that the courts will extend its operation by interpretation, but such interpretation must certainly be a very strained one. Unfortunately for the cause of codification, the Civil Code of California contains too many such imperfect, partial, ambiguous provisions.

³ Winter v. Winter, 5 Hare, 306; Wisden v. Wisden, 2 Simale & G. 396.

his speedy death, and intended to take effect and operate as a transfer of the title upon, and only upon, the happening of the donor's death. Between the time when the gift is made and the article donated is delivered, and the time when the donor dies, the donation is wholly inchoate and conditional; the property remains in the donor, awaiting the time of his death, and passes to the donee when the death, in anticipation of which the gift was made, happens, unless the donation has in the meantime been revoked by the donor; the donee thus becomes a trustee for the donor, with respect to the article delivered into his possession, until the gift is made perfect by the donor's death. The gift must be absolute, with the exception of the condition inherent in its nature depending upon the donor's death, as above described, and a delivery of the article donated is a necessary element; but it is subject to revocation by the act of the donor prior to death, and is completely revoked by the donor's recovery from the sickness or escape from the danger in view of which it was made.^{1 a} Such a dona-

This statute does not in any way affect gifts to children *as a class*: *Olney v. Bates*, 3 Drew. 319; *Browne v. Hammond*, Johns. 210.

¹ Since the whole doctrine is avowedly borrowed from the Roman law, it may be useful to give the definition contained in the Institutes: "*Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat ut, si quid humanitus ei contigisset, haberet is qui accipit; sin autem supervixisset is qui donavit, reciperet, vel si eum donationis penituisset, aut prior decesserit is cui donatum sit.*" "*A donation mortis causa is that which is made in expectation of death; as when anything is so given that if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given*": *Just. Inst.*, lib. 2, tit. 7, sec. 1; *Sanders's Inst.* 218. The California Civil Code thus

(a) This section is cited in *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; *Allen v. Allen*, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442; *Larrahee v. Hascall*, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; *Thomas's Adm'r v. Lewis*, 89 Va. 1,

15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170; *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721; *Smith v. Smith's Adm'r*, 92 Va. 696, 24 S. E. 280.

tion may be made by a donor who anticipates his speedy death because he is suffering at the time under an attack of severe illness which he supposes to be his last, or because he is exposed, or expects soon to be exposed, to some great and unusual peril of his life; as by a soldier soon before

defines it: "Sec. 1149: A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver." "Sec. 1151: A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time." In *Edwards v. Jones*, 1 Mylne & C. 226, 235, Lord Cottenham said: "A party making a *donatio mortis causa* does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift that it shall not otherwise take effect. A *donatio mortis causa* leaves the whole title in the donor, unless the event occurs which is to divest him." To the same effect is *Staniland v. Willott*, 3 Macn. & G. 664, 674-677, 680, per Lord Truro, who concludes his discussion as follows: "I therefore feel bound to declare that the original transaction constituted a *donatio mortis causa*, and that the shares (given) after the plaintiff's (donor's) recovery from the illness during which the gift was made were held by the defendant (donee) as a trustee for the plaintiff."

On the general nature and essentials of gifts *causa mortis*, and as illustrations of the text,^b see *Ward v. Turner*, 2 Ves. Sr. 431; 1 Lead. Cas. Eq., 4th Am. ed., 1205, 1219-1229, 1230-1251; *Hedges v. Hedges*, Prec. Ch. 269; *Jones v. Selby*, Prec. Ch. 300; *Miller v. Miller*, 3 P. Wms. 356; *Lawson v. Lawson*, 1 P. Wms. 441; *Blount v. Burrow*, 1 Ves. 546; *Tate v. Hilbert*, 2 Ves. 111, 120; *Gardner v. Parker*, 3 Madd. 184; *Snellgrove v. Baily*, 3 Atk. 214; *Duffield v. Elwes*, 1 Sim. & St. 239; 1 Bligh, N. S., 497, 527; *Powell v. Hellicar*, 26 Beav. 261; *Cosnahan v. Grice*, 15 Moore P. C. C. 215; *Bontts v. Ellis*, 4 De Gex, M. & G. 249; *Mitchell v. Smith*, 4 De Gex, J. & S. 422; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R. 13 Eq. 489; *Moore v. Moore*, L. R. 18 Eq. 474; *Rolls v. Pearce*, L. R. 5 Ch. Div. 730; *In re Mead*, L. R. 15 Ch. Div. 651; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308; *Walter v. Ford*, 74 Mo. 195; 41 Am. Rep. 312; *West v. Cavins*, 74 Ind. 265; *Pierce v. Boston Sav. Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Turner v. Estabrook*, 129 Mass. 425; 37 Am. Rep. 371; *Conser v. Snowden*, 54 Md. 175; 39 Am. Rep. 368; *Estate of Barclay*, 11 Phila. 123; *Brooks v. Brooks*, 12 S. C. 422; *Darland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 285; *Conklin v. Conklin*, 20 Hun, 278; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *McCarty v.*

(b) *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500; *Calvin v. Free*, 66 Kan. 466, 71 Pac. 323; *Peck v. Scofield*, (Mass.) 71 N. E. 109; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796;

Deneff v. Helms, 42 Oreg. 161, 70 Pac. 390; *Seabright v. Seabright*, 28 W. Va. 412; monographic note to *Johnson v. Colley*, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

entering into battle, or by a person immediately before undergoing a dangerous surgical operation. If a gift is actually made by the donor during his last sickness, or under any other circumstances which would naturally impress him with an expectation of speedy death, it will be presumed to be a donation *causa mortis*, although the donor does not, in express terms, declare it to be such.² Although

Kearnan, 86 Ill. 291; Kilby v. Godwin, 2 Del. Ch. 61; Trorlicht v. Weizenecker, 1 Mo. App. 482; McGrath v. Reynolds, 116 Mass. 566; Clough v. Clough, 117 Mass. 83; Carr v. Silloway, 111 Mass. 24; Ellis v. Secor, 31 Mich. 185; 18 Am. Rep. 178; Stevens v. Stevens, 5 Thomp. & C. 87; Fiero v. Fiero, 5 Thomp. & C. 151; Case v. Dennison, 9 R. I. 88; 11 Am. Rep. 222; Tillinghast v. Wheaton, 8 R. I. 536; 5 Am. Rep. 621; 94 Am. Dec. 126; Smith v. Dorsey, 38 Ind. 451; 10 Am. Rep. 118; Baker v. Williams, 34 Ind. 547; Rockwood v. Wiggin, 16 Gray, 402; Hatch v. Atkinson, 56 Me. 324; 96 Am. Dec. 464; Southerland v. Southerland's Adm'r, 5 Bush, 591; Prickett v. Prickett's Adm'rs, 20 N. J. Eq. 478; Dole v. Lincoln, 31 Me. 422; Borneman v. Sidlinger, 15 Me. 429; 33 Am. Dec. 626; Weston v. Hight, 17 Me. 287, 290; 35 Am. Dec. 250; Holley v. Adams, 16 Vt. 206, 210, 212; 42 Am. Dec. 508; Smith v. Kittridge, 21 Vt. 238, 245; Meach v. Meach, 24 Vt. 591; Parish v. Stone, 14 Pick. 198, 203, 204; 25 Am. Dec. 378; Grover v. Grover, 24 Pick. 261; 35 Am. Dec. 319; Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Grattan v. Appleton, 3 Story, 755, 763; Raymond v. Sellick, 10 Conn. 480; Harris v. Clark, 2 Barb. 94, 96; 3 N. Y. 93; Delmotte v. Taylor, 1 Redf. 417; Ogilvie v. Ogilvie, 1 Bradf. 356; Westerlo v. De Witt, 35 Barb. 215; Wells v. Tucker, 3 Binn. 366; Nicholas v. Adams, 2 Whart. 17; Hebb v. Hebb, 5 Gill, 506; Bradley v. Hunt, 5 Gill & J. 54; 23 Am. Dec. 597; Pennington v. Gittings, 2 Gill & J. 208; Miller v. Jeffress, 4 Gratt. 472; Chevallier v. Wilson, 1 Tex. 161.

With regard to the nature of the peril, it has been held that a gift made by a soldier in time of war, not upon eve of battle or in anticipation of any *immediate* danger, but in anticipation of the general peril incident to his occupation, might be a valid gift *causa mortis*: Baker v. Williams, 34 Ind. 547; Gass v. Simpson, 4 Cold. 288; and see Smith v. Dorsey, 38 Ind. 451; 10 Am. Rep. 118. The contrary is decided in Irish v. Nutting, 47 Barb. 370; Dexheimer v. Gautier, 5 Rob. (N. Y.) 216; Gourley v. Linsenbigler, 51 Pa. St. 345.^c In my opinion, these latter decisions are clearly correct. If such gifts were valid as donations *causa mortis*, on the same ground gifts made at any time by persons having a chronic disease, although in no immediate danger, would be equally good, because their lives are more likely to be shortened than those of persons in health.

² Lawson v. Lawson, 1 P. Wms. 441; Cal. Civ. Code, sec. 1150. It is never necessary that the donor should expressly say that the gift is to be conditional

(c) And compare Parcher v. Savings Institution, 78 Me. 470, 7 Atl. 266.

courts do not lean against gifts *causa mortis*, yet the evidence to establish them should be clear and unequivocal, and will be closely scrutinized. The burden of proof lies on the donee.^{3 e}

§ 1147. Is not Testamentary.—A gift *causa mortis* is not a *testamentary* act; if it becomes absolute, the title of the donee is derived directly from the donor in his lifetime, and not from or through his executors or administrators.¹ For this reason, if a person intends to make a *testamentary* gift, which for any reason is ineffectual, it cannot be supported as a donation *causa mortis*;² nor can an imperfect gift *inter vivos* be sustained as a valid donation *causa*

on his death; this fact may be inferred from the circumstances: *Gardner v. Parker*, 3 Madd. 184, 185; *Tate v. Leithead*, Kay, 658; *Ogilvie v. Ogilvie*, 1 Bradf. 356.^d

³ *Cosnahan v. Grice*, 15 Moore P. C. C. 215; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Delmotte v. Taylor*, 1 Redf. 417; *Westerlo v. De Witt*, 35 Barb. 215; *Conklin v. Conklin*, 20 Hun, 278; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *Rockwood v. Wiggin*, 16 Gray, 402; *Rhodes v. Childs*, 64 Pa. St. 18; *Dean v. Dean's Estate*, 43 Vt. 337; *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464; *First Nat. Bank v. Balcom*, 35 Conn. 351; *Prickett v. Prickett's Adm'rs*, 20 N. J. Eq. 478.

¹ *Ward v. Turner*, 2 Ves. Sr. 431; *Grattan v. Appleton*, 3 Story, 755.^a

² *Mitchell v. Smith*, 4 De Gex, J. & S. 422; *McGrath v. Reynolds*, 116 Mass. 566.^b

(d) *Seabright v. Seabright*, 28 W. Va. 412, 475.

(e) *Smith v. Smith's Adm'r*, 92 Va. 696, 24 S. E. 280, citing the text; *Seabright v. Seabright*, 28 W. Va. 412.

(a) *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. 796.

(b) *Trenholm v. Morgan*, 28 S. C. 268, 5 S. E. 721, quoting this portion of the text. In *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500, the donor delivered to the donee a certificate of deposit with the following indorsement: "Pay to Martin Basket, of Hender-

son, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself." The donor afterwards died. Held, not a valid gift. The court say, through Matthews, J., at page 609 of 107 U. S.: "A *donatio causa mortis* must be completely executed, precisely as required in the case of a gift *inter vivos*, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor, or by the donor surviving the apprehended peril, or outliving the

mortis.³ It partakes, however, so much of the nature of a testamentary bequest that it is liable for the debts of the testator in case of a deficiency of assets.⁴ A valid gift may be made to any person, to the wife of the donor,⁵ or to one standing in fiduciary or confidential relations to him,⁶ as well as to all others.

§ 1148. The Subject-matter of a Valid Gift.—All kinds of personal property, using the word in its broad, mercantile sense, as equivalent to *assets*, which are *capable* of manual delivery, and of which the title, either legal or *equitable*, can be transferred by delivery, may be the subject-matter of a valid donation *causa mortis*. That all actual chattels,

³ *Edwards v. Jones*, 1 Mylne & C. 226; *Kilby v. Godwin*, 2 Del. Ch. 61. c

⁴ *Tate v. Leithead*, Kay, 658; *Smith v. Casen*, cited 1 P. Wms. 406; *Borne-man v. Sidlinger*, 15 Me. 429; 33 Am. Dec. 626; *House v. Grant*, 4 Lans. 296.

⁵ *Boutts v. Ellis*, 4 De Gex, M. & G. 249.

⁶ In such case the evidence must be most unequivocal: *Thompson v. Hef-fernan*, 4 Dru. & War. 285 (to donor's spiritual adviser); *Walsh v. Studdart*, 4 Dru. & War. 159 (to his attorney).

donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will." Page 614 of 107 U. S.: "A delivery which does not confer upon the donee the present right to reduce the fund into possession, by enforcing the obligation according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary

in character, and not good as a gift." Compare *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366, where it was held that the insertion of a power of revocation by the donor, in an assignment of a policy of insurance, did not render the assignment invalid as a gift *causa mortis*, although the evidence showed that the instrument was not to take effect *in presenti* at all. It is said (p. 348): "No present possession or dominion *did or could* pass to the donee; . . . but there was sufficient in the case as made to establish a gift *causa mortis*." It is difficult to resist the impression that the language last quoted indicates a wrong conception of the nature of gifts *causa mortis*.

(c) See, however, *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366.

including money, either coin or bank notes, may be donated, has never been questioned. Whatever doubt may have once been entertained, the rule is now well established that all things in action which consist of the promises or undertakings of third persons, not the donor himself, of which the legal or equitable title can pass by delivery, may be the subjects of a valid gift, including promissory notes, bills of exchange, checks, bonds, mortgages, savings-bank pass-books, certificates of deposit, policies of insurance, and the like; and it is settled by the recent cases that a valid donation of negotiable instruments may thus be made without indorsement.¹ Debts due from the donee himself may be

¹The following cases will furnish illustrations of the various kinds of articles, things in action, etc., with respect of which gifts have been sustained: *Chattels and money, whether coin or bills*: Ward v. Turner, 2 Ves. Sr. 431; Shanley v. Harvey, 2 Eden, 126; Miller v. Miller, 3 P. Wms. 356; Drury v. Smith; 1 P. Wms. 404; Bunn v. Markham, 7 Taunt. 224; Kilby v. Godwin. 2 Del. Ch. 61; Baker v. Williams, 34 Ind. 547; Dean v. Dean's Estate, 43 Vt. 337; Estate of Barclay, 11 Phila. 123; and see Coleman v. Parker, 114 Mass. 30. *Promissory notes of third persons*:^a Stevens v. Stevens, 5 Thomp. & C. 87; Bedell v. Carll, 33 N. Y. 581; House v. Grant, 4 Lans. 296; Coutant v. Schuyler, 1 Paige, 316; Craig v. Craig, 3 Barb. Ch. 76, 117; Southerland v. Southerland's Adm'r, 5 Bush, 591; Ashbrook v. Ryon's Adm'r, 2 Bush, 228; 92 Am. Dec. 481; Turpin v. Thompson, 2 Mct. (Ky.) 420; Borneman v. Sidlinger, 15 Me. 429; 33 Am. Dec. 626; Caldwell v. Renfrew, 33 Vt. 213; Grover v. Grover, 24 Pick. 261; 35 Am. Dec. 319; Sessions v. Moseley, 4 Cush. 87; Chase v. Redding, 13 Gray, 418; Brown v. Brown, 18 Conn. 410; 46 Am. Dec. 328; Gourley v. Linsensigler, 51 Pa. St. 345; Jones v. Deyer, 16 Ala. 221. *Unindorsed bills or notes*:^b In re Mead, L. R. 15 Ch. Div. 651; Veal v. Veal, 27 Beav. 303; Rankin v. Weguelin, cited 27 Beav. 308. 309; Bates v. Kempton, 7 Gray, 382; Chase v. Redding, 13 Gray, 418, 420. *Certificates of deposit*: Moore v. Moore, L. R. 18 Eq. 474 (a "deposit note" which seems to be substantially the same as our certificate of deposit); Amis v. Witt, 33 Beav. 619 (same); Brooks v. Brooks, 12 S. C. 422; Westerlo v. De Witt, 36 N. Y. 340; 93 Am. Dec. 517.^c *Bonds, or bonds and mortgages*: Duffield v. Elwes, 1 Bligh,

(a) Clayton v. Pierson, (W. Va.) 46 S. E. 935 (voucher signed by third person acknowledging indebtedness).

(b) Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026; but where both parties know the importance of a written assignment, a

strong presumption is raised against considering the transfer a gift: Varick v. Hitt, (N. J. Eq.) 55 Atl. 139.

(c) In re Dillon, 44 Ch. Div. 76; and see Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. ed. 500, ante, note (b) to § 1147.

donated, either by giving back to him the written evidence of debt, or by canceling or destroying the same, or by deliv-

N. S., 497, 527, 542; *Gardner v. Parker*, 3 Madd. 184; *Hurst v. Beach*, 5 Madd. 351; *Clavering v. Yorke*, 2 Coll. C. C. 363, note; *In re Patterson*, 10 Jur., N. S., 578; *Snellgrove v. Baily*, 3 Atk. 214; and see *Conklin v. Conklin*, 20 Hun, 278; *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464; *Lee's Ex'r v. Boak*, 11 Gratt. 182; *Bradley v. Hunt*, 5 Gill & J. 54; 23 Am. Dec. 597; *Pennington v. Gittings*, 2 Gill & J. 208.^d *Savings-bank pass-books*: *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Dec. 680; *Pierce v. Boston Sav. Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Turner v. Estabrook*, 129 Mass. 425; 37 Am. Rep. 371; *Vandermark v. Vandermark*, 55 How. Pr. 408; *Tillinghast v. Wheaton*, 8 R. I. 536; 5 Am. Rep. 621; 94 Am. Dec. 126; *Case v. Dennison*, 9 R. I. 88; 11 Am. Rep. 222; *Dean v. Dean's Estate*, 43 Vt. 337; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39; *Penfield v. Thayer*, 2 E. D. Smith, 305;^e but see *Ashbrook v. Ryon's Adm'r*, 2 Bush, 228; 92 Am. Dec. 481 (pass-book of a bank).^f *Check of a third person*: *Boutts v. Ellis*, 4 De Gex, M. & G. 249.^g *Policy of insurance*: *Witt v. Amis*, 1 Best & S. 109.^h *Stock of corporations*: It is held in England that shares of stock are not capable of being the subject-matter of a valid donation, because no title can be transferred by delivery; no title can pass except by transfer on the company's own books: *Moore v. Moore*, L. R. 18 Eq. 474; *Ward v. Turner*, 2 Ves. Sr. 431.ⁱ Under the law of this country, with respect to the title of the assignee before transfer is made on the company's books, there seems to be no reason why a certificate of stock may not be the subject of a valid gift,—certainly if it has been indorsed in blank; but in my opinion, such indorsement is not necessary.^j *Things in action in general*: See also *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Wing v. Merchant*, 57 Me. 383; *Reed v. Spaulding*, 42 N. H. 114; *Champney v. Blanchard*, 39 N. Y. 111; *Waring v. Edmonds*, 11 Md. 424; *Phipps v. Hope*, 16 Ohio St. 586; *Connor v. Trawick's Adm'r*, 37 Ala. 289, 295; 79 Am. Dec. 58. It may be remarked

(d) *Kiff v. Weaver*, 94 N. C. 274, 55 Am. Rep. 601; *Henschel v. Maurer*, 69 Wis. 576, 34 N. W. 926, 2 Am. St. Rep. 757.

(e) *In re Andrews*, [1902] 2 Ch. 394; *In re Weston*, [1902] 1 Ch. 680 (citing *In re Dillon*, 44 Ch. Div. 76; *Cassidy v. Belfast Banking Co.*, 22 L. R. Ir. 68); *Larrahee v. Hascall*, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440; *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684; *Providence Inst. for Savings v. Taft*, 14 R. I. 502; but a delivery of a pass-book of an ordinary bank of deposit creates no right in the donee: *Jones v. Weakley*, 99 Ala. 441, 12 South. 420, 42 Am. St. Rep.

84, 19 L. R. A. 700; *Thomas's Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

(f) Also, *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535.

(g) *Clement v. Cheeseman*, 37 Ch. Div. 631 (unindorsed).

(h) *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366.

(i) *In re Weston*, [1902] 1 Ch. 680; and see *Baltimore Retort, etc., Co. v. Mali*, 65 Md. 93, 3 Atl. 286, 57 Am. Rep. 304.

(j) This is quoted in *Leyson v. Davis*, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429, where it is held that a delivery without indorsement is valid.

ering a receipt.² Things in action, on the other hand, in which the donor himself is the debtor party, cannot be the subject-matter of a valid gift. The reason is, that, whatever be their form, these gifts would amount to nothing more than the donor's own naked executory *promise* to pay at some further day, without any consideration to support it; and such a voluntary promise cannot be enforced against the donor nor against his executors or administrators.³

that, with regard to what may be given, the rules concerning the subject-matter of gifts *causa mortis* and of gifts *inter vivos* are the same.

² Moore v. Darton, 4 De Gex & S. 517 (giving a receipt); Darland v. Taylor, 52 Iowa, 503; 35 Am. Rep. 285; 3 N. W. 510 (destroying notes of the donee); Lee's Ex'r v. Boak, 11 Gratt. 182.

³ This rule has been universally recognized and applied to different forms of promise. *The donor's own promissory note* cannot constitute a valid gift: *West v. Cavins*, 74 Ind. 265; *Flint v. Pattee*, 33 N. H. 520; 66 Am. Dec. 742; *Copp v. Sawyer*, 6 N. H. 386; *Smith v. Kittridge*, 21 Vt. 238; *Holley v. Adams*, 16 Vt. 206; 42 Am. Dec. 508; *Raymond v. Sellick*, 10 Conn. 480; *Grymes v. Hone*, 49 N. Y. 17; 10 Am. Rep. 313; *Whitaker v. Whitaker*, 52 N. Y. 368; 11 Am. Rep. 711; *Johnson v. Spies*, 5 Hun, 468; *Kenistons v. Sceva*, 54 N. H. 24; *Brown v. Moore*, 3 Head, 671. *The donor's own check*: For the same reason the donor's own check, if not paid before his death, cannot be a valid gift: *In re Mead*, L. R. 15 Ch. Div. 651; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *In re Beak's Estate*, L. R. 13 Eq. 489; *Harris v. Clark*, 3 N. Y. 93, 110; 51 Am. Dec. 352; *Second Nat. Bank v. Williams*, 13 Mich. 282; *McKenzie v. Downing*, 25 Ga. 669; see *Walter v. Ford*, 74 Mo. 195; 41 Am. Rep. 312;¹ but the gift may be operative if the check is paid before the donor's death, since the gift is then in reality one of money merely; and the same is true if acts are done prior to the donor's death, which are tantamount to payment; e. g., the check is certified, or that of a third person is substituted in its place, so that the gift is no longer the mere voluntary promise of the donor: *Rolls v. Pearce*, L. R. 5 Ch. Div. 730; *Bromley v. Brunton*, L. R. 6 Eq. 275; *Boutts v. Ellis*, 4 De Gex, M. & G. 249; *Rhodes v. Childs*, 64 Pa. St. 18; *Trorlicht v. Weizenecker*, 1 Mo. App. 482.

A deed of land made by a woman in expectation of death, in consideration of services rendered by the grantee, was held not to be a donation *causa mortis*, but an absolute irrevocable conveyance for a sufficient consideration, which would not be set aside at the suit of the grantor upon her recovery from the illness: *McCarty v. Kearnan*, 86 Ill. 291.

(*) See, also, *Mason v. Gardiner*, (Mass.) 71 N. E. 952.

(1) *In re Beaumont*, [1902] 1 Ch. 889; *Appeal of Waynesburg College*, 111 Pa. St. 130, 3 Atl. 19, 56 Am. Rep. 252; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep.

19, 71 Pac. 83; *contra*, *Phinney v. State*, (Wash.) 78 Pac. 927 (reviewing many cases, but entirely ignoring any distinction between gifts of choses in action where the donor is the debtor and those where a third person is the debtor).

§ 1149. **Delivery.**—It is essential to the validity of a donation that the thing given be delivered to the donee or to his use. Without a delivery the transaction would only amount to a promise to give, which, being without consideration, would be a nullity. The intention to give must be accompanied by a delivery, and the delivery must be made with an intention to give. The practical question therefore is, What is a sufficient delivery?¹ The delivery may be

¹ The mere fact that the alleged donee acquires possession is clearly insufficient; in order to establish a gift, he must show affirmatively that the possession or custody was conferred upon him by the donor, or was assented to by the donor with the intention thereby of divesting the donor of all control, and of making and perfecting a gift, and not with any other intention.^a I add a brief abstract of some of the more recent decisions, which will illustrate, better than any general description, the essential elements of a sufficient delivery.^b The same rules concerning delivery apply alike to gifts *causa mortis* and to gifts *inter vivos*. A lady holding several notes made by her grandson destroyed them during her last illness, saying that she did not want him to pay them; held, a complete gift *causa mortis*, and the donee's acceptance would be presumed: *Darland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 235; 3 N. W. 510. Delivery of a savings-bank pass-book, accompanied by a written assignment to the donee, creates a valid gift of the money on deposit: *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680;^c and a delivery of such a book without any written assignment is also sufficient: *Pierce v. Boston Savings Bank*, 129 Mass. 425; 37 Am. Rep. 371.^d Actual delivery is essential, and if the delivery will not complete a gift *inter vivos*, it will not create a gift *causa mortis*. A mother, during her last sickness, delivered bank notes and chattels belonging to her separate estate to a third person for the benefit of her minor children;

(a) It is even said of gifts *causa mortis* that "although the delivery may have been at one time complete, yet this will not be sufficient unless the possession be constantly maintained by the donee; if the donor again has possession, the gift becomes nugatory": *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Dunbar v. Dunbar*, 80 Me. 152, 6 Am. St. Rep. 166, 13 Atl. 578.

(b) Delivery of keys to donee who takes possession in the presence of the donor is sufficient: *Goulding v. Horbury*, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357. Delivery of voucher for money with oral direction to collect, is sufficient: *Clay-*

tor v. Pierson, (W. Va.) 46 S. E. 935. A verbal direction by creditor to debtor to pay to donee is valid as a gift *causa mortis* when the debtor accepts the order and promises the donee to make payment to him: *Castle v. Persons*, 54 C. C. A. 133, 117 Fed. 835.

(c) *Larrabee v. Hascall*, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440.

(d) *Contra*, *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535. Previous and continuing possession of such a book by the donee, it is said, does not dispense with the necessity of actual delivery: *Drew v. Hagerty*,

made directly to the donee, or to an agent or trustee on his behalf, but not to an agent for the donor. It may be actual — a manual possession of the article itself by the donee or his agent — or constructive. If constructive, it must be more than any mere words, and more than any mere

held, a valid gift to these children: *Kilby v. Godwin*, 2 Del. Ch. 61.^e Money having been deposited in a savings bank by the donor to the credit of *the donee*, the donor delivered to him a locked box containing the bank pass-book of such deposit, and accompanied the delivery with words of donation; held, a sufficient delivery to constitute a valid gift *causa mortis*, although the key of the box was found in the donor's pocket-book after his death: *Vandermark v. Vandermark*, 55 How. Pr. 408. A delivery to an agent or trustee for the donee, sufficient:^f *Clough v. Clough*, 117 Mass. 83. A delivery is no more essential to gifts *causa mortis* than to all other gifts. Things in action are transferable in writing, and the only question of doubt as to the requirement of delivery is, not whether the securities must be delivered, but whether the memorandum of transfer must be delivered. The execution and delivery of a written assignment of securities would constitute a valid gift: *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178. A person, in expectation of death, gave a sealed package to another, informing him that it contained money and savings-bank books, with directions what was to be done with the property. On the donor's death the package was found to contain directions that the balance, after payment of certain debts, was to be divided among certain named persons; held, a valid gift *causa mortis* to the donee, in trust for the last-named persons: *Turner v. Estabrook*, 129 Mass. 425; 37 Am. Dec. 371. When money is already in the hands of the donee, a delivery of the receipt to him is sufficient: *Champney v. Blanchard*, 39 N. Y. 111. If a promissory note is already in the possession of the donee, no further delivery of it is necessary: *Wing v. Merchant*, 57 Me. 383; *Stevens v. Stevens*, 5 Thomp. & C. 87. When a note is in possession of a trustee, the *cestui que trust* may give it to a third person without an actual delivery: *Southerland v. Southerland's Adm'r*, 5 Bush, 591. In the following cases the delivery was held to be insufficient:^g A wife, a few days before her husband's death, took certain bonds

81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230; but see *Providence Inst. for Sav. v. Taft*, 14 R. I. 502, where the contrary ruling is made in the case of a gift *inter vivos*; and *Davis v. Kuck*, (Minn.) 101 N. W. 165 (disapproving *Drew v. Hagerty*), where it was held that if the gift of a chattel was made and accepted in good faith, new and formal acts of delivery were not necessary where the property was already in possession of the donee, and the subsequent possession and

control thereof prior to the donor's death were consistent with ownership.

(^e) And see *Sourwine v. Claypool*, 138 Pa. St. 126, 20 Atl. 840.

(^f) *Caylor v. Caylor*, 22 Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721.

(^g) Delivery of a pass-book of an ordinary bank of deposit is not sufficient: *Jones v. Weakley*, 99 Ala. 441, 12 South. 420, 42 Am. St. Rep. 84, 19 L. R. A. 700; *Thomas's*

symbolic act. A constructive delivery must be something which completely terminates the donor's custody and control of the article donated, and which places it wholly under the donee's power, and enables him without further act on the donor's part to reduce it to his own manual possession. All the cases which hold a constructive delivery to be good, whatever be their special circumstances, will be found to conform to this criterion: that the donor parts with all control and power of exercising dominion, while the donee ob-

of his, and kept continuous possession thereof until after his death; no gift: *Conklin v. Conklin*, 20 Hun, 278. A third person's taking the key of a trunk from its usual place, putting goods into the trunk, and then returning the key to its former place, at the request of the owner during his last sickness, who accompanied his directions by the expression of a desire to make a gift of the trunk and contents, do not constitute a valid gift. The owner does not part with the control of the goods: *Coleman v. Parker*, 114 Mass. 30. A donor delivered to the donee a paper, not so attested as to be a will, purporting to give a sum of money, and at the same time handed him two savings-bank books, and added that the rest of the money was in his pantaloons' pocket, turning in his bed and looking towards the closet in which they hung, and that the owner of the house would give it to the donee; held, that the different acts could not be separated, the transaction must be treated as one intended entire gift, and the delivery was insufficient to complete it: *McGrath v. Reynolds*, 116 Mass. 566. A donor verbally gave to her husband, during her last sickness, a note which was then in a drawer in the house, but doing nothing more to perfect the gift; insufficient: *Stevens v. Stevens*, 5 Thomp. & C. 87.^h A woman, during her last sickness, told a girl who lived with her to bring her bank-book, which being done, she said, "Take that and keep it, and lock it up," and the girl retained the book; held, no evidence of an intention to make a gift: *Fiero v. Fiero*, 5 Thomp. & C. 151. A delivery of the key of a trunk containing money and bonds is not a delivery of such contents:¹ *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464; and see also *Carr v. Silloway*, 111 Mass. 24; *Case v. Dennison*, 9 R. I. 88; 11 Am. Rep. 222; *Prickett v. Prickett's Adm'rs*, 20 N. J. Eq. 478; *Conser v. Snowden*, 54 Md. 175; 39 Am. Rep. 368; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308.

Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170. Where the donor indorsed a note, put it in an envelope addressed to the donee, laid it on a table, and then committed suicide, there was not a sufficient delivery: *Liebe v. Battman*, 33 Oreg. 241, 54 Pac. 179, 72 Am. St. Rep. 705.

(^h) And see *Wilcox v. Matteson*,

53 Wis. 23, 40 Am. Rep. 754, 9 N. W. 814. A mere verbal gift of donor's money on deposit in a bank in a third person's name, insufficient: *Hawn v. Stoler*, 208 Pa. St. 610, 57 Atl. 1115.

(ⁱ) It has been held that a delivery of a key of a locked box is not a delivery of the contents when the box is not in the presence or imme-

tains the exclusive power of taking physical possession and custody of the article, so that it is in fact placed under his sole dominion.^{2j} As a delivery is necessary, it follows, as a

²The leading case on the subject of delivery is *Ward v. Turner*, 2 Ves. Sr. 431, 1 Lead. Cas. Eq. 1205, in which Lord Hardwicke discussed the doctrine on principle and authority in a most exhaustive manner. See also *Bunn v. Markham*, 7 Taunt. 224, 227; *Irons v. Smallpiece*, 2 Barn. & Ald. 551; *Thompson v. Heffernan*, 4 Dru. & War. 285; *Tate v. Hilbert*, 2 Ves. 111, 120; *Reddel v. Dobree*, 10 Sim. 244; *Noble v. Smith*, 2 Johns. 52; 3 Am. Dec. 399; *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352; *Jackson v. Twenty-third St. R'y*, 88 N. Y. 520; *Craig v. Craig*, 3 Barb. Ch. 76, 117; *Brinckerhoff v. Lawrence*, 2 Sand. Ch. 400; *French v. Raymond*, 39 Vt. 623; *Dow v. Gould etc. Min. Co.*, 31 Cal. 629.^k

A delivery to an agent of the donor is not sufficient: *Farquharson v. Cave*, 2 Coll. C. C. 356, 367;^l but a valid and sufficient delivery may be made to a third person as agent for the donee: *Drury v. Smith*, 1 P. Wms. 404; *Moore v. Darton*, 4 De Gex & S. 517; *Kemper v. Kemper's Adm'r*, 1 Duvall, 401; 85 Am. Dec. 636; *Baker v. Williams*, 34 Ind. 547.^m The delivery must be in the lifetime of the donor; a delivery to a third person, with directions to deliver to the donee after the donor's death, is not sufficient: *Walter v. Ford*, 74 Mo. 195; 41 Am. Rep. 312; *sed quære*.ⁿ The gift may also be made upon trust, and the delivery to a trustee on behalf of the donee who is the ultimate beneficiary: *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *Kilby v. Godwin*, 2 Del. Ch. 61; *Trorlicht v. Weizenecker*, 1 Mo. App. 482; *Clough v. Clough*, 117 Mass. 83; *Turner v. Estabrook*, 129 Mass. 425; 37 Am. Rep. 371.

With regard to a constructive delivery, it has been held that a delivery of the key of a locked receptacle was a sufficient delivery of the contents; thus a delivery of the key of a trunk was held, in an old case, to be a good delivery of the trunk and its contents:^o *Jones v. Selby*, Prec. Ch. 300; a delivery of the key of a warehouse in which the furniture donated was locked was held to be a good delivery of the furniture: *Smith v. Smith*, 2 Strange,

mediate control of the donor: *Keepers v. Fidelity Title, etc., Co.*, 56 N. J. Law 302, 28 Atl. 585, 44 Am. St. Rep. 397, 23 L. R. A. 184.

(j) This portion of the text is quoted in *Yancy v. Field*, 85 Va. 756, 8 S. E. 721.

(k) *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Yancy v. Field*, 85 Va. 756, 8 S. E. 721; *Seabright v. Seabright*, 28 W. Va. 412.

(l) But see *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366.

(m) *Woodburn v. Woodburn*, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209;

Caylor v. Caylor, 22 Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331; *Sourwine v. Claypool*, 138 Pa. St. 126, 20 Atl. 840; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. Rep. 884, 44 S. E. 721.

(n) *Augusta Savings Bank v. Fogg*, 82 Me. 538, 20 Atl. 92; *Duryea v. Harvey*, 183 Mass. 429, 67 N. E. 351 (to be delivered on death or when donee should direct).

(o) Delivery of keys of bureau drawer, of safe, and of box in bank, sufficient: *Thomas's Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848, 18 L. R. A. 170.

further requisite to a valid donation, that the donee must accept it. Such acceptance, however, will be presumed when the gift is for his advantage, in the absence of all contrary evidence.³

§ 1150. *Revocation.*—The peculiar element of the donation *causa mortis*, which distinguishes it from the one *inter vivos*, is its revocable nature. Although it be absolute in its form, and although the thing must be delivered to the donee, yet the transaction is inchoate, and the property remains in the donor until his death. He may, therefore, at any time prior to his death, revoke and annul the gift by

955; and the delivery of the key of a locked room in which was an unlocked trunk containing things in action, written securities, was held a good delivery of those securities: *Penfield v. Thayer*, 2 E. D. Smith, 305; and see *Vandermark v. Vandermark*, 55 How. Pr. 408; *Cooper v. Burr*, 45 Barb. 9; *Miller v. Jeffress*, 4 Gratt. 472, 479. But this rule should be applied with the most careful limitation, and perhaps it may be regarded as doubtful under the light of recent decisions. At all events, there should be the clearest evidence of the donor's intention to make the gift, and something more than the mere delivery of the key. Unless the donor completely divests himself of all power over the article, if he retains in any manner any custody over it, or exercises any acts of dominion over it, the delivery of a key will not be a sufficient delivery to perfect the gift: *Powell v. Hellicar*, 26 Beav. 261; *Reddel v. Dohree*, 10 Sim. 244; *Farquharson v. Cave*, 2 Coll. C. C. 356; *Trimmer v. Danby*, 25 L. J. Ch. 424; *Hawkins v. Blewitt*, 2 Esp. 663; *Maguire v. Dodd*, 9 Ir. Ch. 452-459; and the supreme court of Maine has expressly decided that the delivery of the key of a trunk in which money and bonds were locked up was not a sufficient constructive delivery of such contents: *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464.

³ *De Levillain v. Evans*, 39 Cal. 120; *Darland v. Taylor*, 52 Iowa, 503. ^a In the first of these cases the court held that both by the Roman law and the common law, a donation is not valid and binding unless accepted. But if the donee is *sui juris*, he will be presumed to have accepted the donation, when it is for his advantage, unless the contrary is shown; and when the donee is *non sui juris*, if the gift is for his advantage, the law accepts it for him, and no proof of acceptance is necessary. The theory given in this case was applied to a deed of land, but the same doctrine applies, of course, to gifts of all kinds. In the second case cited, an acceptance was held to be presumed.

(^b) But a delivery of a key accompanied by taking of possession of the subject-matter in the presence of the donor is sufficient: *Goulding v. Horbury*, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357.

(^a) *Sourwine v. Claypool*, 138 Pa. St. 126, 20 Atl. 840 (donee being *feme covert*, law accepts the gift for her).

language sufficiently indicating such intent. If the donee did not, therefore, voluntarily surrender up possession of the thing, he would retain it as a trustee for the donor's executors or administrators, who could recover the same, or its value.¹ The donor's recovery from his sickness, or his escape from the anticipated peril with his life, also operates as a revocation, and the donee would then hold the article as a trustee for the donor.^{2 a} When a gift *causa mortis* is made during sickness, it is essential, in order to perfect it and prevent a revocation, that the donor should die of the very same sickness from which he is then suffering, and that there should be no intervening recovery between that illness and his final death; and it seems that the donee must affirmatively show the existence of all these facts.^{3 b} The gift cannot, it seems, be revoked by the donor's will, although it *may* be satisfied by a legacy given thereby.⁴

§ 1151. Equitable Jurisdiction.— Since a donation *causa mortis* is not in any sense a testamentary act, and does not

¹ Staniland v. Willott, 3 Macn. & G. 664; and see Fiero v. Fiero, 5 Thomp. & C. 151; Ellis v. Secor, 31 Mich. 185; 18 Am. Rep. 178.

² Ward v. Turner, 2 Ves. Sr. 431; 1 Lead. Cas. Eq. 1245; Tate v. Hilbert, 2 Ves. 111; 4 Brown Ch. 286; Bunn v. Markham, 7 Taunt. 224; and see the cases cited *ante*, under § 1146.

³ Conser v. Snowden, 54 Md. 175; 39 Am. Rep. 368.

⁴ Jones v. Selby, Prec. Ch. 300; Johnson v. Smith, 1 Ves. Sr. 314; but the California Civil Code somewhat modifies this rule. "Sec. 1152: A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift."

(a) O'Kane v. Whelan, 124 Cal. 200, 56 Pac. 880, 71 Am. St. Rep. 42. But it has been held that a partial recovery does not necessarily work a revocation: Castle v. Persons, 54 C. C. A. 133, 117 Fed. 835.

(b) But it is held that he need not die of the same disease of which he was apprehensive; as where a gift was made in anticipation of a surgi-

cal operation, which was successful, but before the donor left the hospital he died of heart disease, from which he was also suffering at the time of the gift: Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758, 11 L. R. A. 684. See also Larrabee v. Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440.

require the assent or interposition of the executor or administrator to perfect the donee's title, and does not belong to a "succession" or "administration," it did not come within the jurisdiction of the English ecclesiastical courts.¹ The enforcement of the gift at the suit of the donee undoubtedly fell within the jurisdiction of courts of law; but since the gift was not absolute, but was always subject to the rights of the donor's creditors, the remedy conferred by this jurisdiction was necessarily uncertain and incomplete; under some circumstances, it would be clearly impossible to adjudicate finally upon the claim of the donee until there had been a general accounting and settlement of the donor's estate. Indeed, there were *substantially* the same difficulties in the way of exercising the jurisdiction at law over these gifts which prevented the enforcement of general legacies by legal actions.² For these reasons courts of equity assumed jurisdiction over the enforcement of gifts *causa mortis*, and the grounds of this jurisdiction were to some extent the same as those which support the jurisdiction over legacies, and over administrations generally. This jurisdiction, however, unlike that over legacies and administrations, never became exclusive; it was always merely concurrent; it was based, not upon any *equitable* right, title, or interest of the donee in the thing donated, but solely upon the uncertainty, incompleteness, and inadequacy of the remedies which courts of law furnished to the donee. The jurisdictions in equity and at law were exercised con-

¹ Ward v. Turner, 2 Ves. Sr. 431; Miller v. Miller, 3 P. Wms. 356; Thomson v. Batty, 2 Strange, 777. Of course, I refer to a "succession" or "administration" under the English law, and not to administrations as enlarged by the statutes in many of our states.

² Where the gift had been revoked, or was not complete, the donor or his personal representatives could, without any difficulty, recover it or its value in an action at law, and there would then be no reason for the interposition of equity. But where the donee sued at law, and the executor or administrator set up a deficiency of assets, it would be very difficult at best to try that issue before a jury, and almost impossible for the donee to prove a sufficiency of assets previous to an accounting.

currently.³ There are, however, special circumstances in which the jurisdiction of equity must be necessary and exclusive, since the right and interest of the donee in the subject-matter is only equitable,—is not a legal title and ownership. Where bonds due to the donor, or bonds and mortgages, or negotiable instruments payable to order, *but unindorsed*, are given by a mere verbal donation, without any written transfer, although delivered into the donee's possession, the legal title to such securities passes to the executors or administrators of the donor on his death; but they hold this legal title *as trustees* for the donee, who can enforce his equitable title only in a court of equity. This is the theory on which verbal gifts of such securities were supported.^{4a} Whenever, also, a gift is made to one person upon a trust in favor of others, there is ample ground for the jurisdiction of equity in enforcing the donation on behalf of these beneficiaries.⁵ The same jurisdiction as established by the English court of chancery should exist in all of the American states which have adopted the full equitable jurisdiction and jurisprudence, although the concurrent jurisdiction at law may be more frequently exercised, and the powers of the courts of probate may be enlarged by statute.⁶ Practically, the

³ Duffield v. Elwes, 1 Bligh, N. S., 497; Ward v. Turner, 2 Ves. Sr. 431; Miller v. Miller, 3 P. Wms. 356; Thomson v. Batty, 2 Strange, 777. For more recent English illustrations, see Staniland v. Willott, 3 Macn. & G. 664; Boutts v. Ellis, 4 De Gex, M. & G. 249; Mitchell v. Smith, 4 De Gex, J. & S. 422; Hewitt v. Kaye, L. R. 6 Eq. 198; In re Beak's Estate, L. R. 13 Eq. 489; Moore v. Moore, L. R. 18 Eq. 474; Rolls v. Pearce, L. R. 5 Ch. Div. 730; In re Mead, L. R. 15 Ch. Div. 651.

⁴ Duffield v. Elwes, 1 Bligh, N. S., 497, 530, 534; Staniland v. Willott, 3 Macn. & G. 664, 675, 676; and see cases concerning unindorsed notes *ante*, under § 1148.

⁵ See Trorlicht v. Weizenecker, 1 Mo. App. 482.

⁶ The only ground for denying or restricting the equitable jurisdiction is the principle that the jurisdiction only exists where there is not an adequate remedy at law. In applying this doctrine, it cannot be denied that the courts of some of the states seem to have overlooked or to have ignored the equally clear and fundamental principle that where the equitable jurisdiction has once existed, it is not destroyed, nor even lessened, because other

(a) This section is cited in Trenholm v. Morgan, 28 S. C. 268, 5 S. E. 721.

equitable jurisdiction over this gift is exercised in the American states concurrently with that at law, and that of the probate courts in the regular course of administration. Under the large powers given by statute to these courts in many of the states, the claim of the donee, like that of an ordinary creditor, may be presented and determined, either on a special application, or in the final settlement of the estate by a decree of the probate court.⁷ While the equitable jurisdiction is exercised concurrently with that at law, substantially as in England, in some states, in others it is exercised only under special circumstances, where the remedy at law on the particular facts would be inadequate, and is governed by considerations similar to those which regulate the equitable jurisdiction over administrations in general. I have placed some recent examples, by way of illustration, in the foot-note.⁸

courts have acquired the power of granting the same or other adequate remedy, either by their own action or by statute, in the absence of statutory language *necessarily* restrictive. In this manner the equitable jurisdiction has been practically abandoned or curtailed in many instances, in direct violation of this well-settled and familiar doctrine.

⁷ As illustrations, see *Stevens v. Stevens*, 5 Thomp. & C. 87; *Estate of Barclay*, 11 Phila. 123; *Walter v. Ford*, 74 Mo. 195; 41 Am. Rep. 312.

⁸ *Actions at law*.—In a few of these cases the action is against the donee to recover the thing in his possession, or its value. In some, the action is by the donee upon the note, or other thing in action donated, to recover the amount thereof from the debtor party. In the remainder, the action is by the donee to enforce the gift: *Vandermark v. Vandermark*, 55 How. Pr. 408; *Coleman v. Parker*, 114 Mass. 30; *Clough v. Clough*, 117 Mass. 83; *Pierce v. Boston Sav. Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Fiero v. Fiero*, 5 Thomp. & C. 151; *Case v. Dennison*, 9 R. I. 88; 11 Am. Rep. 222; *House v. Grant*, 4 Lans. 296; *Rhodes v. Childs*, 64 Pa. St. 18.

Equitable actions.—The following are either suits in equity, or actions equitable in their nature and belonging to the equitable jurisdiction: *Brooks v. Brooks*, 12 S. C. 422; *Darland v. Taylor*, 52 Iowa, 503; 35 Am. Rep. 285; *Conklin v. Conklin*, 20 Hun, 278; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680; *Kilby v. Godwin*, 2 Del. Ch. 61; *Trorlicht v. Weizenecker*, 1 Mo. App. 482; *McGrath v. Reynolds*, 116 Mass. 566; *Carr v. Silloway*, 111 Mass. 24; *Smith v. Dorsey*, 38 Ind. 451; 10 Am. Rep. 118; *Baker v. Williams*, 34 Ind. 547; *Tillinghast v. Wheaton*, 8 R. I. 536; 5 Am. Rep. 621; 94 Am. Dec. 126; *Dean v. Dean's Estate*, 43 Vt. 337; *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464; *Southerland v. Southerland's Adm'r*,

SECTION III.

ADMINISTRATION OF ESTATES.

ANALYSIS.

§ 1152. Equitable jurisdiction in the United States.

§ 1153. The same; fundamental principle; *Rosenberg v. Frank*.

§ 1154. The jurisdiction as administered in the several states; *general résumé* — The states alphabetically arranged in foot-note.

§ 1152. Equitable Jurisdiction in the United States.^a — The grounds upon which the jurisdiction of the English court of chancery over the subject of administrations was originally based have been explained in the preceding section concerning legacies.¹ I have already described, in a very general manner, the extent and nature of the equitable jurisdiction over the same matters in the various states of this country.² Without repeating the conclusions there formulated, but rather adopting them as the foundation of further discussion, I propose in the present section to furnish a somewhat more detailed and practical description of this branch of the equitable jurisdiction as it is now actually administered throughout the American states. Such a sketch must necessarily be very imperfect. The great diversity in the legislation, and the divergent and often conflicting theories of interpretation held by different courts in applying these statutes to the settled doctrines of equity, render it impossible to give anything more than a partial and fragmentary account of the resulting jurisdic-

5 Bush, 591; *Prickett v. Prickett's Adm'rs*, 20 N. J. Eq. 478; *Turner v. Estabrook*, 129 Mass. 425; 37 Am. Rep. 371; *Conser v. Snowden*, 54 Md. 175; 39 Am. Rep. 368; *West v. Cavins*, 74 Ind. 265; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308.

¹ See *ante*, §§ 1127, 1128.

² See vol. 1, §§ 346-350.^b

(a) This section is cited in *Benedict v. Wilmarth*, (Fla.) 35 South. 84.

(b) Also, §§ 156, 187, 235.

tion as it prevails in all the states. I make no attempt, therefore, to present in an exhaustive manner the complete system as it exists in any single state. I shall endeavor merely to furnish such a general view, drawn from the most recent decisions based upon existing statutes, that the reader in every state shall be able to form an accurate general notion of the systems prevailing in each of the other commonwealths, and to apprehend the spirit and tendency of their decisions, and to determine whether those decisions may be regarded as authoritative in the tribunals of his own state, or whether they would be misleading because proceeding upon a different theory from that adopted by his own courts. To fully accomplish even this limited object is a task of extreme difficulty. I hope, however, that the results of the discussion may render some assistance to members of the bar with respect to a branch of the equitable jurisdiction second to none other in importance, but which has fallen, in this country, into a condition of confusion and uncertainty.

§ 1153. **The Same.** The Fundamental Principle.^a — One fundamental principle should be constantly kept in mind; it underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with respect to such particulars as it has been abrogated by express prohibitory, *negative* language of the statutes, or by necessary implication from *affirmative* language conferring exclusive powers upon the probate tribunals. This equitable jurisdiction may be dormant, but, except so far as thus destroyed by statute, it must continue to exist,

(a) This section is cited in *Benedict v. Wilmarth*, (Fla.) 35 South. 84.

concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient.^{1 b} This general principle, so familiar, so fundamental, running through all branches of the equitable jurisdiction, but so often lost sight of by American courts in dealing with the jurisdiction as applied to administrations, was admirably stated by one of the ablest of American judges: "There is nothing in the nature of jurisdic-

¹ This principle, which is sometimes lost sight of, is fully sustained by a recent decision of the supreme court of California, and the opinion is so remarkable that I shall quote from it at some length. The constitution of the state provided that "the district courts shall have original jurisdiction in all cases in equity," and established courts of probate. The legislation with reference to the probate courts and the subject of administration is exceedingly full, comprehensive, and minute. The power conferred upon these tribunals is co-extensive with the entire subject-matter of administration and final settlement of the estates of decedents, testate or intestate. No state in the Union has a more full and complete statutory system. In *Rosenberg v. Frank*, 58 Cal. 387, a testator bequeathed, "To my sisters E. F., H. R., and H. R. one hundred thousand dollars each; to my sisters T. W. and L. C. fifty thousand dollars each; to J. R., in trust for H. G., C. M., and R. F., one hundred and fifty thousand dollars." After several other bequests, the residuary clause gave the residue "to be divided *pro rata* between my sisters E. F., H. R., H. R., T. W., L. C., and the children of Mary F., deceased, namely, H. G., C. M., and R. F." These residuary legatees were the same persons named in the former bequest. The will was duly admitted to probate, and while the administration was proceeding under the control of the probate court, the executors brought this equitable action to obtain a construction of the said clauses, and especially of the residuary clause. Objection was raised that the court had no jurisdiction. It was urged that the probate court had power to construe the will (which it certainly had under the statute) and that its jurisdiction over the subject was complete and exclusive. The supreme court, however, asserted the equitable jurisdiction, and the grounds upon which their decision is rested are broad and general. Thornton, J., said (p. 400): "In our opinion, the jurisdiction of the district court was ample and plenary. The jurisdiction of the district court was conferred by the amendments of 1862 to the constitution of 1849. [See the clause quoted above.] The jurisdiction could hardly have been conferred in clearer or broader language; and the language of the article as it was adopted in 1849 was no less broad.

(b) The author's note is cited, and the principle applied, in *Moulton v. Smith*, 16 R. I. 126, 27 Am. St. Rep. 728, 12 Atl. 891. The text is quoted in *Domestic & F. Mission-*

ary Soc. of the P. E. Church v. Eells, 68 Vt. 497, 54 Am. St. Rep. 888, 35 Atl. 463; *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

tion, as applied to courts, which renders it exclusive. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular

This section as amended in 1862 has been construed by this court as conferring on the district courts the same jurisdiction in equity as that administered by the high courts of chancery in England: *People v. Davidson*, 30 Cal. 379. In *Willis v. Farley*, 24 Cal. 500, it was held that the constitution invests the district court with original jurisdiction in all cases in equity. The court further said in that case: 'Powers which are granted by the constitution cannot be taken away by legislative enactment, and remedies which are secured to the citizen by the organic law cannot be destroyed by a department of the government that exists in subordination to the constitution.' This was in an action brought against the administrator of a deceased mortgagor and his heirs to foreclose a mortgage. See also *Clarke v. Perry*, 5 Cal. 60; 63 Am. Dec. 82; *Sanford v. Head*, 5 Cal. 298; *Deck v. Gerke*, 12 Cal. 436; 73 Am. Dec. 555. In the last-cited cause *Baldwin, J.*, in the opinion of the court, says on this subject: 'Apart from the previous decisions of this court, it might be questioned whether the probate court, under our constitution, did not possess an exclusive jurisdiction over testamentary and probate matters: *Blanton v. King*, 2 How. (Miss.) 856; *Carmichael v. Browder*, 3 How. (Miss.) 252; *Faroe's Heirs v. Graves*, 4 Smedes & M. 707. But this court has recognized a different rule. In *Clarke v. Perry*, 5 Cal. 60, 63 Am. Dec. 82, it was held that "the probate court is a court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the court of chancery, *which still retains all its jurisdiction*. Where, therefore, a bill is filed in chancery against an administrator, to compel him to account by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement; and although the settlement in the probate court is a final settlement, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the district court, and compel the administrator to a full account." And in *Sanford v. Head*, 5 Cal. 298, the same doctrine was reaffirmed in emphatic terms. The ground upon which equity took jurisdiction in England in such cases was, that the spiritual courts were not able, from their constitution, to afford adequate and complete relief. Though much of the reason of this rule is removed in most of the states of the Union where probate courts exist, yet the power of the chancery court to interpose for the settlement of accounts, and the enforcement of trusts of this sort, is maintained. Under the decisions of this court, chancery has assumed jurisdiction over such subjects, and as, probably, rights have vested under their decrees, and the

court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect

principle asserted is more convenient in practice, we think it is not permissible now to question the jurisdiction.' The court in this case sustained a very broad jurisdiction in the district court. The jurisdiction here invoked was exercised in the case of *Payne v. Payne*, 18 Cal. 291, in construing the will of Theodore Payne. One of the points determined in that case was as to whom the estate was devised, which might have been determined by the probate court on the distribution of the estate by that tribunal. The court held that the whole estate was devised to the widow, to the exclusion of the children. There was no doubt expressed or intimated as to the jurisdiction in that case. The power of the court of chancery in England over the administration of estates does not seem to have been thoroughly established until near the close of the reign of Charles II. After the statute in England had been enacted, empowering the spiritual courts to make distribution, it was contended that that court ought to make distribution, and that the courts of chancery no longer had jurisdiction. In answer to this contention, the Lord Chancellor King said, in 1682, the 'spiritual court had but a lame jurisdiction, and there being no negative words in the act of Parliament, he thought a bill for distribution very proper in this court': Story's Eq. Jur., secs. 542, 543, 1065; *Gould v. Hayes*, 19 Ala. 449. The jurisdiction of the probate courts is not defined in the constitution. In article VI, section 8, constitution of 1849, it is provided that 'the county judges shall also hold in their several counties probate courts, and perform such duties as probate judges as may be prescribed by law.' . . . It seems from the above that the legislature may make the jurisdiction of the probate judge or court what it pleases, within the limits of that jurisdiction which is understood as usually pertaining to probate courts. But the position that it can, under this power, take away from the district courts any of the equity jurisdiction conferred on them by the constitution is manifestly untenable: See *Willis v. Farley*, 24 Cal. 499; *Gould v. Hayes*, 19 Ala. 450. Nor could this be done if the full probate jurisdiction was conferred on the county or probate courts by the constitution. This very point was so held in *Courtwright v. Bear River etc. Co.*, 30 Cal. 573, in relation to the jurisdiction to abate nuisances under the constitutional amendments of 1862. This constitution gave jurisdiction to the county courts in plain terms '*to abate a nuisance.*' An action was brought in the district court to abate a nuisance, and it was sustained as an equity case, under the grant of equity jurisdiction. This ruling was subsequently approved in *Yolo County v. City of Sacramento*, 36 Cal. 195; and see *Caulfield v. Stevens*, 28 Cal. 118; *Stoppelkamp v. Mangeot*, 42 Cal. 325. [The judge also quotes the admirable language of Bronson, J., in *Delafield v. State of Illinois*, 2 Hill, 159, 164, which I have incorporated into the text.] For the reasons above given, we

the power of the old courts to administer justice when it is demanded at their hands."^{2c}

§ 1154. The Jurisdiction as Administered in the Several States.^a—In order to present the most complete view possible of the equitable jurisdiction as it is now actually administered in this country, and as an introduction to the further discussions on the subject, I have placed in the footnote an abstract of the more important and recent decisions

are of opinion that the district court has jurisdiction of this cause. But it is said that the probate court first acquired jurisdiction, and therefore must be allowed to exercise it, to the exclusion of the district court. We do not think that this rule can be properly applied here. The will had only been admitted to probate in the probate court. The matter of distribution was not before it. Moreover, the probate court held its jurisdiction subject to the exercise of this jurisdiction by the district court. Of the probate the jurisdiction of the probate court is exclusive: *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187. Until that was done the district court could not exercise the jurisdiction invoked in this case. To hold that the probate court had first acquired jurisdiction, to the exclusion of any other court, by the will having been admitted to probate in it, would be to oust the jurisdiction of the district court entirely. The probate court taking jurisdiction under these circumstances, it holds it subject to the jurisdiction of the district court, and must be bound by the decree of the district court. We are of opinion that this jurisdiction in the district court is a beneficial one, and can be usefully employed in expediting the settlement of estates." This is an instructive opinion, and, considering the tendency in so many American courts to limit the equitable jurisdiction upon the alleged ground that there is an adequate remedy at law, it is not a little remarkable. It will be observed that the court does not base its decision upon the well-known doctrine that equity has a jurisdiction to *construe* wills,—a doctrine accepted even in states where the probate jurisdiction over administrations in general is regarded as exclusive. It may be doubted whether the case falls within that doctrine as it is ordinarily expressed, since the clause of the will for which a construction was asked contained and created no trust. The decision is rested on the broad and universal ground that the conferring jurisdiction by mere affirmative language in a statute or constitution does not destroy similar or identical jurisdictions already existing; upon the broad and universal ground that the original jurisdiction of equity *over administration* still remains, notwithstanding a complete jurisdiction over the same subject-matter given to the probate courts.

² *Delafield v. State of Illinois*, 2 Hill, 159, 164, per Bronson, J.

(c) The text is quoted in *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

(a) §§ 1154 *et seq.* are cited in *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193; § 1154 and note are cited in *In re Cilley*, 58 Fed. 977, 986.

in nearly all of the states.¹ From a comparison of these

¹ To give a complete account of the system in any one state would require a detailed examination of all its statutes concerning administration,—a matter entirely foreign to the purposes of this work, and which would demand for its full treatment a whole volume by itself. Furthermore, the decisions are so conflicting, and, so to speak, fragmentary, that it seems inexpedient, if not impossible, to discuss the *doctrines* in their entirety, as though they prevailed uniformly throughout all of the commonwealths. It seemed to be the better plan to collect the decisions in each state separately, and to arrange them in the order of the several states. This method may involve some repetition, where the same rule has been adopted by the courts of various states; but the amount of such repetition is very little. Since the decisions are largely based upon the legislation, and since the statutory systems are so different in their detail in the different states, there are comparatively few instances of common doctrines and rules. By presenting each state separately, and thus indicating the *tendency* of judicial decision therein, and the theory adopted by its courts, this abstract will enable the practicing lawyer in a particular state to ascertain the decisions in other commonwealths which are analogous to or in harmony with those of his own courts, so that they can be used as authoritative, and also those which are based upon a wholly different theory of the jurisdiction, so that they may be distinguished as being without binding authority. This is practically the extent of the aid which the necessary limits of the present discussion permit; but even such aid will, I believe, be of substantial benefit to members of the bar and to the bench in all parts of the country. In connection with this note the reader should consult vol. 1, §§ 348–351.

Alabama.—Although the probate court has an ample jurisdiction over the subject of administrations, the concurrent, and sometimes even exclusive, jurisdiction of equity over the same subject-matter is still preserved to a very large extent, and is constantly exercised. The decisions in no other state, perhaps, are more instructive as illustrating the equitable jurisdiction left unobstructed by an elaborate statutory system of administration in the courts of probate. The general principle is asserted in the clearest manner, that the original jurisdiction of equity over administrations is not taken away by the affirmative language of statutes giving a like jurisdiction to probate courts. The doctrine is firmly established that equity retains its original jurisdiction over administrations, the marshaling and distribution of assets, the compulsory payment of legacies, and the like, which may be invoked by the heirs, distributees, or legatees, at any time before the concurrent jurisdiction of the court of probate [the “orphans’ court”] has attached, without the assignment of any special reason for so doing. If, however, the concurrent jurisdiction of the probate court has already attached by the commencement of proceedings therein, these parties cannot invoke the aid of equity in the matter of the administration, unless the circumstances of the case involve some elements of distinctively equitable cognizance. Where, on the other hand, an executor or administrator is the *actor*, he *must* ordinarily institute proceedings in the probate court in the first instance, and cannot resort to equity, in the absence of some

decisions, it will be seen that the states may be *roughly*

special ground of equitable cognizance. Finally, an administrator *de bonis non* is regarded as directly representing the distributees, and may go into equity in the first instance whenever and as they may: *Teague v. Corbitt*, 57 Ala. 529; *Weakley v. Gurley's Adm'r*, 60 Ala. 399; *Glenn's Adm'r v. Billingslea*, 64 Ala. 345; *Randle v. Carter*, 62 Ala. 95; *McNeill's Adm'r v. McNeill's Creditors*, 36 Ala. 109; 76 Am. Dec. 320; *Park's Distributees v. Park's Adm'rs*, 36 Ala. 132; *Moore v. Lesueur*, 33 Ala. 237; *James v. Faulk*, 54 Ala. 184; *Hill v. Armistead*, 56 Ala. 118; *Hause v. Hause*, 57 Ala. 262; *Hooper v. Smith*, 57 Ala. 557; *Whorton v. Moragne*, 59 Ala. 641; *Gould v. Hayes*, 19 Ala. 438; *Horton v. Moseley*, 17 Ala. 794.^b In pursuance of the general doctrine, although the jurisdiction of the probate court has attached by proceedings being commenced therein, the court of equity may take cognizance of the administration for the purpose of a final accounting and settlement therein in the following cases: By an administrator, where he has paid moneys belonging to the estate of a deceased wife, by mistake, to the husband's personal representatives, such moneys being distributed and the distributees not being parties to the settlement in the probate court: *Hemphill v. Moody*, 64 Ala. 468; by an executrix, when she is entitled to a decree in her favor for the amount due her for the excess of her disbursements over her receipts, the probate court not being able to render such a judgment: *Reaves v. Garrett's Adm'r*, 34 Ala. 558; when a creditor of the deceased seeks to pursue certain real and personal property standing in the name of a trustee for the debtor's wife and children, alleging that such property was fraudulently transferred by the deceased, and that her estate is insolvent. A court of probate cannot give adequate relief in such a case: *Pharis v. Leachman*, 20 Ala. 662; by an administrator when the distributees seek to charge him with the payment of money, against which he has an equitable defense not available in the probate court: *Stewart's Adm'r v. Stewart's Heirs*, 31 Ala. 207; by the distributees, legatees, etc., when they sue for a discovery of assets which the administrator has failed to return in his inventory: *Wilson v. Crook*, 17 Ala. 59; *Hunley v. Hunley*, 15 Ala. 91; *Dobbs v. Distributees of Cockerham*, 2 Port. 328; where a discovery is necessary: *Horton v. Moseley*, 17 Ala. 794; by the distributees, etc., where assets are withheld by an

(b) See, also, *Bragg v. Beers*, 71 Ala. 151 (before probate jurisdiction has attached, devisees or heirs, legatees or distributees may resort to equity without assigning any special cause); *Shackelford v. Bankhead*, 72 Ala. 476 (personal representative cannot resort to equity in the first place, and other parties cannot remove the administration to equity, unless there is a special ground for equity jurisdiction); *Trawick v. Davis*, 85 Ala. 342, 5

South. 83; *Noble v. Tait*, 119 Ala. 399, 24 South. 438. As to what acts constitute a taking jurisdiction by the probate court for a final settlement, so as to require a special showing to justify a removal of the administration into chancery, see *Ligon v. Ligon*, 105 Ala. 460, 17 South. 89 (citing *Gamble v. Jordan*, 54 Ala. 432; *James v. Faulk*, 54 Ala. 184; *Glenn v. Billingslea*, 64 Ala. 345).

grouped into three classes, although there is still a con-

administrator claiming them as his own by a secret gift: *Blakey v. Blakey's Heirs*, 9 Ala. 391; where there are complicated and numerous matters of account to be settled, and trusts created, which the probate court cannot enforce: *Gould v. Hayes*, 19 Ala. 438; *Amerson v. Cottrell*, 3 Port. 51; 29 Am. Dec. 239.^c On the contrary, when the administration has begun in the probate court, equity should not assume jurisdiction in the following cases,—the grounds are not sufficient: That the administrator is also guardian of a distributee who has come of age, or that he has committed an error in the allotment of exempt property to a minor child, are not sufficient: *Draper's Adm'r v. Draper*, 64 Ala. 545. Equity will not take jurisdiction and distribute upon a bill filed for an entirely different purpose: *Scott v. Abercombie*, 14 Ala. 270; and see *Horton v. Moseley*, 17 Ala. 794; *Harrison v. Harrison*, 9 Ala. 470.^d Equity has jurisdiction to compel a final accounting, settlement, and distribution in the following special cases: Where an administrator has died before making a final account and settlement, the probate court has authority under the code to order an accounting, and decree a settlement of the estate against *his* personal representatives, but such decree is not conclusive against the sureties of the deceased administrator, nor does it support an action at law against them on the bond; equity, therefore, has jurisdiction in such a case; a bill for a final account and settlement may be filed by the administrator *de bonis non* against the personal representatives of the deceased administrator, and the sureties on his bond: *Stallworth's Administrator v. Farnham*, 64 Ala. 259; see also *Chaquette v. Ortet*, 60 Cal. 591; *Bush v. Lindsey*, 44 Cal. 121, 125;^e where an administrator dies before a final accounting, and *his* executor is appointed the administrator *de bonis non*, equity alone has jurisdiction to compel an accounting and settlement: *Hays v. Cockrell*, 41 Ala. 75. Equity has jurisdiction to appoint a receiver of the assets, and thus virtually to take control of the administration when necessary for the protection of creditors and legatees from irreparable loss through the acts of the administrator or executor, but the danger of such loss must be manifest: *Randle v. Carter*, 62 Ala. 95.^f Equity has concurrent jurisdiction in the assignment of dower: *Hause v. Hause*, 57 Ala. 262; and has jurisdiction of a suit to foreclose a mortgage upon the estate of a deceased mortgagor: *Gayle v. Singleton*, 1 Stew. 566; and of a suit by a distributee to compel payment of his distribu-

(c) Where, in the settlement of an insolvent estate, it is desirable that an allotment of homestead be declared invalid, and that the property be sold free of incumbrances: *Carr v. Shackelford*, 68 Ala. 241.

(d) Where the estate has been declared insolvent, a clear and strong case is necessary to justify removal: *Clark v. Eubank*, 65 Ala. 245, 247; *Shackelford v. Bankhead*, 72 Ala.

476. Omission of property from the inventory, waste or conversion of assets, and failure to make a settlement are no grounds for removal, since the powers of the probate court are adequate: *Shackelford v. Bankhead*, 72 Ala. 476.

(e) To the same effect, see *Wood v. Legg*, 91 Ala. 511, 8 South. 342.

(f) See, also, *Walker v. Johnson*, 82 Ala. 347, 2 South. 744.

siderable diversity among the individuals composing each

tive share as determined by the final settlement of the probate court: *Cherry v. Belcher*, 5 Stew. & P. 133; and has concurrent jurisdiction of suits by legatees, and exclusive jurisdiction when the relief demanded involves the execution of a trust, or a discovery, or the taking an account: *Pearson v. Darrington*, 18 Ala. 348; and wherever the jurisdiction of the probate court is imperfect: *Leavens v. Butler*, 8 Port. 380. Where a ward dies, and his guardian is appointed his administrator, equity has jurisdiction to compel a final accounting and settlement against him in both capacities: *Carswell v. Spencer*, 44 Ala. 204. Where an executor is domiciled in another state, a legatee may proceed in equity against him for an account and payment: *Colbert v. Daniel*, 32 Ala. 314. On the other hand, in respect to the admission of wills to probate, the jurisdiction of the orphans' court is exclusive; there is no need of a resort to equity in case of a destroyed will; the orphans' court can grant probate: *Apperson v. Cottrell*, 3 Port. 51; 29 Am. Dec. 239. Equitable jurisdiction *after* a final decree by the probate court: In the absence of fraud or some other element of special equitable cognizance, a court of equity has no power to interfere with the final decree of the orphans' court: *King v. Smith*, 15 Ala. 264. The decree of a court of probate, on a final settlement of the administration, being complete, is of equal dignity, and as final and conclusive as the judgment of a court of law or decree of a court of chancery. Equity will not interfere with a decree of a court of probate, nor detract from its conclusiveness, nor reopen the litigation unless on facts or grounds of which the party complaining could not have availed himself, when the decree was rendered, because of accident, or fraud, or act of his adversary, unmixed with fault or negligence on his part: *Waring v. Lewis*, 53 Ala. 615; *Gamble v. Jordan*, 54 Ala. 432; *Bowden v. Perdue*, 59 Ala. 409; but the decree of the probate court, in order to be thus conclusive, must be actually complete; when the settlement in the orphans' court, though purporting to be final, actually remains to be completed as to various sums, and there are still assets in the hands of the administrator unadministered, equity may take jurisdiction for a final accounting and settlement: *Dement v. Boggess's Adm'rs*, 13 Ala. 140. It is the universal rule in Alabama that when the court of equity has, and has assumed, jurisdiction of an administration for any particular purpose, however special and partial, it may and will retain the jurisdiction for all purposes, and go on to a final accounting,

(g) See, also, *Walker v. Johnson*, 82 Ala. 347, 2 South. 744. Where there has been no administration, but the heirs or next of kin have settled and divided the estate by voluntary arrangement among themselves, a creditor may maintain a suit to compel the payment of his demand out of the property, without the necessity of taking out an administration: *Cameron v. Cameron*, 82 Ala. 392, 3 South. 148, citing the

text of this paragraph, *post*, at note rrr.

(h) But by statute (Code, § 4298) the validity of a will may be contested by a bill in chancery: *Breeding v. Grantland*, 135 Ala. 497, 33 South. 544.

(i) *Humphreys v. Burleson*, 72 Ala. 1; *Waldrom v. Waldrom*, 76 Ala. 285; *Seals v. Weldon*, 121 Ala. 319, 25 South. 1021.

class. In the states of the first class, the original equitable

settlement, and distribution of the estate. In doing so, it will be governed by the same rules of law which would control the probate court in determining the rights of the parties, but will follow the rules of procedure belonging to courts of equity. If proceedings had already been commenced in the probate court, they are suspended, and the court of equity will, if necessary, restrain the parties from any further prosecution of those proceedings: *Hause v. Hause*, 57 Ala. 262 (assignment of dower); *Cowles v. Pollard*, 51 Ala. 445 (construction of a will); *Pearson v. Darrington*, 21 Ala. 169; *Stewart's Adm'r v. Stewart's Heirs*, 31 Ala. 207; *Wilson v. Crook*, 17 Ala. 59 (discovery of assets); *Taliaferro v. Brown*, 11 Ala. 702; *Hall v. Heirs of Wilson*, 14 Ala. 295; *Gayle v. Singleton*, 1 Stew. 566 (foreclosure of a mortgage); *Hunley v. Hunley*, 15 Ala. 91 (discovery); *Blakey v. Blakey's Heirs*, 9 Ala. 391.^j

Arkansas.—The system prevailing in this state is very different from that of Alabama, and the equitable jurisdiction is confined within the narrowest limits. It is the settled doctrine that the probate court has the exclusive jurisdiction to grant and revoke letters of administration and testamentary, to pass upon all questions touching the bonds of administrators and executors, to call executors and administrators to account, and to decree final settlement. A court of equity has no jurisdiction, in general, over administrators, or to withdraw an administration from the probate court, to assume cognizance thereof, and compel a settlement. The clause in the state constitution conferring jurisdiction in matters of equity upon the circuit courts does not conflict with this conclusion, *because the settlement of an estate is not a matter of equity*. (This ruling, it will be seen, is directly opposed to that of the Alabama and California courts.) The only exception to this general doctrine arises in cases where there has been fraud or waste in the process of administration of such a nature that the relief given by the probate court would not be adequate: *Moren v. McCown*, 23 Ark. 93; *Reinhardt v. Gartrell*, 33 Ark. 727; *Mock v. Pleasants*, 34 Ark. 63; *Flash v. Gresham*, 36 Ark. 529; *Haag v. Sparks*, 27 Ark. 594; *Shegogg v. Perkins*, 34 Ark. 117.^k In cases of fraud or waste during the process of administration which cannot be relieved against by the probate court, equity may interfere while the

(^j) *Bragg v. Beers*, 71 Ala. 151 (having taken jurisdiction, equity will order a sale of lands when, under like circumstances, a court of probate would have ordered it); *Sharp v. Sharp*, 76 Ala. 312 (same); *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342 (construction of will); *Tygh v. Dolan*, 95 Ala. 269, 10 South. 837.

(^k) *Jones v. Graham*, 36 Ark. 383; *Jackson v. McNabb*, 39 Ark. 111; *Nathan v. Lehman*, 39 Ark. 256;

Trimble v. James, 40 Ark. 393, 401; *Dyer v. Jacoway*, 42 Ark. 186, 190, 50 Ark. 222, 6 S. W. 902; *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193; *McLeod v. Griffis*, 51 Ark. 1, 8 S. W. 837; *Brice v. Taylor*, 51 Ark. 80, 9 S. W. 854; *Blevins v. Case*, 66 Ark. 416, 51 S. W. 65. A court of equity may, after the estate of a surety is finally closed, decree satisfaction of his bond out of his real estate in possession of his heirs: *Hall v. Cole*, (Ark.) 76 S. W. 1076.

jurisdiction over administrations remains unabridged by

administration is pending in the probate court, or even after its final decree. Thus where the removal of the fraudulent administrator by the probate court would not have disclosed the fraud, nor canceled a deed obtained through fraud or duress, equity may interpose and control the proceedings and give relief after the final decree in probate. But such interposition of equity on the ground of fraud or waste of assets is merely *corrective*; it does not enable the court of equity to go on with the administration and compel a final accounting and settlement; if further proceedings in the matter of a settlement and distribution are necessary, the cause must be remitted to the probate court, and the final settlement must be completed in that tribunal in accordance with the corrections made by the court of equity: *Freeman v. Reagan*, 26 Ark. 373; *Reinhardt v. Gartrell*, 33 Ark. 727; *Shegogg v. Perkins*, 34 Ark. 117.¹ When an executor or administrator dies, a suit in equity cannot be maintained by the administrator *de bonis non* or by the public administrator against the personal representatives or sureties of the deceased to hold them accountable for property of the estate lost, wasted, or converted by the deceased: *State v. Rottaken*, 34 Ark. 144; *contra* in Alabama and California. Where a suit in equity is maintainable against an executor or administrator, and the relief sought is purely equitable, the court will not allow stale demands, although not barred by the statute of limitations: *Martin v. Campbell*, 35 Ark. 137.

California.—The probate system in this state is very comprehensive, detailed, and complete, embracing not only administrations proper, but the appointment of guardians, and the supervision of the wards' estates in their hands. It may be added, in order to explain passages in judicial opinions which might appear strange to lawyers in other states, that the real as well as the personal estate of the deceased falls within the scope of the administrator's or executor's functions to be administered. Upon the death of an owner intestate, the title to his land does not immediately and absolutely vest in the heirs; they derive their title, if not directly from the administrator, at least *through* him, and not until the estate is fully administered. Under the present judicial system, the probate jurisdiction is given to the single court of original, general jurisdiction in law and in equity,—the superior court,—so that there is no separate probate tribunal. The proceedings in this superior court for a final accounting, settlement, and distribution are *virtually* the same as upon a bill in chancery in an administration suit. It would have been well, in my opinion, to have abandoned the *name* of a separate probate jurisdiction, and to have called the proceedings in administration a branch of the equitable jurisdiction held by the superior court as a court of equity.^m With regard to the equitable jurisdiction exercised by the

(1) *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821.

(m) The recent decisions have very nearly reached this result: *Toland v. Earl*, 129 Cal. 148, 153, 61 Pac. 914, 79 Am. St. Rep. 100,

per Temple, J.: "The special proceeding may as well be in the nature of a proceeding in equity as at law, and it is before the same chancellor, to whom it would be necessary to appeal in a personal action to in-

the statutes, concurrent with that possessed by the probate

"civil action," distinct from the statutory probate proceedings, there appears to be some conflict in the decisions, or at least in the judicial *dicta*. This apparent conflict may, however, have been ended by the very recent case of *Rosenberg v. Frank*, quoted in a preceding note. The *ratio decidendi* in that case is the broad principle that the *affirmative* grant, either in statutes or in the constitution, of jurisdiction to the probate court, does not destroy nor lessen the general jurisdiction in equity conferred upon other courts, and that this general equitable jurisdiction includes administrations. Alabama decisions are cited with approval as sustaining this conclusion. These Alabama cases also hold that resort may always be had *in the first instance* to a court of equity instead of to a court of probate, and this is a necessary consequence of the principle. The courts of California, however, have not followed the principle to this length, and probably they will not. On the contrary, they expressly hold that parties cannot resort to equity in matters of administration except upon some special ground of exclusive equitable cognizance. Some of the later decisions, laying down this rule very emphatically, seem to be somewhat conflicting with the course of decision in *Rosenberg v. Frank*. So far as any such conflict exists, the most recent and authoritative decision in *Rosenberg v. Frank* must be regarded as limiting the expressions of opinion in some of these late cases, and as returning to the more liberal view of the equitable jurisdiction taken by several of the earlier California cases, which are cited and approved.^m It is held that the probate court has exclusive

struct the administrator or executor and the court as to the proper construction of the will. . . . If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, and the proceeding is in fact for that purpose. It is the same court when sitting in matters of probate, and may exercise all equity powers necessary for a complete administration."

(^m) *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394. Some doubt has been cast on the authority of *Rosenberg v. Frank* on the question of jurisdiction. In *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130, it is pointed out that only a minority of the court concurred in the opinion of Thornton, J., in the former case, on the question of the jurisdiction, and that that case, as well as *Payne v. Payne*, 18 Cal. 292, and *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394, were,

in a sense, consent cases, as no one objected to the jurisdiction, and all parties interested desired the decision. It was held in *Siddall v. Harrison* that a court of equity is not bound to entertain an action brought to construe a will which has been duly admitted to probate, and should not do so, except in a case where there is some special reason for seeking its interposition; nor, in the absence of special reasons shown, can a person claiming to be the heir, but who takes nothing under the will, maintain an action in equity for the purpose of determining his heirship, and having the residuary and other legacies in the will pronounced invalid, pending proceedings in probate for the settlement of the estate. Speaking of *Rosenberg v. Frank*, Garoutte, J., in *McDaniel v. Pattison*, (Cal.) 27 Pac. 651, says: "We might add, the correctness of

courts. In many of them a suit for the administration,

jurisdiction of administrations, under all ordinary circumstances, of the accounting of executors and administrators, so that no suit in equity can be maintained in the first instance for an accounting or distribution; whatever jurisdiction in equity exists is wholly corrective: *Auguisola v. Arnaz*, 51 Cal. 435. A court of equity has, therefore, no jurisdiction of an action against an administrator seeking to charge the estate with the expenses of administration: *Gurnee v. Maloney*, 38 Cal. 85; 99 Am. Dec. 352; nor over the allowance of commissions to executors or administrators: *Hope v. Jones*, 24 Cal. 89; and if no court of equity can interfere with the final settlement and decree of a court of probate, it cannot set aside such decree on the ground of fraud, or other like ground of equitable cognizance, and leave the parties to make

the law there found, as to the jurisdiction of a court of equity to construe a will under the laws of this state, is not only doubted, but the effect of the decision is very much limited, in *Siddall v. Harrison*." A recent decision appears to place California in the author's second class. In *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, Temple, J., points out that *Rosenberg v. Frank* arose under the former constitution, which provided for courts of probate as separate and inferior courts, and says, in part: "The legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a minute code has been provided, through which every purpose for which resort was formerly had to courts of equity is attained.

. . . In the probate proceeding provision is made for the presentation and allowance of the claims of creditors, and, when the assets of the estate have been fully ascertained, upon notice the claims of creditors are ordered paid, if the assets are insufficient to pay all, in a certain order. Certainly this provision must be exclusive of the jurisdiction of a court of equity to mar-

shal the assets and to direct the payment of claims. If a legacy falls due, or a partial distribution of an intestate estate should be made, the probate court can order the personal representative to make the payment or distribution. . . . Surely this must be exclusive of a suit in equity, in which the parties are necessarily limited. The same is true as to the settlement of the accounts of the administrator or executor. . . . But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. . . . Here the probate court not only may, but should, and often must, construe the trusts created by the will. . . . If it is necessary or proper to appeal to a court of chancery, *the probate court is such a court*, and the proceeding is in fact for that purpose. It is the same court when sitting in matters of probate, and may exercise all equity powers for a complete administration."

settlement, and distribution of an estate may be brought,

another settlement in probate; and it is even doubtful whether equity could interfere at all, unless an opportunity to open the account or to appeal from the decree had been lost: *Hope v. Jones*, 24 Cal. 89; nor has a court of equity jurisdiction of an action by a ward against his guardian to compel an accounting; the jurisdiction to determine the accounts between guardian and ward belongs exclusively to probate: *Allen v. Tiffany*, 53 Cal. 16. Under the existing organization of the courts, a court of equity or of law has no jurisdiction to try issues of fact framed in the court of probate: In the Matter of the Will of Bowen, 34 Cal. 682; for former practice on the trial of such issues, see *Pond v. Pond*, 10 Cal. 495. (It is certainly very difficult to reconcile some of these cases, or the grounds upon which their ruling is based, with the *ratio decidendi* in *Rosenberg v. Frank*, *supra*, especially as they were all determined under the same constitutional provision.) On the other hand, equity has jurisdiction in the following cases: Where an executor or administrator had died without rendering a final account, equity has jurisdiction of a suit by the administrator *de bonis non*, to compel *his* personal representatives to account, and the judgment therein is conclusive upon the sureties of the deceased executor or administrator. This case is omitted from the powers conferred upon the court of probate, and that court has no jurisdiction except what is expressly given to it by the statute: *Chaquette v. Ortet*, 60 Cal. 594; *Bush v. Lindsey*, 44 Cal. 121 (this rule agrees with decisions in Alabama); where a settlement purporting to be final has been decreed by the probate court, a person who was not an actual party to it may maintain a suit in equity against the administrator, and compel him to a full and final accounting, treating the former settlement as a nullity: *Clarke v. Perry*, 5 Cal. 58; 63 Am. Dec. 82; *Deck v. Gerke*, 12 Cal. 433; 73 Am. Dec. 555; and a court of equity may also take jurisdiction of the settlement of an estate when there are peculiar circumstances of difficulty and embarrassment in its administration, and when the assuming of jurisdiction would prevent great delay, expense, inconvenience, and waste, and thus conclude by one action and decree a protracted and vexatious litigation: *Deck v. Gerke*, *supra* (these two cases are cited and approved in *Rosenberg v. Frank*); equity has exclusive jurisdiction of actions to compel the enforcement of trusts created by will, to call the trustee to an account, and to perform his trust duties: *Haverstick v. Trudel*, 51 Cal. 431; *Auguisola v. Arnaz*, 51 Cal. 435; and of actions against the administrator and heirs of a deceased mortgagor, to foreclose a mortgage: *Meyers v. Farquharson*, 46 Cal. 190; *Willis v. Farley*, 24 Cal. 490, 500; a court of equity has jurisdiction of a suit to set aside a decree of a probate court obtained by fraud: *Sanford v. Head*, 5 Cal. 297; but see *Hope v. Jones*, 24 Cal. 89 (the case of *Sanford v. Head* is cited with approval in *Rosenberg v. Frank*); and has jurisdiction of a suit by the administrator of a deceased partner against the survivors to compel a settlement of the partnership affairs; the jurisdiction given to the probate court in the administration of the decedent's estate does not interfere with the general equitable jurisdiction over

(o) *Hibernia S. & L. Soc. v. London & Lancashire Fire Ins. Co.*, 138 Cal. 257, 71 Pac. 334 (to establish lien against grantee and heir).

as a matter of course, in a court of equity in the first in-

such causes: *Griggs v. Clark*, 23 Cal. 427. It was held in an early case that the court of equity has the same control over the persons and estates of infants which the court of chancery in England possesses: *Wilson v. Roach*, 4 Cal. 362; but this can hardly be true under the existing statutes: See *Allen v. Tiffany*, 53 Cal. 16. The court of probate has exclusive jurisdiction in the matters relating to the probate of wills; and *every* will must be regularly admitted to probate, before it can be given in evidence in any court in support of a title under it: *Castro v. Richardson*, 18 Cal. 478.■

Connecticut.—The courts of probate have not only a complete jurisdiction over all matters of administration and the settlement and distribution of estates, but are clothed with large equitable powers in granting reliefs and determining rights of property. Their jurisdiction, except under some very exceptional circumstances, is exclusive; equity has no jurisdiction over administrations, either in the first instance or by way of correcting errors in probate proceedings, under all ordinary circumstances. For example, the court of probate has full power to correct inventories, to compel the filing of additional inventories, and to settle the accounts of executors and administrators upon a basis of equity. That specific legacies are given by ambiguous language, that there are difficulties in the settlement arising from conveyances of land by the executors pursuant to covenants of the testator, and from their acceptance of mortgaged lands in lieu of the debts due to the deceased secured by the mortgages thereon, are not sufficient grounds to make the interference of equity either necessary or proper: *Beach v. Norton*, 9 Conn. 182; *Pitkin v. Pitkin*, 7 Conn. 315 (suit by executors to charge real estate of testator with expenses incurred in the administration); *Bailey v. Strong*, 8 Conn. 278 (where an insolvent heir indebted to the estate to the full amount of his share therein had fraudulently assigned his interest in the estate, equity will not interfere; full power in the probate court); *Sheldon v. Sheldon*, 2 Root, 512; *Gates v. Treat*, 17 Conn. 388 (equity will not correct an error in carrying out the final settlement and distribution in the probate court). Probate court has full power to correct any error made in a prior and partial settlement, and to do equity among the parties interested, and there is no jurisdiction in courts of equity for such a purpose: *Mix's Appeal*, 35 Conn. 121; 95 Am. Dec. 222. On the other hand, equity has full and exclusive jurisdiction over all trusts of real or personal property created by will, of calling the trustees to account, of settling their accounts and compelling a performance of the trust; the probate jurisdiction does not extend to trusts: *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Parsons v. Lyman*, 32 Conn. 566; *Prindle v. Holcomb*, 45 Conn. 111. Illustration of the extraordinary circumstances under which the equitable jurisdiction exists: All the heirs signed an agreement that the estate should be settled in the probate court, in accordance with the draught of a will prepared, but not executed, by the deceased. One of these heirs, who was weak-minded and ignorant of his

(■) In *McDaniel v. Pattison*, (Cal.) 27 Pac. 651, it was held that a chancery court has no jurisdiction to

probate a will, although such relief is sought only incidentally to the main equitable relief.

stance, instead of in the court of probate. In most, the

rights, and who claimed to have been unduly influenced by the others to sign the agreement, whereby he relinquished a larger interest than he received, filed a bill in equity to set aside the agreement, and to enjoin the proceedings in the probate court under it; held, that courts of probate have sole jurisdiction in all ordinary matters relating to the settlement of estates, but that this was an *extraordinary* matter, and equity had jurisdiction.

Georgia. — There is some discrepancy among the decisions, chiefly arising, however, from the different statutory systems prevailing at different periods. It may be accurately stated, as a general description of the present condition, that while the jurisdiction of probate is sufficient for all ordinary purposes, so that courts of equity will not interfere under ordinary circumstances to *exercise* a jurisdiction which they really possess, yet the equitable jurisdiction will be exercised freely, where the circumstances are special, and where equitable relief is needed, which cannot adequately be conferred by the probate courts. The extent of the equitable jurisdiction is far greater than in Arkansas and Connecticut, and greater perhaps than in California, but more circumscribed than in Alabama. In some of the earlier cases, under the then existing statutes, it was held that the general equitable jurisdiction over administrations existed, substantially the same as that possessed by the English court of chancery; that when a court of equity had obtained jurisdiction over a case of administration, and the administrator is removed from office, it may appoint a receiver who could dispose of the assets and settle the estate under a decree of the court: *Walker v. Morris*, 14 Ga. 323; *Mills v. Lumpkin*, 1 Ga. 511; 44 Am. Dec. 677. Later cases described the probate jurisdiction over matters of accounting, final settlement, and distribution as exclusive under ordinary circumstances, and held that equity could only interfere to grant relief which a court of probate *cannot* and a court of equity *can* give: *Slade v. Street*, 27 Ga. 17; *Perkins v. Perkins*, 21 Ga. 13; *Moody v. Ellerbie*, 36 Ga. 666. Finally, the very recent cases, under existing statutes, admit a broader equitable jurisdiction in the matter of ordinary administrations. It is held that a concurrent jurisdiction of equity over the matter of accounting and settlement by administrators is specially retained by the Code of 1873, sec. 2600: *Ewing v. Moses*, 50 Ga. 264; ^a still it is said that there should be a strong cause to authorize a court of equity to exercise this jurisdiction, and to interfere with the regular administration of an estate: *Mayo v. Keaton*, 54 Ga. 496; and see *Collins v. Stephens*, 58 Ga. 284. The following are particular conditions of fact, or instances of particular relief, in which equity has jurisdiction: *Marshaling of assets*: Equitable suits for the marshaling of assets will be maintained whenever such relief is actually required, and is sought to be obtained; but the *mere* fact that there are numerous claims against the estate, or that the estate is insolvent, does not constitute a case for marshaling: *Bryan v. Hickson*, 40 Ga. 405; *Irvin v. Creditors of Bond*, 41 Ga. 630; *Jeter v. Barnard*,

(a) *Johnston v. Duncan*, 67 Ga. *McGowan v. Lufburrow*, 82 Ga. 523,
61; *McCook v. Pond*, 72 Ga. 150; 9 S. E. 427, 14 Am. St. Rep. 178.

general principle regulating the exercise of all concurrent

42 Ga. 43.* *Destroyed will*: It has been held that equity has no jurisdiction of a suit to establish a will destroyed by accident, since the powers of the probate court are ample in such a case: *Slade v. Street*, 27 Ga. 17; *Perkins v. Perkins*, 21 Ga. 13 (equity will interfere only in case of destruction by *spoliation*); but as equity has jurisdiction in cases of fraud, it may entertain a suit to establish a will destroyed by fraud, notwithstanding the exclusive jurisdiction in general of the court of ordinary over probate matters: *Harris v. Tisereau*, 52 Ga. 153; 21 Am. Rep. 242; equity, however, has no jurisdiction to establish a copy of a lost will: *Ponce v. Underwood*, 55 Ga. 601. *Fraud or waste*: Equity has a corrective jurisdiction in cases of fraud or waste in the course of an administration or settlement, except fraud in the execution of a will;* thus a court of equity may set aside letters of administration procured by fraud, and require the administrator to account for and pay over to the lawful foreign executor the assets received by him: *Wallace v. Walker*, 37 Ga. 265; 92 Am. Dec. 70; and may entertain a suit by a ward against an administrator for various equitable relief against the latter's fraud and waste: *Ware v. Ware*, 42 Ga. 408; and has jurisdiction in all cases of fraud, except fraud in the execution of a will: *Harris v. Tisereau*, 52 Ga. 153; 21 Am. Rep. 242; a court of equity has no jurisdiction, therefore, to set aside a will regularly admitted to probate, and to declare the same, or any part thereof, null and void: *Tudor v. James*, 53 Ga. 302; see *ante*, vol. 2, § 913; where the heirs agree to distribute an estate without a regular administration in the probate court, and appoint an agent for that purpose, and put him in possession of the property, a suit in equity against him by one or more of the distributees may be maintained, as against an administrator: *Moore v. Gleaton*, 23 Ga. 142; a husband procured a policy of life insurance for the benefit of his wife and children. On his death the amount was paid to the widow, and she paid it over to her father, who was co-administrator with her of her husband's estate. The father died without accounting for this fund in his hands. The children bring a suit in equity against the executor of this deceased father for an account and payment of the fund. Held, that the suit should have been brought by the widow, and the children could not maintain it without adding her as a party defendant, and showing why she did not sue herself as the plaintiff: *Fletcher v. Collier*, 61 Ga. 653.† *Equitable remedies*

(*) *Stephens v. James*, 77 Ga. 139, 3 S. E. 160.

(§) "It is well settled in this state that courts of equity have concurrent jurisdiction with the courts of ordinary in the administration of the estates of deceased persons in all cases where equitable interference is necessary, or proper to the full protection of the rights of the parties at interest." Hence an heir can resort to equity when

the property is being mismanaged or wasted: *Bivins v. Marvin*, 96 Ga. 268, 22 S. E. 923; *Thompson v. Orser*, 105 Ga. 482, 30 S. E. 626. The mere insolvency of the administrator will not give equity jurisdiction, however: *Duggan v. Lamar*, (Ga.) 29 S. E. 19.

(†) It was held in *Bailey v. Ross*, 68 Ga. 735, that where, after due notice, leave has been regularly granted by the court of ordinary,

jurisdiction prevails, that when either court has assumed

of creditors: When an estate has been settled and distributed, and the executor discharged by a decree of the probate court rendered with the consent of the heirs, a creditor who subsequently obtained a judgment against the estate may maintain a suit in equity upon it against the heirs to reach the property distributed to them, the executor being insolvent: *Long v. Mitchell*, 63 Ga. 769; and a judgment creditor of the estate may sue in equity to reach assets already distributed, when the executor is a non-resident and insolvent, and all the assets are distributed, the executor himself being a devisee and being made a defendant. In such a case, if the executor has committed waste, his share should be first applied in discharge of the judgment, before taking the shares of other devisees: *Redd v. Davis*, 59 Ga. 823.

Illinois.—The theory is admitted by later as well as earlier cases in this state that equity retains a general jurisdiction over administrations, concurrent with, but paramount to, that possessed by the probate courts, and the only practical question is, When will that jurisdiction be exercised? The earlier decisions allowed its exercise somewhat more freely than is done by the later ones; they seem to have permitted a resort to equity in the first instance, instead of to the probate court, for the purpose of an accounting and final settlement, without any special ground alleged; and also for the purpose of re-examining and correcting a settlement made by a probate court, with which a party was dissatisfied: *Grattan v. Grattan*, 18 Ill. 167; 65 Am. Dec. 726; *Mahar v. O'Hara*, 4 Gilm. 424; *Jennings v. McConnel*, 17 Ill. 148; *Heward v. Slagle*, 52 Ill. 336. The more recent cases, while fully admitting the existence of this jurisdiction, have repeatedly declared the rule to be: "Courts of equity will not exercise jurisdiction over the administration of estates except in extraordinary cases; some special reason must be shown why the administration should be taken from the probate court": *Freeland v. Dazey*, 25 Ill. 294; *Townsend v. Radcliffe*, 44 Ill. 446; *Garvin v. Stewart's Heirs*, 59 Ill. 229; *Harris v. Douglas*, 64 Ill. 466; *Blanchard v. Williamson*, 70 Ill. 647; *Heustis v. Johnson*, 84 Ill. 61; *Crain v. Kennedy*, 85 Ill. 340; *Hales v. Holland*, 92 Ill. 494.^u The following are examples of

(probate) to an administrator to sell realty of a decedent, equity will not restrain the sale by injunction at the instance of an heir on account of reasons—as that there were no debts against the estate—which could have been as readily urged at the time when such order was granted; but it is said in a similar case that where the estate is ready for distribution, and this is asked for in the bill, equity may assume jurisdiction, and incidentally enjoin the administrator from making such a sale: *McCook v. Pond*,

72 Ga. 150. In *Simmons v. Crumbley*, 84 Ga. 495, 10 S. E. 1090, it was held that where the probate court cannot revoke authority for an administrator's sale because the sale was to be made between terms, equity will enjoin the sale if it appears that sufficient has not been set apart, in accordance with statute, for a twelve months' support of minor children.

(^u) *Harding v. Shepard*, 107 Ill. 264; *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588. The court of equity will not interfere when the equitable

jurisdiction of a particular case, the other tribunal will

such special facts in which this concurrent jurisdiction is properly exercised: Where a court of probate ordered an administrator to pay over money in his hands to the person *legally* entitled to receive it, without determining who were *equitably* entitled to the fund: *Townsend v. Radcliffe*, 44 Ill. 446; a suit by a creditor against an administrator for an accounting and a sale of land for purpose of satisfying the claim, where the court of probate had committed error in passing upon the demand, and all the papers and records in the probate court had been destroyed by accidental fire: *Clark v. Hogle*, 52 Ill. 427; in a case involving complicated equities, a court of equity may entertain a creditor's suit against the heirs of a deceased debtor, and may then retain the case, in order to decree a final settlement: *Garvin v. Stewart's Heirs*, 59 Ill. 229; where the payment of debts is made a charge on the testator's real estate, equity has jurisdiction in the first instance, on the ground of its jurisdiction over trusts: *Harris v. Douglas*, 64 Ill. 466; see also case of a special agreement for distribution and accounting made by heirs and devisees: *Pool v. Docker*, 92 Ill. 501. In the following cases the facts are not sufficient to admit the exercise of this equitable jurisdiction: Equity will not take jurisdiction of a suit to establish a simple legal claim or debt, where there are no equitable incidents: *Hales v. Holland*, 92 Ill. 494; *Armstrong v. Cooper*, 11 Ill. 560; even that the claim is equitable is not of itself sufficient: *Garvin v. Stewart's Heirs*, 59 Ill. 229; one of several executors cannot call his co-executors to account in equity: *Crain v. Kennedy*, 85 Ill. 340; it is not a sufficient ground for a suit in equity by a creditor that he has not presented his claim, and that the presentation was barred by the statutory period of limitation, that the administrator was discharged by order of the probate court, and that there were assets not inventoried: *Blanchard v. Williamson*, 70 Ill. 647. In the following cases equity has an

powers of the probate court are adequate: *Shepard v. Spear*, 140 Ill. 238, 29 N. E. 718 (affirming 41 Ill. App. 211, and citing *Wadsworth v. Connell*, 104 Ill. 378; *Spencer v. Boardman*, 118 Ill. 555, 9 N. E. 330); *Duval v. Duval*, 153 Ill. 49, 38 N. E. 944, affirming 49 Ill. App. 469; *Goodman v. Kopperl*, 169 Ill. 136, 48 N. E. 172 (affirming 67 Ill. App. 42, and citing these additional cases: *Wood v. Johnson*, 13 Ill. App. 548; *Scripps v. King*, 103 Ill. 469); *Shepard v. Spear*, 140 Ill. 238, 29 N. E. 718; *Strauss v. Phillips*, 189 Ill. 9, 59 N. E. 500, affirming 91 Ill. App. 373.

(v) A court of equity will not ordinarily assume jurisdiction until

the claimant shall have exhibited his claim and had it allowed in the county (probate) court: *Strauss v. Phillips*, 189 Ill. 9, 59 N. E. 560, and cases cited, affirming 91 Ill. App. 373; *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588; and then, if any special reasons that may be deemed sufficient can be assigned why the court cannot afford the requisite relief, equity will assist him, but not otherwise; in this respect, judgment creditors, except so far as their judgments are liens on real estate, and simple contract creditors, are on the same footing. For waste by, or fraud, mistake, or incompetency of, the administrator, relief may be had in the county court. The fact that

not ordinarily interfere. These states are Alabama,

exclusive, or at least a certain, jurisdiction: Where a legacy is charged upon land devised, equity has jurisdiction of its enforcement, on the ground of trust, and courts of equity have jurisdiction in all cases of legacies: *Mahar v. O'Hara*, 4 Gilm. 424; where the object of a suit is to charge an administrator for violating the duties of his trust in regard to land, a court of equity not only has jurisdiction, but is the only court which can give adequate relief: *McCreedy v. Mier*, 64 Ill. 495; heirs who are dissatisfied with the settlement of an estate which is complicated should proceed by bill in equity, and not by appeal from the decree of the probate court: *Heward v. Slagle*, 52 Ill. 336; see vol. 1, § 349, note 1.^w

Indiana.—Under the earlier statutes it was held that the probate courts had jurisdiction of all matters of administration, and the decrees of final settlement made therein were *prima facie* correct, and that a court of equity could only interfere with such decrees or with pending administrations in clear cases of fraud or mistake, but the jurisdiction *did* exist to correct fraud or mistake: *Allen v. Clark*, 2 Blackf. 343; *Brackenridge v. Holland*, 2 Blackf. 377; 20 Am. Dec. 123; *Murdock v. Holland's Heirs*, 3 Blackf. 114. Where the guardian of A's children had died without accounting, and not leaving personal property sufficient, and the accounts were complicated, a suit in equity by these children and A's representatives against the guardian's personal representatives and heirs for an accounting and settlement, was held proper: *Peck v. Braman*, 2 Blackf. 141. Under the existing statutory system (2 Rev. Stats., p. 17, and act of March 6, 1873, sec. 79), the probate jurisdiction held by the circuit courts over all probate and testamentary matters, and over administrations, the accounting, settlement, and distribution of decedents' estates, is practically exclusive: *Ex parte Shockley*, 14 Ind. 413; *Williams v. Perrin*, 73 Ind. 57; *Ramsey v. Fouts*, 67 Ind. 78; *Heaton v. Knowlton*, 65 Ind. 255; *Noble v. McGinnis*, 55 Ind. 528; *Alexander v. Alexander*, 48 Ind. 559.

the administrator failed, through fraud or negligence, to collect assets in the hands of surviving partners of the intestate is not sufficient ground for the interposition of a court of equity: See *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588. Equity will not take jurisdiction of an administration bill by creditor of an insolvent estate, of which no administrator has been appointed, for the purpose of setting aside a fraudulent conveyance: *Goodman v. Kopperl*, 169 Ill. 136, 48 N. E. 172, affirming 67 Ill. App. 42; *Houston v. Maddux*, 179 Ill. 377, 70 Am. St. Rep. 98, 53 N. E. 599, reversing 73 Ill. App. 203. The jurisdiction to set aside the pro-

bate of a will is derived solely from statute and can be exercised only in the mode and under the limitations prescribed by statute: *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211.

(^w) An act which gives a probate court jurisdiction of claims against estates, when the decedent has received money in trust for any purpose, does not confer on those courts exclusive jurisdiction; the legislature has no power to deprive circuit courts of equity jurisdiction over trusts: *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863, citing the author's note.

Illinois, Iowa, Kentucky, Maryland, Mississippi, New

Notwithstanding this general conclusion, it seems hardly possible that the original and most salutary jurisdiction of equity over fraud and mistake has been entirely abrogated so as to prevent a court of equitable powers from setting aside or correcting any case of fraud or mistake in an administration, however clear, although no recent cases involving this question seem to have arisen.* It is plain that the equitable jurisdiction in this state is confined within the narrowest limits.

Iowa.—The decisions in this state are few, but they show very clearly that a large *original*, as well as *supervisory* or *corrective*, jurisdiction in equity is left unaffected by statutes; that the probate system is not complete, does not extend to many matters of a distinctively equitable cognizance, and over such matters the jurisdiction of equity will be exercised without question. Substantially, a concurrent jurisdiction in equity *exists*, and the practical inquiry is, When will it be exercised? Ordinary claims against an estate come within the probate jurisdiction, but this does not apply to matters of an equitable nature, of which a court of chancery has cognizance. The probate jurisdiction over all matters connected with the settlement of estates is not exclusive; the equitable jurisdiction is not taken away expressly, or by any fair construction of the statutes.† The probate court has not the power to entertain a suit by creditors to compel the administrator to sell real estate; jurisdiction of such a suit must be confined to equity: *Waples v. Marsh*, 19 Iowa, 381. Under the statute, a will admitted to probate may be contested either by appeal, or by an *original* suit in the court of equity: *Havelick v. Havelick*, 18 Iowa, 414; and equity has jurisdiction to set aside and declare void probate proceedings, on the ground of their fraud: *Cowin v. Toole*, 31 Iowa, 513. Still, the circuit court, as a court of equity, will not review and correct the acts of an administrator while the administration is pending,—that is, will not remove a pending administration from the control of probate: *Hutton v. Laws*, 55 Iowa, 710.

Kansas.—While the decisions in this state are very few, they clearly show that the grant of a broad jurisdiction to the probate courts is not re-

(*) In *Denny v. Denny*, 113 Ind. 22, 14 N. E. 593, a widow sued to enjoin the executors of her husband's will from selling certain grain which she had selected under the provisions of Rev. St. Ind. 1881, § 2269, giving the widow the right to select property of certain value out of her husband's estate. She alleged that if the sale should be made she would be left without necessary feed for her animals, and that other corn could not be readily secured. The court held that under these circumstances a suit on the bond of the executors would not be an adequate remedy, and the injunction was granted as prayed.

(†) An administrator can maintain a creditors' bill against the grantee of the decedent to set aside a fraudulent conveyance: *Mallow v. Walker*, 115 Iowa 238, 88 N. W. 452, 91 Am. St. Rep. 158. The mere fact that an estate remains unsettled is insufficient ground for equitable relief against the statutory bar for failure to notice a claim within the prescribed time: *In re Jacob's Estate*, 119 Iowa 176, 93 N. W. 94.

Jersey, North Carolina, Rhode Island, Tennessee (in cer-

garded as having destroyed the original jurisdiction of equity over administrations, but it still exists concurrently with that of the probate courts. Although the concurrent jurisdiction of equity thus *exists*, it is practically exercised only as an ancillary, supplementary, and corrective jurisdiction; it is invoked under circumstances or to grant reliefs where the powers and remedies of probate are inadequate, and to correct the proceedings of the probate court where there is fraud, mistake, or perhaps plain error;^z but it will not interpose with a pending administration, where the estate is still unsettled, in order to determine matters which come within the probate jurisdiction and over which the probate powers are certain and adequate. While *all* these conclusions are not, perhaps, expressly formulated by any of the decisions, they seem to be necessarily involved in or implied by those decisions. In an equitable suit by an administrator *de bonis non* to subject certain lands of the estate to the payment of claims which had been adjudged, upon final settlement in the probate court, to be due to the administrator, held, that the court of equity had jurisdiction; that the grant of jurisdiction to the probate courts was not intended to limit the jurisdiction of equity in such matters:^{aa} *Shoemaker v. Brown*, 10 Kan. 383. On the other hand, where a creditor, whose claim was allowed by the probate court, sought to have lands of the estate sold in satisfaction, it was held that in such a case, where the creditor had no specific lien on the land, and the administration was still pending in the probate court, the remedy given by the probate court was adequate, and therefore the jurisdiction of equity would not be exercised. The probate court had ample powers to order the administrator to sell land, for payment of debts, when there was a deficiency of personal assets, and the creditor should resort to this statutory method, and not to a suit in equity: *Johnson v. Cain*, 15 Kan. 532. This decision undoubtedly conforms to the rule prevailing in the great majority of states, where power to sell land under the direction and control of the probate court is given to an administrator.^{bb}

Kentucky.—The equitable jurisdiction in this state is broad,—concurrent with that of the probate courts, so that parties *may* in the first instance proceed by a suit in equity for an accounting and final settlement; but ordinarily, the court which first assumes jurisdiction of an administration will retain it unto the end, without interference with the other. Equity has also a jurisdiction in special cases, where the powers of the probate court are not adequate, or perhaps do not at all exist. The equitable juris-

(z) A fraudulent sale of a decedent's land resulting from a fraudulent allowance of a claim against the estate will be set aside in equity after the estate is closed: *McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529.

(aa) A creditor's bill for discovery, etc., against parties who have fraudulently converted and con-

cealed assets of the deceased may be maintained: *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273. Equity has jurisdiction to enforce the payment of a demand which accrues after the death of the deceased: *In re Hyde*, 47 Kan. 277, 27 Pac. 1001.

(bb) Quoted in *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193.

tain special cases), Virginia, District of Columbia, and

diction over administrations is not taken away by the statutes. Courts of chancery may entertain jurisdiction of suits for a final accounting, settlement, and distribution: *Moore v. Waller's Heirs*, 1 A. K. Marsh. 488. But this jurisdiction is concurrent with that possessed by the probate courts, and in general, the first court which assumes jurisdiction of an administration may retain it. If a suit had been commenced in chancery, any subsequent proceedings by way of settlement in the probate court would be nugatory, or would not be permitted; and conversely, if proceedings for a settlement had been begun in the probate court, a court of chancery would not, under ordinary circumstances, interfere with the administration: *Saunders's Heirs v. Saunders's Ex'rs*, 2 Litt. 314; *Blackerby v. Holton*, 5 Dana, 520. There are, however, special cases in which equity will exercise its jurisdiction because the powers and reliefs of the probate court are inadequate, or perhaps do not exist. Where an executor, at the request of heirs and devisees, sold a negro, taking a note for the price to himself as executor, the remedy of the heirs and devisees for their share of the note or purchase-money is by suit in equity: *Cartmel v. Rench*, 2 J. J. Marsh. 118. After an administrator has distributed the estate among the heirs, a creditor whose debt has not been paid, and who had obtained no judgment, may resort to equity for relief: *Stroud's Heirs v. Barnett*, 3 Dana, 391. A suit in equity is also proper to obtain a discovery of assets and appropriation thereof in satisfaction of a judgment which the plaintiff had recovered against the administrator, on which the execution had been returned unsatisfied: *Pilkington's Ex'x v. Gaunt's Adm'x*, 5 Dana, 410. A court of equity has jurisdiction of a suit to annul and set aside settlement made by an executor in the probate court, on the ground of fraud, or to obtain a discovery of assets; and having assumed jurisdiction for such a purpose, the court will retain the suit and give full and final relief: *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Mon. 499, 507. A suit in equity for an accounting may be maintained by an administrator *de bonis non* against the personal representatives and heirs of a deceased administrator, who died before the estate was settled: *Bellomy's Adm'r v. Bellomy*, 3 Bush, 109. (The same rule prevails in Alabama and California.) A court of equity will not entertain a suit to establish a lost will, when the same relief can be granted by a probate court: *Hunt v. Hamilton*, 9 Dana, 90.

Maine.—From the limited nature of the equity jurisdiction conferred by statute, hitherto held by the courts of this state: See *ante*, vol. 1, §§ 286, 322-337; and from the absence of decided cases in which any such jurisdiction has been exercised,—it appears that the equitable jurisdiction in matters connected with administrations is extremely narrow,—that it is confined, in fact, to testamentary trusts and to the construction of wills as a branch of the general jurisdiction over trusts.^{cc} The jurisdiction of probate over all matters connected with the settlement of the estates of decedents appears

(cc) "A bill for the construction of a will cannot be maintained unless the plaintiff has such interest,

personal or official, legal or equitable, in the estate, or under the will, as would be served by a construc-

the United States courts. In the states of the second

to be virtually exclusive; the instances in which equity can interfere, in addition to the two above mentioned, seem to be referable to some other distinct head of equity jurisdiction,—such, for example, as that in aid of creditors whose remedies at law have been exhausted, or perhaps that of fraud. An administrator of an insolvent estate is entitled to the aid of a court of equity to reach property of the deceased, for the purpose of satisfying the claims of creditors, which has been conveyed or is held in fraud of the rights of such creditors; but his legal remedies must be exhausted before resorting to equity: *Caswell v. Caswell*, 28 Me. 232; *Fletcher v. Holmes*, 40 Me. 364;^{dd} but while the administrator may thus invoke the aid of equity, a creditor of the deceased, who has not exhausted his legal remedies, cannot maintain a suit to have such property appropriated in payment of his debt: *Caswell v. Caswell*, *supra*. A had obtained a decree in an equitable suit against the administratrix of B, brought to procure a deposit made by B in a bank, and pledged to A as security for a debt due him by B, to be paid to him. Upon the subsequent death of the administratrix, A brought a second suit in equity against the administrator *de bonis non* of B to recover indemnity for certain extraordinary expenses in the first litigation caused by the fraud of the administratrix. Held, that the suit could not be maintained: *Boynton v. Ingalls*, 70 Me. 461. Equity has a complete jurisdiction over trusts created by wills, for the enforcement of the trusts and the control of the trustees: *Richardson v. Knight*, 69 Me. 285, 289; *Nason v. First etc. Church*, 66 Me. 100; *Elder v. Elder*, 50 Me. 535; *Morton v. Southgate*, 28 Me. 41; and see other cases cited in note 5 under § 329, *ante*, in vol. 1.

Maryland.—The equitable jurisdiction in this state is equally broad as and quite similar to that in Kentucky and several other commonwealths. Notwithstanding the statutory probate system, it is perfectly well settled that the original jurisdiction of equity in administrations remains, and will be exercised in calling executors and administrators to account, in superintending the administration of assets, and in making final settlement and distribution of the estate among legatees, distributees, and the like: *Davis v. Clabaugh*, 30 Md. 508; *Barnes v. Compton's Adm'rs*, 8 Gill, 391; as an illustration, a suit in equity by the representatives of a ward against the executors of a deceased guardian, who had died before an accounting and final settlement of the ward's estate, was held to be clearly maintainable: *Barnes v. Compton's Adm'rs*, *supra*.^{ee} This jurisdiction, however, is only concurrent with that of the probate court, and will not be exercised, in the absence of special

tion of the will": *Burgess v. Shepherd*, 97 Me. 522, 55 Atl. 415. A court of equity will not decree specific performance of a contract by a decedent, when the probate court, after hearing a petition, has refused to order a conveyance: *May v. Boyd*, 97 Me. 398, 94 Am. St. Rep. 509, 54 Atl. 938.

(^{dd}) *Frost v. Libby*, 79 Me. 56, 8 Atl. 149.

(^{ee}) Where some of the parties claiming distribution are non-residents, and refuse to appear in the orphans' court, as that court has no power to issue process to bring them in, or to make publication against them, a proper case is pre-

class, the jurisdiction of the probate courts over every-

equitable features, where probate has already assumed jurisdiction. Equity will not ordinarily interfere with an administration begun and pending in the orphans' court. The powers of the latter tribunal are generally adequate to protect the rights of those interested in the estate: *Lee v. Price*, 12 Md. 253.^{ff} In matters of distinctively equitable cognizance, the jurisdiction of equity is exclusive. Thus where a sale had been made under an order of the orphans' court, and this sale was afterwards vacated by a subsequent order, the orphans' court has no power to pass upon and to adjust the rights and equities of the purchaser growing out of the order of vacation; such matters belong exclusively to the jurisdiction of equity: *Eichelberger v. Hawthorne*, 33 Md. 588.^{gg}

Massachusetts.—It is not enough to say that the equitable jurisdiction in this state is narrow; the only conclusion to be drawn from decisions heretofore made is, that there is no equitable jurisdiction whatever in matters belonging properly to the administration and settlement and distribution of estates. The statutory powers given to courts of equity in cases of trust, fraud, discovery, and the like, are held not to be any grounds for interposition in administrations. Not only will a court of equity not interfere with a pending administration in the probate court, but it will not entertain a suit to correct or invalidate a settlement made by the probate court on the ground of fraud or mistake, or because a discovery is needed, etc. These conclusions are sustained by the entire course of decisions: *Jennison v. Hapgood*, 7 Pick. 1; 19 Am. Dec. 258; *Grinnell v. Baxter*, 17 Pick. 383; *Sever v. Russell*, 4 Cush. 513; 50 Am. Dec. 811; *Wilson v. Leishman*, 12 Met. 316; *Hathaway v. Thayer*, 8 Allen, 421; *Southwick v. Morrell*, 121 Mass. 520; *Sykes v. Meacham*, 103 Mass. 285; see *ante*, vol. 1, § 320, note 3, for a quotation from the opinion in

sent for equity to administer and distribute the estate: *Alexander v. Leakin*, 72 Md. 199, 19 Atl. 532.

(^{ff}) If, for example, a personal representative apprehends a loss from the neglect or misconduct of his co-executor or co-administrator, adequate relief may be obtained in the probate court: *Beal v. Hilliary*, 1 Md. 186, 54 Am. Dec. 649; *Whiting v. Whiting's Adm'r*, 64 Md. 157, 20 Atl. 1030. Likewise, equity has no jurisdiction of a bill alleging that the executor of a will has died and that one of the children of the testator is concealing the property: *Macgill v. Hyatt*, 80 Md. 253, 30 Atl. 710.

(^{gg}) And a statute providing that the administrator *de bonis non* may

be empowered by a probate court to execute the powers of sale of realty conferred by the will upon the executor has not affected the general superintending power exercised by the court of chancery over trusts; such administrator *de bonis non* may therefore administer the estate and execute the power of sale under the direction and protection of a court of equity: *Keplinger v. Maccubbin*, 58 Md. 206. A court of equity has jurisdiction to determine whether an advancement has been converted into personalty; and having taken jurisdiction, it may retain it and distribute the estate: *Safe Deposit & Trust Co. v. Baker*, 91 Md. 297, 46 Atl. 1071.

thing pertaining to the regular administration and settle-

Wilson v. Leishman, which expresses the theory maintained by the court.^{hh} This doctrine is carried to such an extent as to deny the jurisdiction of equity to interfere with a settlement made in the probate court by an executor, which was impeached on the ground of his fraud and misconduct, although his account was rendered and the settlement made without notice to the parties interested: *Sever v. Russell*, *supra*. Matters which are collateral to or incidentally affect an administration may sometimes come within the equitable jurisdiction; for example, where A claims the rights of a child and heir of the intestate under an agreement made between the intestate and A's father, and also under an adoption in pursuance of a statute and judicial decree in Pennsylvania, the question of his rights to the estate under the agreement may be determined in equity, but not until his *status* as a child of the intestate has been settled in the probate court: *Ross v. Ross*, 123 Mass. 212.ⁱⁱ Another instance is that of creditors who may resort to equity for aid when their legal remedies have been exhausted, and thus a creditor may maintain a suit in equity against the executor and devisees whose devises are subject to debts, when the statutory period of limitation has elapsed: *Fairfield v. Fairfield*, 15 Gray, 596.^{jj}

Michigan. — The equitable jurisdiction over the subject-matter in this state is of the narrowest extent. This state is to be ranged in the same class with

(^{hh}) *Muldoon v. Muldoon*, 133 Mass. 111. By St. 1891, c. 415, equity jurisdiction is given to probate courts concurrent with that of other equity courts. The equitable relief sought may be tested by supposing the bill to have been brought in the superior court. "An application in equity to the probate judge for equitable relief stands like a bill in equity in other courts, and cannot be helped out by considering his powers in another capacity." Upon these principles it has been held that a probate court will not entertain a bill to enjoin an administrator from performing his duties: *Bennett v. Kimball*, 175 Mass. 199, 55 N. E. 893.

(ⁱⁱ) And as trustees may ask instructions, not only as to the construction of the will, but as to their duties under it, so executors may properly ask instructions as to their duties under the will, in advance of the final settlement of their account,

when grave embarrassments may result from delay, the probate court having no power to give directions as to how future accounts shall be rendered or the duties of executors performed: *Welch v. Adams*, 152 Mass. 74, 81, 25 N. E. 34, 9 L. R. A. 244. A bill to ascertain the validity and construction of assignments of a legatee's interest may be maintained. The probate court does not take cognizance of assignments made by legatees or distributees of their interests, but deals only with those primarily entitled to the legacies or distributive shares. An injunction will issue to restrain payment to the assignor: *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923.

(^{jj}) A creditor of the deceased cannot maintain a bill to reach land fraudulently conveyed by the deceased in his lifetime. The proper person to bring such suit is the personal representative: *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. 370.

ment of decedents' estates is virtually exclusive. The equi-

Maine and Massachusetts. The rule is settled that the jurisdiction over everything pertaining to administration belongs exclusively to the probate courts. Equity has no jurisdiction to interfere with anything directly belonging to the course of administration, accounting, settlement, or distribution. Even frauds, mistakes, abuse of his trust, and the like acts of an administrator or executor must be dealt with by the probate court. Whatever equitable jurisdiction relating to the estates of decedents exists is confined to matters of purely equitable cognizance, and *auxiliary or ancillary to the administration* and remedies granted by probate tribunals: *Holbrook v. Campau*, 22 Mich. 288; *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182; *Winegar v. Newland*, 44 Mich. 367, 6 N. W. 841; *Kellogg v. Aldrich*, 39 Mich. 576; *Shelden v. Walbridge*, 44 Mich. 251, 6 N. W. 681.~~kk~~ As illustrations of cases which do not furnish sufficient grounds for the interference of equity: A suit by a sister of an intestate entitled to a distributive share of his estate, alleging fraud in the appointment of a guardian and administrator, and asking that he may be removed and a receiver appointed, was held not maintainable; the relief must be obtained from the probate court: *Kellogg v. Aldrich*, *supra*; and when a father had obtained allowance of a claim upon his son's estate, but the son's widow, who was the executrix, refused to pay it, and conveyed away property out of which it should be satisfied, the remedy was not in equity, but in probate: *Winegar v. Newland*, *supra*. In the following case equity exercised jurisdiction: A suit brought by an administrator against the grantee to set aside a deed of conveyance made by an heir of the deceased intestate was dismissed on the facts; but an injunction was allowed to the grantee to restrain the administrator and heir from selling the real estate, since it appeared that the personal property was sufficient to pay all debts and claims against the estate: *Hill v. Mitchell*, 40 Mich. 389.^{ll}

(~~kk~~) *Aldrich v. Annin*, 54 Mich. 230, 19 N. W. 964.

(^{ll}) A court of equity has jurisdiction to restrain a sale of lands by the executor to pay debts and legacies in any other order than that prescribed by statute; and jurisdiction having been assumed, the court may go on and declare for what specific purpose a sale may be ordered: *Ireland v. Miller*, 71 Mich. 119, 39 N. W. 16. When a probate court, acting under the influence of fraudulent representations, orders an estate distributed to persons who are not the heirs, equity has jurisdiction of a bill by the true heirs to recover their shares. The probate courts "cannot correct their decrees and

orders, and equity is the only tribunal that can bring all of the parties together, and put an end to the matter, by doing full and complete justice to all concerned": *Maney v. Casserly*, (Mich.) 96 N. W. 478. In *Berdan v. Milwaukee Mut. Life Ins. Co.*, (Mich.) 99 N. W. 411, it was held that equity has jurisdiction to set aside as fraudulent a settlement of a minor's claim on an insurance policy made by his guardian under direction of the probate court. See, also, *Carr v. Lyle*, 126 Mich. 655, 8 Detroit Leg. N. 185, 86 N. W. 145, where an executor was allowed to maintain a bill to force a wife to abide by an antenuptial contract, although the wife

table jurisdiction over the subject is neither concurrent nor

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Mississippi.—In describing the equitable jurisdiction of this state, it is necessary to keep two statutory systems perfectly distinct, the former and the present. By the act of May 4, 1870, a sweeping change was made in the judicial powers and organization. The entire powers and functions of the probate courts were transferred to the courts of chancery, so that courts of equity were clothed with a complete and exclusive jurisdiction over all testamentary matters, matters of probate, and of the administration, accounting, settlement, and distribution of estates of decedents, and of all questions and reliefs incidental, collateral, or auxiliary to regular administrations. Still, the decisions under this statute held that the two jurisdictions were not amalgamated and made one, and that the proper jurisdiction of equity was not enlarged, but that the same court simply held and exercised all the powers of the probate court, and all those of a court of chancery, in the same manner as a court may at once be a court of law and of equity. Under the present constitution, however, and the Code of 1871, sec. 976, it seems that the two jurisdictions have been somewhat amalgamated, and that the equity jurisdiction has been enlarged. In the language of a recent case, the design of this last legislation was to restore the chancery jurisdiction to its original dimensions: See *ante*, vol. 1, § 350, note 1: *Wells v. Smith*, 44 Miss. 296; *Bernheimer v. Calhoun*, 44 Miss. 426; *Saxon v. Ames*, 47 Miss. 565; *Troup v. Rice*, 49 Miss. 248; *Smith v. Everett*, 50 Miss. 575. The following cases are decided under the last statute: *Walker v. State*, 53 Miss. 532; *Bank of Miss. v. Duncan*, 52 Miss. 740; *Brunini v. Pera*, 54 Miss. 649; *Evans v. Robertson*, 54 Miss. 683; *Buie v. Pollock*, 55 Miss. 309; *Clopton v. Haughton*, 57 Miss. 787; *Hunt v. Potter*, 58 Miss. 96.

had raised the question of the validity of the contract in the probate court. In *Canfield v. Canfield*, 118 Fed. 1 (Michigan), it was held that settlement of the accounts of a trustee under a will and distribution of the trust fund on the termination of the trust are matters exclusively of equitable jurisdiction in Michigan.

(mm) *Minnesota.*—The views expressed in *Peterson v. Vanderburgh*, 77 Minn. 218, 77 Am. St. Rep. 671, 79 N. W. 828, appear to place Minnesota in the third class. The syllabus, by the court, is as follows: "A court of equity will entertain an action brought by an executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other

case, where justice requires it, there being no remedy at law." The opinion of Collins, J., asserts the existence of a concurrent jurisdiction: "Even if it be admitted that the probate court can have jurisdiction by holding the debt to have become an asset in defendant's hands immediately upon his qualification as executor, and by enforcing its collection in the settlement of his trust account, it would not follow that, where justice required it, and there was no remedy at law, an equitable action could not be maintained in the district court for the purpose of ascertaining the amount of a disputed claim and for such other purpose as equity might require. Such a case would simply be one of concurrent jurisdiction, and not at all new or novel."

auxiliary and corrective. It exists only in matters which

As examples of the present system:ⁿⁿ A suit in equity may be maintained against the executor or administrator, *and his sureties*; legatees, distributees, and creditors are enabled to bring executors or administrators into chancery for investigation and adjudication of questions relating to the execution of their trusts, and their sureties can also be made parties: *Buie v. Pollock, supra*; judgment creditors of an estate may maintain a suit in equity against an executor to compel a final settlement and payment, and for a *personal* decree against him if he has committed a *devastavit*; and if the executor dies, the suit should be revived against his representatives: *Clopton v. Haughton, supra*; an administrator of an attorney may maintain a suit in equity against the executor of a deceased client to recover the amount justly due for professional services: *Hunt v. Potter, supra*. *The former system*: Although the former system has been superseded, it is necessary to give a brief abstract of the decisions under it, in order to show what cases are still authoritative, and what have been rendered obsolete and nugatory. The general doctrine was settled that with respect to all matters directly and properly belonging to the administration and settlement of estates, the jurisdiction of the probate courts was exclusive; equity had no jurisdiction: *Gildart's Heirs v. Starke*, 1 How. 450; *Blanton v. King*, 2 How. 856; *Edmundson v. Roberts*, 2 How. 822; *Carmichael v. Browder*, 3 How. 252; *McRea v. Walker*, 4 How. 455; *Hamberlin v. Terry*, 7 How. 143 (has no jurisdiction of a suit to set aside a probate of a will on the ground of testator's insanity or of fraud in the probate); *Farve's Heirs v. Graves*, 4 Smedes & M. 707; *Gaines v. Smiley*, 7 Smedes & M. 53; 45 Am. Dec. 295; *Ragland v. Green*, 14 Smedes & M. 194; *Neylans v. Burge*, 14 Smedes & M. 201; *Hill v. McLaurin*, 28 Miss. 288; *Ratliff v. Davis*, 38 Miss. 107; *Hart v. Hart*, 39 Miss. 221; 77 Am. Dec. 668; *Capers v. McCaa*, 41 Miss. 479; *Gilliam v. Chancellor*, 43 Miss. 437; 5 Am. Rep. 498. Notwithstanding this general rule, there were certain classes of cases in which it was settled that equity had jurisdiction under the former system. These cases are still useful under the present system, for they illustrate what controversies, rights, and remedies connected with administration are proper subject-matter of equitable cognizance in general. These cases may be arranged in three principal classes: 1. In matters which are incidental and collateral to the regular course of administration, where the question is one peculiarly of equitable cognizance, and the probate courts could not give adequate relief: *Carmichael v. Browder*, 3 How. 252; as where an heir sought the specific delivery up of a family negro slave: *McRea v. Walker*, 4 How. 455. Where there was fraud in an executor's settlement, a court of equity might set it aside, and order a new settlement in the probate court: *Neylans v. Burge*, 14 Smedes & M. 201; *Green v. Creighton*, 10 Smedes & M. 159; 48 Am. Dec. 742; *Searles v. Scott*, 14 Smedes & M. 94; but a suit in equity to set aside a fraudulent sale by an administrator could not be maintained: *Hart v. Hart*, 39 Miss. 221; 77 Am. Dec. 668. A suit in equity was proper to set aside and cancel a title, so that the property held under it could be regularly administered upon and distributed: *Hill v. McLaurin*,

(nn) Equity will not recognize nor act upon a will until it has been admitted to probate: *Pratt v. Har-*

greaves, 76 Miss. 955, 71 Am. St. Rep. 551, 25 South. 658.

lie outside of the regular course of administration and set-

28 Miss. 288. A sale of land ordered by a probate court to pay a debt barred by the statute of limitations might be enjoined in equity, at the suit of a party who had no opportunity to contest the proceedings in the probate court: *Moody v. Harper*, 38 Miss. 599. And where a widow claimed under an antenuptial agreement, and also under her husband's will, a suit could be maintained to determine whether she was entitled to both, or whether she was put to her election; and the court of equity, having acquired jurisdiction, may restrain proceedings in the probate court, and grant full and final relief: *Gilliam v. Chancellor*, 43 Miss. 437; 5 Am. Rep. 498. 2. A second class included cases where there was no administration at all pending in the probate court. It was at first held that where no letters testamentary or of administration had been issued, so that no administration at all had been commenced, a court of equity might assume jurisdiction in the first instance of the administration by suit, and might thus decree a final settlement and distribution. This rule was then extended to the cases where an administration in the probate court had been entirely ended, the estate settled and distributed; a party who had not been included in this final settlement might resort to equity for a further independent accounting and settlement: *Farve's Heirs v. Graves*, 4 Smedes & M. 707; *Rabb v. Griffin*, 26 Miss. 579; *Archer v. Jones*, 26 Miss. 583; *Wood v. Ford*, 29 Miss. 57; *Manly v. Kidd*, 33 Miss. 141; *Hill v. Boyland*, 40 Miss. 618. 3. Finally, there were some cases in which equity had an exclusive jurisdiction, because a court of probate was not competent to give the relief to which the plaintiff was entitled: Suit by administrator of a deceased partner against a surviving partner for an account and settlement: *Scott v. Searles*, 5 Smedes & M. 25; 7 Smedes & M. 498; 45 Am. Dec. 317 (suit to restrain interference with assets); *American etc. Soc. v. Wade*, 8 Smedes & M. 610 (appointment of a receiver over certain property).

Missouri.—There is some direct conflict among the decisions; and the court has, at different times, adopted different views with respect to the extent of the equitable jurisdiction. The plain tendency of the most recent cases is to restrict that jurisdiction within very narrow limits. The present system seems to be, that the probate court has absolutely exclusive jurisdiction over admission of wills to probate, granting and revoking letters testamentary, and an *original* jurisdiction, generally exclusive, over all matters pertaining to the administration itself, the accounting of executors and administrators, the appropriation of assets in payment of debts, the final settlement and distribution of estates. Equity has no original jurisdiction to maintain a suit in the first instance for any of these purposes; its jurisdiction is only corrective in special cases after a settlement has been made, or auxiliary, to grant equitable relief in some incidental matters belonging distinctively to the equitable cognizance, such as trusts and the like: *Butler v. Lawson*, 72 Mo. 227 (equity has exclusive jurisdiction to follow trust funds, etc., although the trustee is dead, and an administration is pending in the probate court); *Pearce v. Calhoun*, 59 Mo. 271; *Titterington v. Hooker*, 58 Mo. 593 (on failure of personal property and after final settlement, a suit in equity cannot be maintained by a creditor to reach lands descended to the heirs of the intestate. The doctrine of equitable assets, and equitable suits for marshaling assets, or for a discovery, accounting, and the like, are abrogated, except so

tlement, which are of purely equitable cognizance, and

far as they are incorporated in the statutory rules controlling the probate courts; these courts have exclusive jurisdiction of all such matters); *Chandler v. Dodson*, 52 Mo. 128 (the same); *Overton v. McFarland*, 15 Mo. 312; *Jackson v. Jackson*, 4 Mo. 210 (no jurisdiction in equity to establish a lost or destroyed will); *Graham v. O'Fallon*, 3 Mo. 507. It was at one time held that equity had an *original* jurisdiction, and could entertain a suit in the first instance for an administration: *Erwin v. Henry*, 5 Mo. 469; but this case was soon overruled, and the doctrine established that equity only had a concurrent jurisdiction over such matters as were not expressly and specifically given by the statute to the jurisdiction of the probate court. Matters incidental to the regular administration: *Miller v. Woodward*, 8 Mo. 169 (suit by a surety on a bond of the deceased for subrogation and exoneration); *Berry v. Robinson*, 9 Mo. 273 (correcting a settlement); *Clark v. Henry's Adm'r*, 9 Mo. 336 (the same); *Jones v. Brinker*, 20 Mo. 87 (to falsify accounts and settlement). It would seem that the doctrine of these cases has been somewhat limited by the more recent decisions first quoted.^{oo}

Nebraska.—The reported decisions throw no light upon the subject, except so far as the absence of an equitable jurisdiction may be inferred from the absence of cases. There is a full statutory system of probate, and the jurisdiction of the probate courts over all matters properly belonging to an administration seems to be practically exclusive. There is no jurisdiction in a court of equity to set aside a will admitted to probate: *Loosemore v. Smith*, 12 Neh. 343.^{pp}

Nevada.—In this state, also, the statutory probate jurisdiction is so full and complete that there was ground for the argument that a court of equity

(^{oo}) The statutes authorize a suit to contest a will, or to establish one which has been rejected by the probate court. Although technically a suit at law, yet in many respects it partakes of the nature of a proceeding in chancery: *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887. Where the probate court orders a sale, which is made, and orders a deed to be made, which is not, equity may establish the rights of the purchaser as against the heirs: *Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399.

Montana.—The jurisdiction over administrations is discussed, and § 1153 quoted with approval, in *Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742 (court of equity has at least concurrent jurisdiction to specifically enforce an agreement to make a will).

(^{pp}) A bill in equity may be maintained in the probate court to set aside an order admitting a will to probate, when the plaintiff alleges "that he had no actual knowledge that such will was to be offered for probate or probate proceedings had on the day when the order of probate was made, and was informed by the sole beneficiary of the will, and led to believe, that it would only be opened and read at that time": *Genau v. Abbott*, (Neb.) 93 N. W. 942. The district court has jurisdiction in equity of actions to construe wills in cases where a trust relation exists by reason of the terms of the instrument itself, and to determine the rights of parties thereunder, while the county court has exclusive original jurisdiction in the probate and contest of wills, and in their construction, for the purposes of

which do not come within the scope of the probate jurisdic-

was deprived of the power to entertain a suit for the foreclosure of a mortgage, where the mortgagor was dead, but that the power belonged wholly to the probate court to decree payment of a mortgage in the same manner as they would deal with any other claim in the course of the administration. It is held, however, that equity has jurisdiction of a suit to foreclose a mortgage against the estate of a decedent; that this jurisdiction is exclusive, where it is necessary to bring in other parties; but where the only parties are the mortgagee and the representatives of the deceased mortgagor, the equitable jurisdiction is concurrent with that of the probate court. In the latter class of cases a court of equity may, in its discretion, assume the jurisdiction, or may decline to exercise it, and may thus leave the parties to the relief given by the probate proceedings: *Corbett v. Rice*, 2 Nev. 330. In this state, the statutory probate jurisdiction and the ordinary jurisdiction in equity and law are conferred upon the same court,—the district court; but the proceedings in each branch are separate and distinct: *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

New Hampshire.—Although the general statutory equitable jurisdiction in this state has always been exercised more liberally and broadly than in Massachusetts and Maine, still it is settled, as in those states, that the various heads of jurisdiction—"trusts," "accounting," "discovery," and the like—do not include nor give a jurisdiction to entertain administration suits, or suits for accounting, settlement, and distribution of decedents' estates; all matters properly pertaining to administration belong exclusively to the probate courts: *Walker v. Cheever*, 35 N. H. 339, 349. Where a trust, however, is created by a will, the probate court has no power to compel the trustee to carry out the trust, nor to decide upon the rights of the *cestuis que trustent*, nor the duties of the trustee; all matters relating to the due execution of the trust belong to the exclusive jurisdiction of equity: *Hayes v. Hayes*, 48 N. H. 219; *Wells v. Pierce*, 27 N. H. 503; *Wheeler v. Perry*, 18 N. H. 307; *Petition of Baptist Church*, 51 N. H. 424; *Methodist Epis. Soc. v. Heirs of Harriman*, 54 N. H. 444; and see *ante*, vol. 1, § 305.¶

New Jersey.—The equitable jurisdiction in this state is theoretically broad, and practically it is exercised constantly and freely. It is the settled doctrine that the court of chancery possesses a concurrent jurisdiction with the probate court over administrations, over accounting by executors and administrators, the settlement and distribution of decedents' estates, and over all matters incident thereto, to the same extent as that possessed by the English court of chancery. This jurisdiction may always be exercised in the first instance—that is, before any proceedings for a settlement are begun in the orphans' court—at the suit of legatees, distributees, or creditors. Even

administration and settlement of estates: *Andersen v. Andersen*, (Nebr.) 96 N. W. 276; *Youngson v. Bond*, (Nebr.) 95 N. W. 700.

(¶) An administrator can maintain a bill in equity for the discovery

of assets and the recovery of property conveyed by the deceased in fraud of his creditors, so far as it is needed to pay the debts of the deceased: *Preston v. Cole*, 64 N. H. 460, 13 Atl. 788.

tion. These states are Connecticut, Indiana, Maine, Massa-

after such proceedings *have* been begun in the orphans' court, the equity jurisdiction is not thereby defeated; while they are pending in the probate court, the court of chancery may assume jurisdiction, and draw the final accounting and settlement to itself. Still, while the power to interfere in this manner with an administration already pending in the orphans' court undoubtedly exists, the court of chancery will not, as a general rule, exercise the power, unless there is some substantial reason for invoking the aid of equity. If there be such good reason,—if there are special facts rendering the relief given by the orphans' court inadequate,—the equitable jurisdiction will then be exercised as a matter of course. The most recent decisions show a decided tendency to a more stringent construction of this rule; they require a plain case of inadequacy in the remedies of the probate court, or that the reasons for interference should be plain and convincing, before the equitable jurisdiction can be invoked, where the proceedings for a settlement have already been begun in the orphans' court: *See ante*, vol. 1, § 350, note 1; *Salter v. Williamson*, 2 N. J. Eq. 480; 35 Am. Dec. 513; *King v. Executors of Berry*, 3 N. J. Eq. 44, 261; *Smith v. Executor of Moore*, 4 N. J. Eq. 485; *Meeker v. Marsh*, 1 N. J. Eq. 198; *Van Mater v. Sickler*, 9 N. J. Eq. 483; *Clarke v. Johnston*, 10 N. J. Eq. 287; *Mallory's Adm'r v. Craige*, 15 N. J. Eq. 73; *Frey v. Demarest*, 16 N. J. Eq. 236; *Search's Adm'r v. Search's Adm'rs*, 27 N. J. Eq. 137; *Decker v. Decker's Adm'x*, 27 N. J. Eq. 239 (suit by a creditor for a final settlement dismissed, on the ground that no sufficient reason appeared for not proceeding with the settlement in the probate court.) Side by side with this general doctrine is the rule that where a party seeks relief on

(*rr*) "In case the administration of an estate in the orphans' court be imperfect or incomplete, and serious complications are presented, it is proper for the parties seeking relief to ask the aid of this court": *Bechtold v. Read*, 49 N. J. Eq. (4 Dick.) 111, 22 Atl. 1085. Equity may enjoin an executor who is acting as trustee from acting as such: *Bentley v. Dixon*, 60 N. J. Eq. 353, 46 Atl. 689. An injunction will lie to restrain a sale by an administrator which would result in an unnecessary sacrifice to the prejudice of an infant: *Doll v. Cash*, 61 N. J. Eq. 108, 47 Atl. 1059. The court of chancery has no jurisdiction, however, to order executors to sell land to pay debts, for the orphans' court has full power in that respect: *Chamberlain v. Chamberlain*, (N. J. Eq.) 20 Atl.

1085. The jurisdiction of equity to construe a will can only be involved when such construction involves some equitable relief sought: *Hoagland v. Cooper*, (N. J. Eq.) 56 Atl. 705. A claimant under a devise of the purely legal title to lands who seeks to establish his title by construction of the will must resort to law: *Hayday v. Hayday*, (N. J. Eq.) 39 Atl. 373; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Fahy v. Fahy*, 58 N. J. Eq. 210, 42 Atl. 726. The fact that proceedings have been started in the probate court to compel an executor to account does not prevent a court of equity from taking jurisdiction of a bill to allow him to settle in equity and to foreclose mortgages: *Mulford v. Mulford*, (N. J. Eq.) 53 Atl. 79.

chusetts, Michigan, Nebraska, Nevada, New Hampshire,

grounds of peculiarly equitable cognizance, and which is itself purely equitable, the jurisdiction of chancery is not simply concurrent, but paramount to that of probate. For example, a suit, not only for an account, but to compel executors to give security, to restrain them from calling in and receiving portions of the estate, and to have a receiver appointed if necessary, belongs solely to the equity jurisdiction: *King v. Executors of Berry*, 2 N. J. Eq. 44, 261. Where an administrator retains funds of the estate in his own hands mingled with his own, a party interested may maintain a suit for a discovery and accounting: *Frey v. Demarest*, 16 N. J. Eq. 236. Where for any special purpose—such as the construction of a will—the court of chancery assumes jurisdiction, it may, and generally will, retain the case so as to decree a final settlement and distribution: *Mallory's Adm'r v. Craige*, 14 N. J. Eq. 73; *Youmans v. Youmans*, 26 N. J. Eq. 149.^{ss} Finally, a suit in equity may be maintained to look behind, impeach, and correct a final settlement in the probate court on the ground of fraud or mistake: *Frey v. Demarest*, *supra*. Where a sale had been made under a decree in a mortgage foreclosure suit of land belonging to an intestate, and the administrator, who was a party, on being requested by creditors, refused to apply to have the sale set aside, held, that a creditor, on behalf of himself and other creditors, might apply, on petition in the suit, and obtain the relief: *Van Dyke v. Van Dyke*, 31 N. J. Eq. 176.

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New York.—The system in New York is so fully described in the first volume that very little needs to be added here: See *ante*, vol. 1, § 349, note 1, extract from the opinion in *Chipman v. Montgomery*. Although the equitable jurisdiction is not expressly abrogated by anything in the statutes, yet it is *displaced* in all ordinary cases by the probate system; the surrogate's court is the only appropriate tribunal for the control of administrations under all ordinary circumstances. The equitable jurisdiction will not be exercised except for some very special and substantial reasons,—in some extraordinary circumstances which render the action of the surrogate's court and its remedies imperfect and inadequate. In the apt language of the court in the case of *Chipman v. Montgomery*, the equitable jurisdiction is rather auxiliary than concurrent. Thus a court of equity may maintain a suit to construe a will, to enforce a trust created by a will, and undoubtedly to set aside a decree of the surrogate's court on the ground of fraud, and to grant relief in particular instances not included within the statutory powers conferred upon

(ss) *Coddington v. Bispham*, 36 N. J. Eq. 574, 578.

(tt) *New Mexico*.—The probate court cannot grant equitable relief. The district court has concurrent jurisdiction of claims against the estate. The probate court has only a very limited power to pass upon the validity of a will; in approving a will

the judge acts merely in an administrative capacity. The district courts have the same chancery powers in administration of estates that are possessed by the federal courts. New Mexico is, therefore, plainly in the first class: *Garcia y Perea v. Barela*, 6 N. M. 239, 27 Pac. 507.

Oregon, and Pennsylvania. In the states of the third class,

the probate tribunal:^{uu} *Seymour v. Seymour*, 4 Johns. Ch. 409; *Thompson v. Brown*, 4 Johns. Ch. 619; *Whitney v. Monro*, 4 Edw. Ch. 5; *Rogers v. King*, 8 Paige, 210; *Christy v. Libby*, 35 How. Pr. 119; *Chipman v. Montgomery*, 63 N. Y. 221, 235, 236. In *Rogers v. King*, and especially in *Christy v. Libby*, *supra*, the equitable jurisdiction is described in a somewhat broader manner than is admissible since the decision in *Chipman v. Montgomery*. See also *Peyser v. Wendt*, 87 N. Y. 322; *Haddow v. Lundy*, 59 N. Y. 320, in which the jurisdiction was exercised without question. As illustrations of special circumstances and peculiar reliefs for which the equitable jurisdiction may be properly exercised: Under the old system of courts and procedure a bill for a discovery of assets was proper, but under the existing procedure no suit for a discovery is permitted: *Thompson v. Brown*, 4 Johns. Ch. 619; where a suit for a construction of a will is proper, the court may determine the validity of any of its provisions, so far as it concerns the plaintiff's interest in the property, and may render a decree in his favor for such portions of the property as he is entitled to receive: *Bowers v. Smith*, 10 Paige, 193; and the probate of a will obtained through fraud may be set aside by a suit in equity: *De Bussierre v. Holladay*, 55 How. Pr. 210; it seems that a suit may be maintained by an administrator to enjoin the surrogate from disregarding, in a final settlement, certain sealed instruments executed by next of kin releasing him from liability for their distributive shares; but a complaint which did not allege that these releases were valid was fatally defective: *Wright v. Fleming*, 76 N. Y. 517.^{vv}

North Carolina.—The equitable jurisdiction in this state is full and active, substantially the same as in Alabama,—more freely exercised than in New

(uu) In order to obtain a correct and binding execution of the trusts and other provisions of wills, the supreme court is clothed with that equity jurisdiction through which an authoritative decision of practical questions arising may be anticipated for the safety of the executor, trustee, *cestui que trust*, or beneficiary: *Bryant v. Thompson*, 59 Hun 627, 14 N. Y. Supp. 386.

(vv) A court of equity cannot administer on estates of decedents. Therefore it cannot take jurisdiction to order the sale of land to pay legacies when there has been no administration: *Hogan v. Kavanaugh*, 138 N. Y. 417, 34 N. E. 292. Equity will not assume jurisdiction where the powers of the surrogate are adequate, unless for some special reason. When

it once takes jurisdiction, however, it will retain it until all questions involved have been adjusted: *Blake v. Barnes*, 63 Hun 633, 28 Abb. N. C. 401, 18 N. Y. Supp. 471; *Meeks v. Meeks*, 34 Misc. Rep. 465, 69 N. Y. Supp. 737. In the case of *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263, it was held that a surrogate's court has no power to annul or set aside, on the ground of fraud, a release executed by parties interested in an estate to the executors thereof; that such relief may and can only be obtained from a court of equity; and that in an action brought for such purpose the court, in the exercise of its concurrent jurisdiction with the surrogate's court, may grant full relief, and decree an accounting by executors, a settlement

the equitable jurisdiction is not concurrent, but is simply

Jersey. Although there seems to be some discrepancy in the judicial *dicta*, the doctrine is settled by the most recent decisions that the jurisdiction of equity over administrations, the calling of executors and administrators to account, the final settlement and distribution of estates, and all matters properly belonging thereto, is concurrent with that of the probate court. If proceedings for a settlement have been begun in either court, such court has, in general, the paramount authority to go on and conclude the settlement. A suit for an accounting and settlement may be brought in the first instance in a court of equity; and if so, it will enjoin any proceedings which may afterwards be instituted in the probate court: *Pegram v. Armstrong*, 82 N. C. 326; *Haywood v. Haywood*, 79 N. C. 42; *Finger v. Finger*, 64 N. C. 183 (the court may in such a suit enjoin a sale of land for payment of debts under an order made by the probate court); the case of *Hunt v. Sneed*, 64 N. C. 176, seems to be conflicting, and it is difficult to reconcile some of its *dicta* with the foregoing decisions. A suit by a legatee against an executrix who was alleged to be wasting the property was dismissed on the ground that the probate court has original jurisdiction over all proceedings for the settlement of decedents' estates, which is exclusive when adequate. The only mode of reconciliation is to regard this latter proposition as only intended to be applicable to cases where the probate jurisdiction has already attached by reason of proceedings for a final settlement having been begun therein. The following are some special instances of the equitable jurisdiction: A legatee or distributee may maintain a suit for an accounting against the personal representatives of a deceased executor or administrator who died before a final settlement, although there is a surviving co-executor, or an administrator *de bonis non* has been appointed: *Brotten v. Bateman*, 2 Dev. Eq. 115; 22 Am. Dec. 732; *Thompson v. McDonald*, 2 Dev. & B. Eq. 463; in a suit to declare the trusts of a will, and to determine the liability of lands devised subject to the payment of legacies, the court has jurisdiction to retain the cause, and decree the application of the personalty, and that failing, to apply the lands in payment of the legacies: *Devereux v. Devereux*, 81 N. C. 12; a court of equity has exclusive jurisdiction where a creditor brings a suit against an administrator, alleging that the intestate bought certain land, and for the purpose of defrauding his creditors, he being insolvent, procured the land to be conveyed to his son, who became, and is, the administrator, and praying that the administrator be declared a trustee, and that the land be sold to satisfy the debts of the intestate. Such a case has no resemblance to the ordinary sale of real estate of a deceased person for the purpose of paying his debts, and the probate court has no jurisdiction over it: *Greer v. Cagle*, 84 N. C. 385. An administrator cannot apply to a court of equity for instructions as to the distribution, where the alleged titles of the claimants are

and distribution of the estate. Equity has jurisdiction of an action by residuary legatees against executors for an accounting, where the fund to which plaintiffs are entitled is held

by parties to whom it has been paid under a decree of distribution which is not binding on plaintiffs: *Pfister v. Writer*, 33 Misc. Rep. 701, 68 N. Y. Supp. 976.

auxiliary or ancillary and corrective. The probate court

wholly legal:xx Ferrand v. Howard, 3 Ired. Eq. 381. It seems that a single creditor cannot sue in equity for a payment of his own debt, and a discovery of assets: Wilkins v. Finch, Phill. Eq. 355; and see Wadsworth v. Davis, 63 N. C. 251.

Ohio.— Under the existing statutory system, the jurisdiction of the probate court over administrations, accounting of executors and administrators, settlement and distribution of estates, is generally exclusive. The jurisdiction of equity is entirely auxiliary, and can be exercised only when the remedies conferred by the probate court would be imperfect or inadequate: Piatt v. Longworth's Devisees, 27 Ohio St. 159, 186; see *ante*, § 349, note 1; McDonald v. Aten, 1 Ohio St. 293; Taylor v. Huber's Ex'rs, 13 Ohio St. 288; as examples, a creditor may maintain a suit to reach assets and place them in the administrator's hands, but that being accomplished, the distribution of such assets will go on under direction of the probate court: McDonald v. Aten; and equity may decree payments under a trust to be made without a pending administration: Taylor v. Huber's Ex'rs. Under former statutes, the equitable jurisdiction was much more extensive, and seems to have been concurrent in all matters of administration with that of the probate court: Cram v. Green, 6 Ohio, 429; Stiver v. Heirs of Stiver, 8 Ohio, 217.

Oregon.— The absence of decisions upon the general question indicates that the statutory system of probate jurisdiction is exclusive, and that there is practically no equity jurisdiction.vy The very few cases upon incidental subjects show that matters and reliefs connected with an administration, which are ordinarily of a purely equitable cognizance, and which in most other states, even where there was a full probate jurisdiction, would confessedly belong to the equitable jurisdiction, are embraced within this statutory probate system, and are taken away from the courts of equity. Thus it is held that the probate court has exclusive jurisdiction in all matters pertaining to the transfer of title to the personal property of decedents. Even where there was an antenuptial agreement made by the deceased, the rights of the parties claiming under it cannot be determined in equity; it should be presented and proved in the regular course of the administration pending in the probate court, and all rights arising out of it determined by that court in the final settlement: Winkle v. Winkle, 8 Or. 193. A creditor whose demand has been rejected by the administrator, and who has failed to

(xx) An executor can maintain a bill for construction of the will where there is a present, existing question of right to be acted upon, the determination of which can be made the subject-matter of a decree. Having taken jurisdiction, equity may order a valuation of real estate, if necessary to afford complete relief, though it involve the granting

of a remedy ordinarily granted in a special proceeding: Balsley v. Balsley, 116 N. C. 472, 21 S. E. 954.

(vy) Quoted in Esterly v. Rua, 122 Fed. 609, 58 C. C. A. 548, holding that a claim by a surviving partner against the estate of a deceased partner, involving an account of the partnership affairs, is within the jurisdiction of the probate court.

takes cognizance originally of all administrations, and has

bring an action against the administrator for the purpose of establishing it, cannot, after the final settlement, maintain a suit in equity against the next of kin to compel payment out of their distributive shares: *Grange Union v. Burkhardt*, 8 Or. 51.

Pennsylvania.—This state, like Massachusetts and Maine, belongs to the class in which the statutory probate jurisdiction is exclusive in all matters pertaining to ordinary administrations. Equity has jurisdiction only of matters and reliefs incidental to the regular course of administration which are distinctly of equitable cognizance, and for which the methods and remedies of the probate court are imperfect or inadequate. In other words, equity cannot interfere in the settlement of decedents' estates, except upon some extraordinary and substantial ground: *Campbell's Appeal*, 80 Pa. St. 298; *Dundas's Appeal*, 73 Pa. St. 474, 479; *Linsenbigler v. Gourley*, 56 Pa. St. 166, 172; 94 Am. Dec. 51; *Whiteside v. Whiteside*, 20 Pa. St. 473, per Black, C. J.^{zz} See *ante*, vol. 1, § 348, note 1. As recent illustrations of such special grounds for invoking the aid of equity: Although the statute gives the orphans' court jurisdiction to decree the specific performance of decedents' contracts for the purchase and sale of land, that court has no power to take cognizance of partnership matters, and to compel an accounting between the personal representatives of a deceased partner and the survivors, or where a full and final settlement of partnership affairs and the specific performance of firm agreements are necessarily involved in the carrying out of decedents' contracts; all such matters still belong to the exclusive jurisdiction of equity: *Wiley's Executors' Appeal*, 84 Pa. St. 270; while equity has jurisdiction of a suit to declare the trusts of a will void, it will not exercise the jurisdiction where the party seeking the relief has no interest nor title in the land, nor where the relief is only a nominal part of the entire relief sought for by the suit, and the main questions involved therein are within the exclusive jurisdiction of the orphans' court: *Norris v. Farrell*, 33 Leg. Int. 129; 2 Week. Not. Cas. 423.^{aaa} The equitable jurisdiction clearly extends to trusts created by will.

Rhode Island.—It seems that the supreme court, as a court of equity, has a concurrent original jurisdiction with the probate court over administra-

(zz) *York's Appeal*, 110 Pa. St. 69, 1 Atl. 162, 2 Atl. 65.

(aaa) In the case of a legacy charged upon real estate, the jurisdiction of the orphans' court is exclusive: *Brotzman's Appeal*, 119 Pa. St. 645, 13 Atl. 483. A court of equity in another county from that in which the estate is being administered has no jurisdiction to determine the amount of a distributive share: *Henderson v. Stryker*, 164 Pa. St. 170, 35 Wkly. Notes Cas. 151, 30

Atl. 386. A bill may be maintained against an administrator to fix a liability against the estate: *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779. Likewise, a bill in equity may be maintained to reach property of a debtor, since deceased, conveyed in fraud of creditors, even though such property may be reached by the legal remedy: *Houseman v. Grossman*, 177 Pa. St. 453, 35 Atl. 736. Where executors are about to convey with-

powers sufficient for all ordinary purposes. Equity inter-

tions, and according to the settled doctrine in such case, where one court has first assumed jurisdiction of a case, the other will not interfere.^{bbb} Held, therefore, that where there had been an accounting by an administrator, and a final decree thereon in the probate court, a suit in equity to review the accounting would not be maintained, even though it charged that a release obtained by the administrator from the next of kin was fraudulent, and sought to have the same declared void, since full relief could be granted by means of an appeal from the final decree of the probate court: *Blake v. Butler*, 10 R. I. 133. See *ante*, vol. 1, § 349, note 1. See also the following cases in the United States circuit court, which arose in this state: *Mallett v. Dexter*, 1 Curt. 178; *Pratt v. Northam*, 5 Mason, 95.

South Carolina.—It seems that the equitable jurisdiction in this state is restricted to those special circumstances and extraordinary reliefs which do not fall at all within the scope of the probate cognizance, or for which its remedies are wholly inadequate. In ordinary and regular administrations, the jurisdiction of the probate court seems to be exclusive. A court of equity may interfere with a pending administration where an executor has committed a *devastavit*, or is insolvent and wasting the assets: *Ragsdale v. Holmes*, 1 S. C. 91.^{ccc} But a court of equity cannot order a sale of real

out authority a right of way to a railroad through the land of their testator, they will be enjoined at the suit of the devisees. The reason given by the court is that equity has jurisdiction to establish rights under wills: *McClane v. McClane*, 207 Pa. St. 465, 56 Atl. 996.

(^{bbb}) It is held that a grant of jurisdiction to the probate court does not oust the equity jurisdiction: *Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728. Thus, an administrator of an administrator was allowed, in this case, to recover in equity from the administrator *de bonis non* for sums advanced personally by his intestate. Where, between classes of heirs, questions arise which affect the equitable marshaling of the debts and assets, a court of equity will intervene: *Jenks v. Steere*, 23 R. I. 160, 49 Atl. 698. The statutes provide a procedure for compelling an administrator to sell property to pay debts. Hence a bill for that purpose

cannot be maintained, for there is an adequate remedy at law: *Gavitt v. Berry*, 23 R. I. 14, 49 Atl. 99.

(^{ccc}) When a legatee has been overpaid, and the executor is insolvent and refuses to sue, the other legatees may proceed in equity against the overpaid legatee without first exhausting their remedies against the executor: *Miller v. Stark*, 29 S. C. 325, 7 S. E. 501. An administrator *de bonis non* may sue in equity to set aside a fraudulent deed executed by one who was a debtor by note and judgment to the first administrator, as such: *Shell v. Boyd*, 32 S. C. 359, 11 S. E. 205. A creditor may maintain a bill to marshal the assets of the estate and to set aside fraudulent conveyances by the decedent: *Sheppard v. Green*, 48 S. C. 165, 26 S. E. 224. Equity can interfere with the improper exercise of a limited power by an executor: *Ashley v. Holman*, 55 S. C. 124, 32 S. E. 992.

poses only in special or extraordinary cases, which have

estate to pay debts where the personal property is insufficient: *Eno v. Calder*, 14 Rich. Eq. 154; and cannot remove an executor or administrator: *Campbell v. Bank of Charleston*, 3 S. C. 384.

add

Tennessee.—There is a very unusual power conferred by statute upon the court of chancery in this state. If six months have elapsed after the death of the intestate, and no one will apply or can be procured to apply to the probate court for appointment as administrator, and for the issue of letters of administration, then a suit may be maintained in equity by a creditor or next of kin, but not by the widow of the decedent, for the appointment of an administrator. In such a case the court of chancery has jurisdiction to appoint an administrator, and, it seems, to go on and control the entire administration thus begun, to compel an accounting, and to decree a final settlement and distribution. The operation of the statute is confined to the exceptional circumstances as described. It does not confer upon the courts of equity any concurrent jurisdiction with the probate courts over administrations generally. In all other cases, the equitable jurisdiction is limited to such extraordinary matters and reliefs as do not come within the scope of the powers conferred on the courts of probate: *Evans v. Evans*, 2 Cold. 143; *Bruce v. Bruce*, 11 Heisk. 760; *Rankin v. Anderson*, 8 Baxt. 240. A court of equity has no jurisdiction whatever in the matter of admitting wills to probate: *Townsend v. Townsend*, 4 Cold. 70; 94 Am. Dec. 185.

Texas.—The earlier decisions recognize an original jurisdiction of the equity courts concurrent with that of probate, over administrations, the accounting of executors and administrators, the settlement of estates, and the like, with power to remove an executor and to appoint a receiver. This jurisdiction would especially be exercised in cases of trust, delay, fraud, fraudulent combination between an administrator and others, and similar circumstances of ordinary equitable cognizance: *Long v. Wortham*, 4 Tex. 381; *Dobbin v. Bryan*, 5 Tex. 276 (fraud of an administrator); *Newson v. Chrisman*, 9 Tex. 113; *Smith v. Smith*, 11 Tex. 102 (delay, fraud, or trust; suit by an heir); *Crain v. Crain*, 17 Tex. 80 (fraudulent combination by an ex-

(add) *South Dakota* appears to be of the first class. Courts of equity have concurrent jurisdiction with courts of probate in all matters of guardianship and the settlement of estates of deceased persons, and will exercise such jurisdiction when the powers of the probate court are inadequate for the purposes of perfect justice. Therefore, when an administrator refuses to bring an action upon a claim due the estate, a person interested in its collection may sue

thereon in equity in his own name: *Trotter v. Mutual Reserve Fund Life Assn.*, 9 S. Dak. 596, 62 Am. St. Rep. 887, 70 N. W. 843. An action by a legatee to set aside a release of her share of the estate to other legatees, on the ground of fraud, is of equitable cognizance: *Ward v. Pree*, (S. Dak.) 94 N. W. 397.

(eee) A creditors' bill may be maintained to compel a sale of the assets of a decedent: *Waddell v. Waddell*, (Tenn. Ch. App.) 42 S. W. 46.

either been wholly omitted from the statutory grant of

executor or administrator with third persons).^{fff} By the later decisions, however, this equitable jurisdiction is much restricted, and is confined to cases in which the probate courts are unable to grant full and adequate relief. In all cases where the probate court can give such relief, its jurisdiction is practically exclusive, and a court of equity cannot, or at least will not, interfere. As illustrations: Where questions of title are involved depending upon the construction of a will, a court of equity is the more appropriate tribunal: *Little v. Birdwell*, 21 Tex. 597; 73 Am. Dec. 242. In an action brought by an executor on notes given for the price of land belonging to the estate sold by the executor, the defendants filed a cross-bill alleging a debt in their favor against the estate larger than the amount of the notes in suit, that it constituted a lien on the land which had priority over other claims, that the other debts of the estate were small and owed to a very few persons, and praying that all the parties interested might be brought in as defendants to the cross-bill, and the estate finally settled and distributed in that suit; held, that the court, as a court of equity, should not entertain jurisdiction, but that the probate court was fully competent to determine all the questions thus raised, and to adjudicate upon all the rights of all the parties: *Atchison v. Smith*, 25 Tex. 228. A court of probate has full power to enforce the lien of a mortgage upon the real estate of a deceased person as a step in the regular course of administration, and a court of equity will not entertain a suit for the foreclosure of such a mortgage, unless there are some special and substantial grounds for its interference; resort to a court of equity in matters connected with the administration of estates is discouraged where the powers of the probate court are adequate: *Cannon v. McDaniel*, 46 Tex. 303. Although the jurisdiction of equity in Texas is the same as that held by the English court of chancery, yet there is no power, as a part of this original jurisdiction, to order the sale of lands of a deceased for the payment of his debts, while an administration on his estate is pending in the probate court: *Rogers v. Kennard*, 54 Tex. 30. On the other hand, where no administrator had been appointed, and there was only one debt against the estate, and the heirs voluntarily settled and distributed the estate among themselves by agreement without paying this debt, the creditor, it was held, could maintain an equitable suit to compel payment of the debt, and to enforce the lien which it created on lands of the deceased, against all the heirs as defendants, without instituting proceedings for an administration in the probate court:^{sss} *Patterson v. Allen*, 50 Tex. 23.

Vermont.—The jurisdiction of the probate court is complete, sufficient, and practically exclusive in all matters belonging to the regular, ordinary course

(^{fff}) See, also, *Love v. Keowne*, 58 Tex. 191.

(^{sss}) Courts of equity have the power to cancel a conveyance made by an executor in violation of an order of the probate court confirming a sale of land, when necessary for

the protection of devisees, heirs, or creditors, and this power they have notwithstanding a similar power may exist in the probate court: *Fisher v. Wood*, 65 Tex. 199. Pending an appeal from a judgment of the county court refusing to compel an admin-

probate jurisdiction, or for which its methods and reliefs

of an administration, and the equitable jurisdiction is purely ancillary and auxiliary. The doctrine here prevailing is identical with that adopted by the New York courts. The proper place to have the accounts of executors, administrators, and trustees *appointed by the probate court* settled is in the probate court; the jurisdiction of chancery is only in aid of the probate court: *Merriam v. Hemmenway*, 26 Vt. 565. In one leading case, this view is set forth so clearly, and the opinion is so admirable a statement of the doctrine adopted in all the other states which belong to the same class with Vermont and New York, that I shall quote from it at some length. "Where courts of chancery have interfered in the settlement of estates, it has been merely in aid of the powers of the court of probate, and where, from defect of adequate means, it was not in its power to do the same justice as a court of equity. As a general rule, chancery retains its *ancillary* jurisdiction to the same extent over probate matters which it has over those in common-law courts. Unreasonable delay in probate courts in proceeding with the settlement, the fact that some of the parties affected by a decree were infants without guardians, or the fact that an administrator rendering his accounts will not produce books and papers, and is not compelled to do so, do not constitute sufficient grounds for the interference of chancery [i. e., such matters come within the powers of the probate court to relieve, or if that court commits an error, ample relief can be obtained on appeal from its decree.] But chancery will examine and adjust claims *between an administrator and the estate* [i. e., claims which an administrator sets up in his own favor personally, independently of the regular course of administration.] Claims *against* an administrator for moneys or property coming into his hands during administration are exclusively within the probate court's jurisdiction, as is also the entire subject of advancement. Chancery will enjoin administrators from asserting title to themselves under deeds obtained by fraud, and will require an account for the land as the property of the estate. Where administrators have received money for trespasses on intestate's land, chancery, to avoid all doubt, may take jurisdiction, so far as to cause an account to be rendered, although the matter *might* be adjusted in the probate court": *Heirs of Adams v. Adams*, 22 Vt. 50. (This decision has been cited with approval by the New York court of appeals in the recent case of *Chipman v. Montgomery*, *supra*.) Where, in the course of administration, an administrator sets up a claim on his own behalf, adverse to that of the creditors, the latter may resort to chancery to have the controversy determined; but the equitable suit is merely ancillary, and after its decision settling the rights of the parties, the case is remitted to the probate court for final settlement and distribution; *Morse v. Slason*, 13 Vt. 296. hhh

Virginia.—So far as is indicated by the tenor of decided cases, it seems to be clear that the original jurisdiction of equity over administrations, the

istrator to execute a deed to a purchaser of land at an administrator's sale, the administrator may be enjoined from making a second sale:

Claridge v. Lavenburg, 7 Tex. Civ. App. 155, 26 S. W. 324.

(hhh) An equity court has no jurisdiction to set up spoliated, suppressed,

are imperfect and inadequate, or where its proceedings

accounting of executors and administrators, the settlement and distribution of estates, and all matters incidental thereto, is fully preserved, concurrent with that of the probate tribunal, even if not exclusive. Any person interested in the settlement of an estate, as legatee, distributee, or creditor, may maintain a suit in equity for an administration. The system prevailing in this state appears to be substantially the same as that in Alabama. Courts of equity have jurisdiction in all cases to compel the delivery of a specific legacy by the executor: *Nelson's Adm'r v. Cornwell*, 11 Gratt. 724; and *a fortiori* the equitable jurisdiction should exist in case of a general legacy. A suit in the nature of a creditor's suit may be maintained by a creditor against the executor, devisees, and legatees, to compel an accounting, and no other creditor can then maintain a separate suit for his own debt, since all the creditors can come in under the decree in the original action, and the estate can thus be settled: *Kent's Adm'r v. Cloyd's Adm'r*, 30 Gratt. 555.¹¹¹ An administrator may maintain a suit in equity against a general agent of his intestate for a discovery and an accounting of all the transactions growing out of the agency:¹¹² *Simmons v. Simmons's Adm'r*, 33 Gratt. 451. A, having taken out a fire policy running from year to year, died intestate, leav-

and destroyed wills: *Domestic & Foreign Miss. Soc. v. Eells*, 68 Vt. 497, 54 Am. St. Rep. 888, 35 Atl. 463. Though a court of equity has no jurisdiction to establish or set aside a will, these matters being within the exclusive jurisdiction of the probate court, yet, when a will which charged a legacy upon land has fraudulently been procured to be disallowed by the probate court, a court of equity may take jurisdiction, on the ground of the fraud, to charge the legacy upon the land: *Wetherbee v. Chase*, 57 Vt. 347. And a court of equity has ancillary jurisdiction to compel the executor to pay a legacy which the probate court has ordered to be paid: *Bellows v. Sowles*, 57 Vt. 411. Before a testamentary trustee can recover a legacy in equity, he must show that he has resorted to the probate court in vain, and that he has no adequate remedy there, or that it is necessary that a trustee be appointed: *School District No. 3 v. Sheldon*, 71 Vt. 95, 41 Atl. 1041. A bill by a ward to impeach his guard-

ian's account for fraud and concealment, but which does not attack the decree of confirmation, is demurrable: *Scoville v. Brock*, 75 Vt. 243, 54 Atl. 177. But with proper averments, such a bill may be maintained: *Scoville v. Brock*, (Vt.) 57 Atl. 967. The equity powers conferred upon the probate court and upon appellate courts of law do not extend to the establishment of purely equitable claims and equitable rights. Such claims and rights must be established in equity: *Leonard's Adm'r v. Leonard's Ex'r*, 67 Vt. 318, 31 Atl. 783.

(111) See, also, *Carter v. Hampton's Adm'rs*, 77 Va. 631; *Wilson v. Wilson*, 93 Va. 546, 25 S. E. 546.

(112) An administrator may sue for the settlement of an estate and have assignees of life insurance policies which the estate claims made defendants, although there may be a remedy at law: *National Life Association v. Hopkins' Adm'r*, 97 Va. 167, 33 S. E. 539.

have miscarried and require correction. This class includes

ing a widow and son. The widow, as administratrix, continued to pay the premiums until the loss occurred; held, that the administratrix and the heir might unite and maintain a suit in equity against the company to recover the amount due on the policy, there being a question whether this insurance money should be treated as real or as personal property: *Portsmouth Ins. Co. v. Reynolds's Adm'x*, 32 Gratt. 613.

kkk

Wisconsin.—The system prevailing in this state, as settled by the decisions, is the same *in principle*, and substantially the same in practice, as that existing in New York, although the powers conferred upon the probate courts seem to be somewhat greater in number and extent than those given to the surrogates in the latter state. The probate courts have a plenary jurisdiction in all matters of administration, settlement, and distribution of estates, and much of this jurisdiction, and many of the reliefs granted in its exercise, are really equitable in their nature, and are necessarily concurrent with the jurisdiction of equity. Although the statutes have given such a broad jurisdiction to the probate courts, the original jurisdiction of equity is not abrogated; it still *exists*, dormant and suspended, but alive,

(kkk) *West Virginia.*—The authority of the Virginia cases decided previous to the formation of the state is recognized. In the very carefully considered case of *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646, it was decided, after an elaborate review of the decisions upon the subject, that courts of probate and of equity have concurrent jurisdiction for the establishment of lost, suppressed, or destroyed wills. Where the personal estate is insufficient for the payment of the debts of the estate, a creditor may bring suit in equity for the ascertainment of debts due from the testator, for the settlement of the estate, and for the sale of the lands for the payment of debts, on the failure of the executor to institute such suit within the time limited by statute: *Broderick v. Broderick*, 28 W. Va. 378. Equity has jurisdiction at suit of administrator or trustee to determine amount due an estate under a deed of trust: *Pendleton v. Bower*, 49 W. Va. 146, 38 S. E. 487. Jurisdiction in equity to construe wills is limited and special, and will

only be exercised as incident to general equity jurisdiction, and then, in a particular case, only to the extent of determining whether or not the relief sought can be granted: *Martin v. Martin*, 52 W. Va. 99, 44 S. E. 198; *Matthews v. Tyree*, 53 W. Va. 298, 44 S. E. 526. The executor or administrator may apply to equity for relief when the affairs of the estate are so involved that he cannot safely administer except under the direction of the court. In such case it is competent for him to institute a suit against creditors generally for the purpose of having their claims adjusted and obtaining a final decree settling the order and payment of assets: *Hanna v. Galford*, (W. Va.) 47 S. E. 359. A single creditor cannot maintain for himself a suit in equity upon a legal demand against an executor who had rendered an account, without surcharging or falsifying: *Thompson & Lively v. Mann*, 53 W. Va. 432, 44 S. E. 246. Since the probate court has exclusive jurisdiction in all purely probate and ordinary administrative matters, a

Arkansas, California, Georgia, Kansas, Missouri, New

ready to be invoked when necessary to do complete justice in special cases. It is well settled as the practical rule that a court of equity will not, in general, entertain or exercise jurisdiction wherever a complete, adequate, and full remedy can be obtained in the probate court: *Batchelder v. Batchelder*, 20 Wis. 452; *Tryon v. Farnsworth*, 30 Wis. 577; *Brook v. Chappell*, 34 Wis. 405. And the probate court has jurisdiction to give construction to a will, and may exercise such jurisdiction as fully as a court of equity, but the power of equity to construe wills does not seem to be thereby abrogated or abridged.⁽ⁱⁱⁱ⁾ *Appeal of Schæffner*, 41 Wis. 260; *Wolf v. Schæffner*, 51 Wis. 53, 8 N. W. 8. In an equitable suit against the executor of A, the complaint alleged that the plaintiff and A were partners in the ownership of certain mills, the title to which stood in the name of A alone, but was held by him in trust for the firm; that A sold and conveyed the mills, and received the purchase-money, and had also received large sums as rents of the mills; that A was bound to pay the plaintiff two thirds of the sum received as the price of the mills and two thirds of said rents, but the plaintiff had received nothing; the plaintiff demanded an accounting of the rents and payment by the executor of what was found due the plaintiff on such accounting, and also payment of two thirds of the sum received by A on the sale of the mills. There was no allegation of a specific lien or any real property or fund in the executor's hands, nor of any failure by the probate court to fix a time for the presenting of claims against the estate. Held, that the suit was one merely to recover money due to the plaintiff from the deceased, since no equitable lien in plaintiff's favor upon any fund nor against other creditors was alleged to exist, and that the action could not be maintained; a court of equity had no jurisdiction; that of the probate court was complete and adequate: *Lannon v. Hackett*, 49 Wis. 261. The correctness of the decision may, I think, be questioned. It denies an equitable jurisdiction which is, I believe, generally, if not universally, recognized and exercised. Even in states where the probate jurisdiction is so broad that the equitable jurisdiction is ordinarily dormant, like California and New York, it is held that an equitable action for an accounting and settlement of the partnership affairs may be maintained by the administrator of a deceased partner against the survivor, or by the survivor against the administrator of a deceased partner; the power of a court of probate over the estate of a deceased partner is not regarded as restricting the jurisdiction of equity over such actions. Among the special cases in which the equitable jurisdiction is not dormant, but may be freely exercised, are the following: To compel the performance of trusts created by a will: *Batchelder v. Batch-*

court of equity cannot, as incident to a suit by administrator *c. t. a.* for construction of a will, restrain the qualifying as executrix of the person named as such in the will: *Stone v. Simmons*, (W. Va.) 48 S. E. 841 (reviewing statutes on the general subject).

(iii) "The jurisdiction of courts of equity for the construction of wills and giving directions in respect to the execution of them has long been established and well understood, and devolves upon the circuit court in all proper cases, as a part of its proper constitutional jurisdiction,

York, Ohio, South Carolina, Tennessee, Texas, Vermont, and Wisconsin.^{qqq} Among the particular instances in which

elder, 20 Wis. 452; and also in matters of legacies, their enforcement and payment, although a concurrent jurisdiction is held by the probate court: *Catlin v. Wheeler*, 49 Wis. 507.^{mmm}

District of Columbia.—The original general jurisdiction of equity over administrations and the settlement of estates seems to be preserved: *Creswell v. Kennedy*, 3 McAr. 78; *Keefe v. Malone*, 3 McAr. 236.

United States Courts.—The full original jurisdiction of the English court of chancery over administrations and matters pertaining to the settlement of estates is possessed by the United States circuit courts. Whenever these courts obtain jurisdiction of such a matter on account of the state citizenship of the parties, they will exercise the full powers and grant the full reliefs of chancery, unlimited and unaffected by any restrictive legislation of the state in which the matter arose, or in which the parties are resident. The state statutes abrogating the equitable jurisdiction of the state courts, and conferring an exclusive jurisdiction upon the probate courts, have no effect whatever upon the powers of the United States tribunals. This jurisdiction of the United States courts is, however, concurrent with that of the state tribunals; and if a state probate or other court has already assumed jurisdiction, and an administration is pending before it, the United States circuit court will not interfere, in the absence of fraud or other like ground of equitable cognizance.ⁿⁿⁿ But a suit may be maintained in the circuit court to avoid a settlement obtained in a state probate court through fraud: *Pratt v. Northam*, 5 Mason, 95; *Mallett v. Dexter*, 1 Curt. 178; see *ante*, vol. 1, § 293.^{ooo} The United States courts, as courts of equity, have no jurisdiction to set aside a will, nor the probate of a will, on the ground of fraud: *Case of Broderick's Will*, 21 Wall. 504; 22 L. ed. 599.^{ppp}

particularly in cases of trust:" *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413. Equity will not construe a will, however, when only legal interests are involved: *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334.

(^{mmm}) An action brought by infants having an interest in the estate of a testator, seeking to set aside fraudulent sales of real estate made by the executor as trustee, is of equitable cognizance, on the ground that the action is to enforce a trust: *Hawley v. Tesch*, 72 Wis. 299, 39 N. W. 483. A creditors' bill may be maintained to reach assets of the decedent: *Richter v. Leiby*, 99 Wis. 512, 75 N. W. 82; but it cannot be maintained against executors to reach

property *in custodia legis*: *Williams v. Smith*, 117 Wis. 142, 93 N. W. 464. A creditor may sue to enforce an equitable lien upon the testator's realty: *Pym v. Pym*, 118 Wis. 662, 96 N. W. 429.

(ⁿⁿⁿ) *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. ed. 1006; *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. ed. 630.

(^{ooo}) *Sullivan v. Andoe*, 6 Fed. 641, 647, 4 Hughes 290.

(^{ppp}) *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. ed. 1006.

(^{qqq}) This portion of the text, containing the author's classification of the states, is quoted in *Garcia y Perea v. Barela*, 6 N. M. 239, 27 Pac. 507.

it has been held by courts of states composing the third class, that equity has jurisdiction of matters belonging to administrations, the following are some of the most important, although it must not be understood that such cases have arisen and such decisions been made in all of these states. If a court of equity in those states where its jurisdiction is merely auxiliary and corrective can take cognizance of such special circumstances, then *a fortiori* a court of equity may do so in those states where its original jurisdiction is preserved concurrent with that of the probate tribunals. In states of the second class, however, the probate courts would furnish the only relief in all these cases. Where an executor or administrator has died without rendering a final account, equity has jurisdiction of a suit to compel *his* personal representatives to account at the instance of an administrator *de bonis non* or other party interested in the original estate, even, as some cases hold, where there is a surviving executor or administrator, and the decree so rendered has been held to be binding upon the sureties of the deceased executor or administrator. This particular condition of fact seems to have been omitted from the statutory jurisdiction of the probate courts in several states. When a settlement purporting to be final has been decreed in the probate court, a person interested in the estate, who was not a party to such proceeding, may maintain a suit in equity against the administrator or executor, and compel him to a full and final account, treating the former settlement as a nullity. It has been held in some of these states that a court of equity may take jurisdiction in the first instance, or even after proceedings in probate have been begun, of an administration, and may decree a final settlement and distribution, when there are peculiar circumstances of difficulty in the administration, and when such exercise of the equitable jurisdiction would prevent great delay, expense, inconvenience, and waste, and would thus conclude by one suit and decree a protracted and vexatious litigation. It cannot be said that

these circumstances would be regarded as sufficient grounds for exercising the equitable jurisdiction in all the states of the third class, although they would undoubtedly be sufficient in all those of the first class. It is generally held that a court of equity has jurisdiction to set aside the decree of a probate court obtained by fraud, both in states of the first and of the third classes, but not in those of the second. A judgment creditor of the deceased may maintain a suit virtually to take the administration out of the hands of the administrator, and for a final settlement, where the intestate had, with the connivance of the person afterwards appointed administrator, make a disposition of his property fraudulent as against his creditors, and the administrator is engaged in carrying out such fraudulent scheme. It is also generally held that equity may interfere with a pending administration when the administrator has committed a *devastavit*, or is wasting the assets, especially if he be insolvent, or is guilty of fraud in the management of his trust. Although the accounting by the administrator for property of the estate in his hands belongs to the probate court, yet equity has jurisdiction of personal claims between an administrator and the estate; that is, claims personal to himself, growing out of dealings with the deceased, which the administrator sets up adverse to creditors, distributees, and other persons interested in the estate; as, for example, claims set up under a deed to himself from the deceased, or under an agreement with the deceased, and the like. Where there has been no administration, but the heirs or next of kin have settled and divided the estate by voluntary arrangement among themselves, it seems that a creditor may maintain a suit in equity to compel a payment of his demand out of the property, without the necessity of taking out an administration;^{rrr} and in some states

(rrr) The text is cited to this effect in *Cameron v. Cameron*, 82 Ala. 392, 3 South. 148.

it is held that equity has jurisdiction both when there has been no administrator, and when the administrator has made a final settlement and has been discharged. By virtue of the auxiliary jurisdiction of equity, a creditor may maintain a suit, somewhat in the nature of a "creditor's bill," to reach assets which justly and equitably belong to the estate, and to bring them within the power and control of the administrator, so that they may be administered upon and distributed by him. When a partner dies, although the probate court may have ample power to settle *his* estate, yet the auxiliary jurisdiction of equity still remains, and will be generally exercised in states of the first and third classes, and probably in many of the second, by means of a suit for an accounting and settlement of the partnership affairs, either brought by the representatives of the deceased partner against the survivors, or by the survivors against such representatives. In all the states of the first and third classes, and in a great majority it seems of those belonging to the second, equity retains its jurisdiction of suits for the foreclosure of mortgages upon the lands of deceased mortgagors or other deceased owners of land encumbered by mortgage; but in a very few of the states forming the second class, it appears that the mortgage must be enforced, like any other demand against the estate of the deceased mortgagor, in the regular course of administration pending before the probate court. Finally, throughout all the states, the original jurisdiction of equity over trusts remains unabridged and virtually unaffected by the jurisdiction given to probate courts. It is exercised in enforcing the performance of trusts and in controlling the conduct of trustees as well when trusts of real or of personal property are created by will as by deed. The equitable jurisdiction concerning the enforcement of testamentary trusts is universally regarded as entirely separate and distinct from the jurisdiction over administrations.

SECTION IV.

CONSTRUCTION AND ENFORCEMENT OF WILLS.

ANALYSIS.

- § 1155. Origin of the jurisdiction.
- § 1156. Extent of the jurisdiction; a branch of that over trusts.
- § 1157. The same; a broader jurisdiction in some states.
- § 1158. Suit to establish a will.

§ 1155. Origin of This Jurisdiction.^a—Since in England the court of chancery possesses and exercises a full jurisdiction over the administration and settlement of decedents' estates, whether the deceased died testate or intestate, it has never been doubted that equity has there the power, as an incident of this jurisdiction, to construe and enforce wills of personal property. Under its general jurisdiction over trusts, a court of equity has also the power to construe and enforce wills of real as well as of personal property, so far as they create, or their dispositions involve the creation of, trusts.^b So far as a will of real property bequeaths purely legal estates, and the devisees therein obtain purely legal titles to the land given, the enforcement thereof belongs to the courts of law by means of the action of ejectment; the courts of law have full power to construe and interpret the instrument and to determine the rights of the devisees; there is no necessity, and therefore no power, of resorting to a court of equity, in order to obtain a construction of such wills.^c The same rules would be recognized as regulating the action of the courts in all of the states of this country which have preserved the original jurisdiction of equity over administrations, either as ex-

(a) This section is cited in *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Benedict v. Wilmarth*, (Fla.) 35 South. 84.

(b) The text is quoted in *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413.

(c) This portion of the text is quoted in *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334.

clusive or as concurrent with that given to the courts of probate. In the great majority of the states, as has been shown, this original jurisdiction of equity over administrations has either been completely abrogated, or has been so curtailed and restricted that it exists merely as auxiliary to and corrective of the principal jurisdiction held by the probate tribunals. Throughout the American states there has necessarily arisen, as a supplement to the ordinary functions of the probate courts, and for the purpose of supplying the defects in their methods and remedies, a special jurisdiction of equity "for the construction of wills," which it is the object of the present section to describe.

§ 1156. **Extent of the Jurisdiction — A Branch of That over Trusts.**—Although there is not an entire uniformity in the decisions by courts of different states upon this particular subject, yet the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is, that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought *solely* for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated.¹ In the language of

¹ *Sellers v. Sellers*, 35 Ala. 235; *Cowles v. Pollard*, 51 Ala. 445; *Clay v. Gurley*, 62 Ala. 14; *Clark v. Clark*, 17 Ga. 485; *Strubher v. Belsey*, 79 Ill. 307; *Whitman v. Fisher*, 74 Ill. 147; *Mallory's Adm'r v. Craig*, 15 N. J. Eq. 73; *Youmans v. Youmans*, 26 N. J. Eq. 149; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Bowers v. Smith*, 10 Paige, 193; *Emmons v. Cairns*, 2 Sand. Ch. 369; *Onderdonk v. Mott*, 34 Barb. 106; *Woodruff v. Cook*, 47 Barb. 304; *Bailey v. Southwick*, 6 Lans. 356; *Bailey v. Briggs*, 56 N. Y. 407; *Chipman*

(a) The text is cited in *Lake View M. & M. Co. v. Hannon*, 93 Ala. 87, 9 South. 539; *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Bryant v. Thompson*, 59 Hun 627, 14 N. Y. Supp. 386; *Martin v. Martin*, 52 W. Va. 381, 44

recent and well-considered cases, "The rule is, that to put a court of equity in motion, there must be an actual litigation in respect to matters which are the proper subjects of the jurisdiction of that court as distinguished from a court of law. It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers, as an incident of that jurisdiction, take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy. It is when the court is moved on behalf of an executor, trustee, or *cestui que trust*, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a

v. Montgomery, 63 N. Y. 221, 230; *Dill v. Wisner*, 88 N. Y. 153, 160; *Delaney v. McCormack*, 88 N. Y. 174; *Post v. Hover*, 33 N. Y. 593, 602; 30 Barh. 312, 324; *Walrath v. Handy*, 24 How. Pr. 353; *Stinde v. Ridgway*, 55 How. Pr. 301; *Duncan v. Duncan*, 4 Abb. N. C. 275; *Marlett v. Marlett*, 14 Hun, 313; *Wager v. Wager*, 21 Hun, 93; *Powell v. Demming*, 22 Hun, 235; *Bullock v. Bullock*, 2 Dev. Eq. 307; *Ferrand v. Howard*, 3 Ired. Eq. 381; *Simmons v. Hendricks*, 8 Ired. Eq. 84, 85, 86; 55 Am. Dec. 439; *Tayloe v. Bond*, Busb. Eq. 5; *Marrow v. Marrow*, Busb. Eq. 148; *Devereux v. Devereux*, 81 N. C. 12; *Houston v. Howie*, 84 N. C. 349; *Rothgeb v. Mauck*, 35 Ohio St. 503; *Goddard v. Brown*, 12 R. I. 31; *Bussy v. McKie*, 2 McCord Eq. 23; 16 Am. Dec. 628; *Gibbes v. Elliott*, 5 Rich. Eq. 327; *Appeal of Schæffner*, 41 Wis. 260; *Wolf v. Schæffner*, 51 Wis. 53; 8 N. W. 8; *Rexroad v. Wells*, 13 W. Va. 812; *Magers v. Edwards's Adm'r*, 13 W. Va. 822.

S. E. 198; *Andersen v. Andersen*, (Nehr.) 96 N. W. 276; *Hoagland v. Cooper*, (N. J. Eq.) 56 Atl. 705; quoted in *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100. See, also, *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Harrison v. Owsley*, 172 Ill. 629, 50 N. E. 227; *Wager v. Wager*, 89 N. Y. 161; *Weed v. Weed*, 94 N. Y. 243; *Hoagland v. Cooper*, (N. J. Eq.) 56 Atl. 705; *Fahy v. Fahy*, 58 N. J. Eq. 210, 42 Atl. 726; *Hayday v. Hayday*, (N. J. Eq.) 39 Atl. 373; *Cozart v. Lyon*, 91 N. C. 282; *Woodlief v. Mer-*

ritt, 96 N. C. 226, 2 S. E. 350; *Martin v. Martin*, 52 W. Va. 381, 44 S. E. 198; *Mathews v. Tyree*, 53 W. Va. 298, 44 S. E. 526; *Kelley v. Kelley*, 80 Wis. 486, 50 N. W. 334. It has been held that the bill cannot be sustained unless the construction may affect the rights of the complainant in person or property, or unless it may affect the performance of his duties under the will, as executor, trustee, or otherwise: *Burgess v. Shepherd*, 97 Me. 522, 55 Atl. 415.

doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts."² Even by courts which maintain this restricted doctrine, it has been held that the jurisdiction extends to the construction of a doubtful will of personal property at the suit of the executor or of a legatee, although the instrument creates no express trusts, on account of the implied trust relation always existing between the executor and the legatees.³ In accordance with this doctrine, which regards a trust express or implied as essential to the jurisdiction, it necessarily follows that the suit can only be maintained by some party *directly* interested in the trust under the will; that is, by an executor or a trustee, or by a *cestui que trust* or a legatee; it cannot be maintained by an heir at law, or a devisee of a mere legal title, and much less by a creditor.⁴

² *Chipman v. Montgomery*, 63 N. Y. 221, 230, per Allen, J.; *Bailey v. Briggs*, 56 N. Y. 407, per Folger, J.

³ Thus in *Bowers v. Smith*, 10 Paige, 193, it is held that "an executor takes the legal estate in the personal property of the testator as trustee for the legatees or next of kin, and chancery having general jurisdiction in cases of trusts, any person having an interest in such property may file a bill in that court to have the construction of the will settled, or to have the question as to the validity of any of its provisions determined, so far as concerns the interest of the claimant in the property, and to have a decree for such portions of the property as he is entitled to receive. But testator's heir at law, or *devisee* claiming a mere legal estate, where there is no trust, cannot come into equity for the mere purpose of obtaining a construction to a will." This decision clearly distinguishes between a will of personal property and one of land, and does *not* require any trust to be created by the instrument in the former. And see *Onderdonk v. Mott*, 34 Barb. 106; *Bliven v. Seymour*, 88 N. Y. 469. Some later New York decisions fail to recognize this distinction, and deny the jurisdiction unless the will of personal property creates a trust as well as one of lands: *Walrath v. Handy*, 24 How. Pr. 353; *Wager v. Wager*, 21 Hun, 93; but in *Bliven v. Seymour*, 88 N. Y. 469, a will of personal property was construed, although no trust whatever was created; and see *Dill v. Wisner*, 88 N. Y. 153, 160.^b

⁴ See cases cited in the second note before the last.

(b) In *Wager v. Wager*, 89 N. Y. 161, the same case in the court below was reversed, and the above distinction was recognized, per Rapallo, J.:

see, also, *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748.

§ 1157. **The Same. A Broader Jurisdiction in Some States.**—It cannot be denied that there are decisions by able courts which take another and less restricted view of the jurisdiction. According to the doctrine of these cases, the jurisdiction to construe wills is not necessarily connected with the general jurisdiction over trusts; the presence of a trust express or implied is not made a criterion of its existence nor of its proper exercise; it is regarded as arising wholly from the complicated character of provisions in a will, from the difficulty of understanding their meaning, or the doubt and uncertainty as to the rights and interests of the parties claiming under them. In short, the jurisdiction to construe a will exists and is exercised whenever its terms are really difficult or doubtful, or their validity is contested, without reference to the presence or absence of any trust.¹ It is well settled that a court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent, and uncertain;² nor upon a matter which is wholly past, as upon the past conduct of the executor.³ The jurisdiction will not, it seems, be extended so as to permit an administrator to obtain the direction of

¹ *Rosenberg v. Frank*, 58 Cal. 387; see extract from opinion *ante*, under § 1153. The clause construed in this case was a residuary bequest, creating no trust, and the opinion does not treat the jurisdiction as incidental to the power of equity over express trusts, but as an incident of the power over administrations: *Sellers v. Sellers*, 35 Ala. 235; *Trotter v. Blocker*, 6 Port. 269; *Baldwin v. Bean*, 59 Me. 481; *First Baptist Church v. Robberson*, 71 Mo. 326; *Benham v. Hendrickson*, 32 N. J. Eq. 441; *Purvis v. Sherrod*, 12 Tex. 140; *Howze v. Howze*, 14 Tex. 232; *Little v. Birdwell*, 21 Tex. 597; 73 Am. Dec. 242; *Gibbes v. Elliott*, 5 Rich. Eq. 327.

² *Minot v. Taylor*, 129 Mass. 160; *Tayloe v. Bond*, Busb. Eq. 5; *Marrow v. Marrow*, Busb. Eq. 148; *Goddard v. Brown*, 12 R. I. 31.^b

³ *Sohier v. Burr*, 127 Mass. 221; *Tayloe v. Bond*, Busb. Eq. 5; *Marrow v. Marrow*, Busb. Eq. 148. In short, a construction can only be given when it will determine and direct some present or continuing act or conduct of the executor or trustee: *Powell v. Demming*, 22 Hun, 235.

(a) The text is cited in *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342.

(b) *Little v. Thorne*, 93 N. C. 69.

a court of equity with regard to the proper discharge of his duties.⁴

§ 1158. Suit to Establish a Will.—The rule is settled in England that a devisee in possession is entitled at any time to maintain a suit against the heir at law of the testator for the purpose of establishing the will, although the heir has brought an action of ejectment to recover the land, although the will creates no trusts, but gives the devisee a purely legal estate, and although it is not necessary to administer the estate under the direction of the court of chancery.¹ A devisee may maintain a similar suit against parties claiming under another will of the same testator.² In both instances the suit is in the nature of a bill to quiet title. For obvious reasons, no such jurisdiction probably exists in any of the states,—certainly not in the great majority of them.^{3 a}

⁴ Clay v. Gurley, 62 Ala. 14; Ferrand v. Howard, 3 Ired. Eq. 381; but see Stevens v. Warren, 101 Mass. 564.

¹ Boyse v. Rossborough, Kay, 71; 3 De Gex, M. & G. 817; affirmed *sub nom.* Colclough v. Boyse, 6 H. L. Cas. 1. This case was very carefully considered by all of the courts, and the previous authorities were quoted and examined in a most exhaustive manner.

² Lovett v. Lovett, 3 Kay & J. 1; and see *In re Tayleur*, L. R. 6 Ch. 416.

³ The sole ground of this jurisdiction in England was a condition of the law which does not exist in any American state, and no longer exists in that country. Until the statute creating the probate court (about 1857: 20 & 21 Vict., c. 77), there was no jurisdiction whatever to admit a will of land to probate; the only mode of testing the validity of such will was by an action of ejectment between the heir and devisee. If the devisee is in possession, he cannot, of course, bring an action of ejectment, but must await an action brought by the heir. For this reason, to enable the devisee to test the validity of the will at once, and to relieve him from the cloud hanging in-

(a) So held in *In re Cilley*, 58 Fed. 977, 986; *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. 427, 2 L. R. A. 175, citing the author's text and note. This note is also cited in *McDaniel v. Pattison*, (Cal.) 27 Pac. 651; *Domestic & Foreign Miss. Soc. of the P. E. Church v. Eels*, 68 Vt. 497, 54 Am. St. Rep. 888, 35 Atl. 463 (no jurisdiction to estab-

lish a lost will). In Missouri the statutes authorize a suit to contest a will, or to establish one which has been rejected by the probate court. Although technically a suit at law, yet in many respects it partakes of the nature of a proceeding in chancery: *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887.

CHAPTER FOURTH.

EQUITABLE ESTATES ARISING FROM CONVERSION.

SECTION I.

THE CONVERSION OF REAL ESTATE INTO PERSONAL, AND OF PERSONAL ESTATE INTO REAL.

ANALYSIS.

- § 1159. Definition and general nature.
- § 1160. I. What words are sufficient to work a conversion.
- § 1161. The same; under a contract of sale.
- § 1162. II. Time from which the conversion takes effect.
- § 1163. The same; in contracts of sale with option.
- § 1164. III. Effects of a conversion; land directed or agreed to be sold.
- § 1165. The same; money directed or agreed to be laid out in land.
- § 1166. Limitations on these effects.
- § 1167. Conversion by paramount authority; compulsory sale of land under statute; sale by order of court.
- § 1168. Conversion as between life tenant and remainderman.

§ 1159. Definition and General Nature.^a —The fundamental principle that equity regards that as done which ought to

definitely over his title from the heir's adverse claim, the jurisdiction described in the text exists. No such reasons exist in this country. A will of land as well as one of personal property may be admitted to probate, and in some states the probate is conclusive upon all parties. The devisee can therefore, at any time, establish the validity of the will in the probate court, and is under no possible necessity of resorting to equity for such relief. On the contrary, the doctrine seems to be general, if not universal, throughout the states, that a court of equity will not recognize nor act upon a will of land or of personalty until it has been admitted to probate:^b See cases cited *ante*, in note under § 1154.

(b) Quoted in *Pratt v. Hargreaves*, 76 Miss. 955, 71 Am. St. Rep. 551, 25 South. 658.

(a) This and the following sec-

tions are cited in *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120. This section is cited in *Clift v. Moses*, 116 N. Y. 144, 22

be done, which underlies the doctrine of equitable conversion, and of which it is the most remarkable illustration, has been fully discussed and explained in a former volume.¹ Conversion has been briefly and accurately defined as "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such."²

¹ See *ante*, vol. 1, §§ 364-371.

² See the more full definition given by Sir Thomas Sewell, M. R., in *Fletcher v. Ashburner*, 1 Brown Ch. 497, quoted *ante*, in § 371, and cases cited in note 2 thereunder. In *Lorrillard v. Coster*, 5 Paige, 172, 218, Chancellor Walworth thus described the doctrine: "Upon the principles of equitable conversion, money directed by the testator to be employed in the purchase of land, or land directed to be sold and turned into money, is in this court, for all the purposes of the will, considered as that species of property into which it is directed to be converted, so far as the purposes for which such conversion is directed to be made are legal, and can be carried into effect. The same principle is also applicable to the case of a direction in a will to sell one piece of land and to convert it into another, for the purposes of the will, by investing the proceeds of the sale in the purchase of such other lands, under a valid power in trust to make such sale and reinvestment. The whole doctrine of equitable conversion depends upon the well-established and familiar principle that a court of equity looks upon that as done which the parties to an agreement or marriage settlement have contracted to do, or which the testator by his will has directed to be done, so far as the contract of the parties, or the will of the decedent, could have been carried into effect without violating any equitable principle or rule of law." In addition to the cases cited under § 371, see the following illustrations of the general doctrine:^b *Abbott v. Lee*, 2 Vern. 284; *Symons v. Rutter*, 2 Vern. 227; *Lancy v. Fairechild*, 2 Vern. 101; *Kettleby v. Atwood*, 1 Vern. 298; *Annand v. Honeywood*, 1 Vern. 345; *Lingen v. Sowray*, 1 Eq. Cas. Abr. 175; 1 P. Wms. 172; *Edwards v. Countess of Warwick*, 2 P. Wms. 171, 175, and note; *Chaplin v. Horner*, 1 P. Wms. 483; *Green v. Smith*, 1 Atk. 572; *Walker v. Denne*, 2 Ves. 170; *Griffith v. Ricketts*, 7 Hare, 299; *Taylor v. Taylor*, 3 De Gex, M. & G. 190; *Holland v. Cruft*, 3 Gray, 162, 180; *Prentice v. Janssen*, 79 N. Y. 478; *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550; *Van Vechten v. Keator*, 63 N. Y. 52; *Moncrief v. Ross*, 50 N. Y. 431; *White v. Howard*, 46 N. Y. 144; *Hood v. Hood*, 85 N. Y. 561;

N. E. 393; *Carr v. Branch*, 85 Va. 597, 8 S. E. 476; *Sickles v. City of New Orleans*, 26 C. C. A. 204, 80 Fed. 868; *Hutchings v. Davis*, 68 Ohio St. 160, 67 N. E. 251.

(b) *Matter of Corrington*, 124 Ill. 363, 16 N. E. 252; *Perkins v. Coughlan*, 148 Mass. 30, 18 N. E. 600;

Parker v. Glover, 42 N. J. Eq. 559, 9 Atl. 217; *Robert v. Corning*, 89 N. Y. 225; *Delafield v. Barlow*, 107 N. Y. 535, 14 N. E. 498; *Greenland v. Waddell*, 116 N. Y. 239, 22 N. E. 367, 15 Am. St. Rep. 400; *Fraser v. Trustees*, 124 N. Y. 480, 26 N. E. 1034.

No express declaration in the instrument is needed that land shall be treated as money although not sold, or that money shall be deemed land although not actually laid out in the purchase of land. The only essential requisite is an absolute expression of an intention that the land *shall* be sold and turned into money, or that the money *shall* be expended in the purchase of land. If this intention is sufficiently expressed, the circumstance that the land has not yet been sold and turned into money, or that the money has not yet been laid out in land, is the very condition of fact in which the doctrine of conversion comes into play, to which the maxim, Equity regards that as done which ought to be done, applies.³ The true test in all such cases

Delaney v. McCormack, 88 N. Y. 174; Wells v. Wells, 88 N. Y. 323; Lawrence v. Elliott, 3 Redf. 235; Klock v. Buell, 56 Barb. 398; Arnold v. Gilbert, 5 Barb. 190; Pleasants's Appeal, 77 Pa. St. 356; Eby's Appeal, 84 Pa. St. 241; McClure's Appeal, 72 Pa. St. 414; Jones v. Caldwell, 97 Pa. St. 42; Page's Estate, 75 Pa. St. 87; Brolasky v. Gally's Ex'rs, 51 Pa. St. 509; Estate of Dobson, 11 Phila. 81; Estate of McAvoy, 12 Phila. 83; Parkinson's Appeal, 32 Pa. St. 455; Burr v. Sim, 1 Whart. 252; 29 Am. Dec. 48; Cook's Ex'r v. Cook's Adm'r, 20 N. J. Eq. 375; Smith v. Bayright, 34 N. J. Eq. 424; Scudder's Ex'rs v. Vanarsdale, 13 N. J. Eq. 109; Orriek v. Boehm, 49 Md. 72; Lynn v. Gephart, 27 Md. 547, 563; Thomas v. Wood, 1 Md. Ch. 296; Ex parte McBee, 63 N. C. 332; Tayloe v. Johnson, 63 N. C. 381; Masterson v. Pullen, 62 Ala. 145; High v. Worley, 33 Ala. 196; Succession of Gamble, 23 La. Ann. 9; Collins v. Champ's Heirs, 15 B. Mon. 118; 61 Am. Dec. 179; Green v. Johnson, 4 Bush, 164, 167; Hocker v. Gentry, 3 Met. (Ky.) 463; Dodge v. Williams, 46 Wis. 70; 1 N. W. 92; 50 N. W. 1103; Gould v. Taylor Orphan Asylum, 46 Wis. 106; 50 N. W. 422; Janes v. Throckmorton, 57 Cal. 368; Hilton v. Hilton, 2 McAr. 70.

³ In Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 215, Sir Joseph Jekyll said: "The forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the *cestuis que trustent*, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in all such cases is, that what ought to have been done shall be taken as done; and a rule so powerful it is as to alter the very nature of things,—to make money land, and on the contrary, to turn land into money. Thus money articiled to be laid out in land shall be taken as land, and descend to the heir, and on the other hand, land agreed to be sold shall be considered as personal estate." In Scudamore v. Scudamore, Prec. Ch. 543, where a sum of money had been bequeathed to be laid out in the purchase of land, Lord Macclesfield said: "If the purchase had been made, it [i. e., the land] must have gone to the heir; but if the trustee, by delaying

is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal or the personal estate be turned into real? As this doctrine of conversion is wholly a creation of equity jurisprudence, the estates or interests which result from it are purely equitable, and of equitable cognizance alone. Equity has exclusive jurisdiction of suits to maintain and protect such interests, except where, in this country, the doctrine, as it affects the devolution of property, is recognized and followed by the probate courts in the settlement and distribution of decedents' estates. The practical questions growing out of the operation of the doctrine are generally connected with the devolution—inheritance or succession—of the property converted upon the death of the person for whose benefit it was originally given, or with his transfer of it by assignment, or with the claims to it of third parties.⁴

the purchase, may alter the right and give it to the executors, this would be to make it the trustee's will, and not the will of the first testator, which would be very unreasonable and inconvenient." From the general definition given in the text, and from the foregoing extracts, and in fact from all the decisions upon the subject, it is plain that an equitable conversion, and the equitable estates or interests arising therefrom, can only exist while the directions of the will or deed or the stipulations of the contract remain, to some extent at least, executory and unperformed; there can be no place for the operation of the doctrine, after these directions or stipulations have been fully carried into effect and completely executed.

⁴ For illustration, if money had been given by will or deed to trustees upon trust to purchase land therewith and convey the same to A in fee, and A died before the trustees had made the purchase, and while the money was in their hands, the important question as to A's interest would for the first time practically arise: Was that interest real estate, so that it descended to A's heirs if he died intestate? or was it personal estate, so that it devolved upon his administrator? Would it pass by a general bequest of personal property, or by a general devise of lands? If A was a married man, was his widow entitled to dower in it? If A was a married woman, was her husband entitled to curtesy? Where the parties to a contract for the sale of land die before execution, are the vendee's heirs or his personal representatives entitled to the benefit of the agreement? Does the purchase-money, when paid, belong to the heirs or to the administrators of the vendor? These are the kinds of questions which are determined by the doctrine of conversion; and their solution depends upon the nature of the estates resulting from the operation of that doctrine upon the interests of the original parties to the will, deed, or

§ 1160. I. What Words are Sufficient to Effect a Conversion.

—The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a *duty* resting upon the trustees or other parties to do the specified act; for unless the equitable *ought* exists, there is no room for the operation of the maxim, Equity regards that as done which ought to be done.¹ The rule is therefore firmly settled, that in order to work a conversion *while the property is yet actually unchanged* in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear imperative agreement in the contract, to convert the property,—that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting—that is, the act itself of selling the land or of laying out the money in land—is left to the option, discretion, or choice of the trustees or other parties, then no equitable conversion will take place, because no *duty* to make the change rests upon them.^{2 a} It is not essential,

contract. No other doctrine is perhaps more important in the equity jurisprudence of England, both because such trusts by wills, deeds, and family settlements are there very frequent, and because the common-law difference between the descent of land and the succession of personal property is still preserved in all of its integrity. The applications of the doctrine to settlements often give rise to questions of great difficulty. In our own country the doctrine is theoretically adopted in all the states; but its applications are much less frequent and more simple than in England. With us, trust estates and family settlements are comparatively very few, and the tendency of modern legislation in many of the states is toward a uniformity in the rules of law which regulate the descent of lands and the devolution of personal property. In a few of the states the difference has been completely abolished, and both real and personal estate devolve in the same proportions to the same parties. It necessarily follows that many of the questions connected with conversion of the most frequent occurrence and of the highest importance in England are practically unknown in this country, and need nothing more than a bare mention or even allusion in a treatise upon the American equity jurisprudence.

¹ See *ante*, §§ 364, 365.

² It should be carefully noticed that the option or discretion spoken of in this rule means an option with respect to the very act of changing the form

(a) This section is cited to this effect in *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704; and quoted, in *Maxwell v. Barringer*, 110 N. C. 76, 28 Am. St. Rep. 668, 14 S. E. 516.

however, that the direction should be *express*, in order to be imperative; it may be necessarily implied. Where a power to convert is given without words of command, so that there is an appearance of discretion, if the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance is sufficient to

of the property. If the option is *merely as to the time* when this shall be done, a conversion may take place, as will be more fully stated hereafter. The general rule of the text is illustrated by the following cases:^b *Curling v. May*, cited 3 Atk. 255 (the leading case); *Polley v. Seymour*, 2 Younge & C. 708; *Swann v. Fonnereau*, 3 Ves. 41; *Amler v. Amler*, 3 Ves. 583; *Van v. Barnett*, 19 Ves. 102; *Bourne v. Bourne*, 2 Hare, 35; *Grieverson v. Kirsopp*, 2 Keen, 653; *Lucas v. Brandreth*, 28 Beav. 273; *Smithwick v. Smithwick*, 12 Ir. Ch. Rep. 181; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524, 548; *Greenway v. Greenway*, 2 De Gex, F. & J. 128; *Wall v. Colthead*, 2 De Gex & J. 683; *Rich v. Whitfield*, L. R. 2 Eq. 583; *Hood v. Hood*, 85 N. Y. 561; *Prentice v. Janssen*, 79 N. Y. 478; *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550; *Fisher v. Banta*, 66 N. Y. 468; *Moncrief v. Ross*, 50 N. Y. 431; *White v. Howard*, 46 N. Y. 144; *Lawrence v. Elliott*, 3 Redf. 235; *Dominick v. Michael*, 4 Sand. 374; *Peterson's Appeal*, 88 Pa. St. 397; *Jones v. Caldwell*, 97 Pa. St. 42; *McClure's Appeal*, 72 Pa. St. 414; *Miller's and Bowman's Appeal*, 60 Pa. St. 404; *Estate of Dobson*, 11 Phila. 81; *Chew v. Nicklin*, 45 Pa. St. 84; *Anewalt's Appeal*, 42 Pa. St. 414; *Bleight v. Manufacturers' etc. Bank*, 10 Pa. St. 131; *Cook's Ex'r v. Cook's Adm'r*, 20 N. J. Eq. 375; *Pratt v. Taliaferro*, 3 Leigh, 419; *Hilton v. Hilton*, 2 McAr. 70; *Montgomery v. Milliken*, *Smedes & M. Ch.* 495; *Dodge v. Williams*, 46 Wis. 70; 1 N. W. 92; 50 N. W. 1103; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; 50 N. W. 422; *Janes v. Throckmorton*, 57 Cal. 368. Whenever trustees are clothed with a discretion and exercise it, and thus actually make a conversion, the property will, in general, pass in the nature and form to which they have converted it:^c *Bourne v. Bourne*, 2 Hare, 35; *In re Ibbitson's Estate*, L. R. 7 Eq. 226;

(b) *Haward v. Peavy*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135, 25 L. R. A. 746; *Chamberlain v. Taylor*, 105 N. Y. 185, 11 N. E. 625; *Scholle v. Scholle*, 113 N. Y. 261, 21 N. E. 84; *Clift v. Moses*, 116 N. Y. 144, 22 N. E. 393; *Matter of McComb*, 117 N. Y. 378, 22 N. E. 1070; *Mills v. Harris*, 104 N. C. 626, 10 S. E. 704; *In re Cooper's Estate*, 206 Pa. St. 628, 98 Am. St. Rep. 799, 56 Atl. 67 (direction to lease if it could be done to advantage, otherwise to

sell); *Perot's Appeal*, 102 Pa. St. 235; *Hunt's Appeal*, 105 Pa. St. 128; *Sheridan v. Sheridan*, 136 Pa. St. 14, 19 Atl. 1068; *Greenough v. Small*, 137 Pa. St. 131, 20 Atl. 396, 553; *Bedford v. Bedford*, 110 Tenn. 204, 75 S. W. 1017; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117.

(c) *Lent v. Howard*, 89 N. Y. 169; *Mellon v. Reed*, 123 Pa. St. 1, 15 Atl. 906; *Bell v. Bell*, 25 S. C. 149; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117.

outweigh the appearance of an option, and to render the whole imperative. Thus if a power is given to lay out money in land, but the limitations expressed are applicable only to land, this will show an intention that the money should be so laid out, and will amount to an imperative direction to convert, for otherwise the terms of the instrument could not be carried into effect.³ In fact, the whole result depends upon the intention. If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place.^{4 d}

Rich v. Whitfield, L. R. 2 Eq. 583; *Lawrence v. Elliott*, 3 Redf. 235; *Van Vechten v. Keator*, 63 N. Y. 52; *White v. Howard*, 46 N. Y. 144. Mere discretion as to the time or manner of effecting the sale does not prevent a conversion from taking place: *Stagg v. Jackson*, 1 N. Y. 206; *Tazewell v. Smith's Adm'r*, 1 Rand. 313; 10 Am. Dec. 533; but see *Christler's Ex'r v. Meddis*, 8 B. Mon. 35. Money directed to be laid out in land with consent or on request, *and not without*, is not converted until consent is given or request made: *Davies v. Goodhew*, 6 Sim. 585; *Sykes v. Sheard*, 33 Beav. 114; but consent must not be withheld from improper or interested motives: *Lord v. Wightwick*, 4 De Gex, M. & G. 803.

³ *Earlom v. Saunders*, Amb. 241; *Johnson v. Arnold*, 1 Ves. Sr. 169; *Hereford v. Ravenhill*, 5 Beav. 51; *Simpson v. Ashworth*, 6 Beav. 412; *Cowley v. Hartstonge*, 1 Dow, 361; *Cookson v. Cookson*, 12 Clark & F. 121; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *In the Matter of De Lancey*, L. R. 5 Ex. 102; *Atwell v. Atwell*, L. R. 13 Eq. 23; *Power v. Cassidy*, 79 N. Y. 602; 35 Am. Rep. 550.

⁴ *Thornton v. Hawley*, 10 Ves. 129; *Davies v. Goodhew*, 6 Sim. 585; *Burrell v. Baskerfield*, 11 Beav. 525; *Cornick v. Pearce*, 7 Hare, 477; *Mower v. Orr*, 7 Hare, 473; *Fisher v. Banta*, 66 N. Y. 468; *Dodge v. Pond*, 23 N. Y. 69; *Stagg v. Jackson*, 1 N. Y. 206; *Wurts's Ex'rs v. Page*, 19 N. J. Eq. 365; *Page's Estate*, 75 Pa. St. 87; *Dodge v. Williams*, 46 Wis. 70; 1 N. W. 92; 50 N. W. 1103; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106; 50 N. W. 422; and see cases in the two preceding notes.

(d) Quoted in *In re Pforr's Estate*, 144 Cal. 121, 77 Pac. 825. See, also, *Ramsey v. Hanlon*, 33 Fed. 425; *Roy v. Monroe*, 47 N. J. Eq. 356, 20 Atl. 481; *Schlereth v. Schlereth*, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616; *Lent v. Howard*, 89 N. Y. 169; *Asche v. Asche*, 113 N. Y. 233, 21 N. E. 70; *Lee v. Baird*, 132 N. C.

755, 44 S. E. 605; *Penfield v. Tower*, 1 N. Dak. 216, 46 N. W. 413; *Hunt's Appeal*, 105 Pa. St. 128; *Fahnestock v. Fahnestock*, 152 Pa. St. 56, 25 Atl. 313, 34 Am. St. Rep. 623; *Mellon v. Reed*, 123 Pa. St. 14, 15 Atl. 906; *Estate of Mustin*, 194 Pa. St. 437, 45 Atl. 313, 75 Am. St. Rep. 702; *King v. King*, 13 R. I. 501; *Clarke*

§ 1161. **Under a Contract of Sale.**—A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate for the purchaser, and the purchaser a trustee of the purchase-money for the vendor.^{1a} In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against an unwilling purchaser.^{2b} The fact that the contract of purchase is entirely at the option of the purchaser does not prevent its working a conversion, if he avails himself of the option.³

§ 1162. **II. Time from which the Conversion Takes Effect.**—This, like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at some specified future time; and if it created a trust to sell upon the happening of a specified event, which might or might not happen, then

¹ Green v. Smith, 1 Atk. 572; Pollexfen v. Moore, 3 Atk. 272; Atcherley v. Vernon, 10 Mod. 518; Masterson v. Pullen, 62 Ala. 145; and see *ante*, §§ 368, 372, and cases cited.

² Garnett v. Acton, 28 Beav. 333; Ingle v. Richards, 28 Beav. 361. Nevertheless, it has been held that a verbal contract by an owner in fee who dies intestate before it is performed, if adopted by his heir voluntarily, and not under a mistake, will effect a conversion *retrospectively*, and the purchase-money will belong to the next of kin: Frayne v. Taylor, 10 Jur., N. S., 119.

³ Lawes v. Bennett, 1 Cox, 167; Townley v. Bedwell, 14 Ves. 591; Collingwood v. Row, 3 Jur., N. S., 785; for further on the subject of such optional contracts, see *post*, § 1163.

v. Clarke, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117; but such intention must clearly appear, especially when no express power to sell is contained in the will: Hobson v. Hale, 95 N. Y. 588, and cases cited; Hale v. Hale, 125 Ill. 399, 17 N. E. 470; Appeal of Clarke, 70 Conn. 195,

39 Atl. 155 ("It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money").

(a) See *post*, §§ 1260, 1261, 1406. See, also, Clapp v. Tower, 11 N. Dak. 556, 93 N. W. 862.

(b) Quoted in Mills v. Harris, 104 N. C. 626, 10 S. E. 704.

the conversion would only take place from the time of the happening of that event, but would take place when the event happened exactly as though there had been an absolute direction to sell at that time.^{1 a} Subject to this general modification, the rule is settled that a conversion takes place in wills as from the death of the testator, and in deeds, and other instruments *inter vivos*, as from the date of their execution.^{2 b}

¹ Ward v. Arch, 15 Sim. 389; Polley v. Seymour, 2 Younge & C. 708; Moncrief v. Ross, 50 N. Y. 431; McClure's Appeal, 72 Pa. St. 414.

² Wills: Beauclerk v. Mead, 2 Atk. 167; Fisher v. Banta, 66 N. Y. 468; Cook's Ex'r v. Cook's Adm'r, 20 N. J. Eq. 375; Jones v. Caldwell, 97 Pa. St. 42; McClure's Appeal, 72 Pa. St. 414.^c

Deeds: Griffith v. Ricketts, 7 Hare, 299, 311; Clarke v. Franklin, 4 Kay & J. 257; Hewitt v. Wright, 1 Brown Ch. 86. In Griffith v. Ricketts, *supra*, Wigram, V. C., explained the rule and its operation as follows: "A deed differs from a will in this material respect: the will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal, and not real, estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering

(a) Massey v. Modawell, 73 Ala. 421; Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Keller v. Harper, 64 Md. 74, 1 Atl. 65.

(b) This section is cited to this effect in Underwood v. Curtis, 127 N. Y. 523, 28 N. E. 585; Carr v. Branch, 85 Va. 597, 8 S. E. 476 (wills).

(c) Morris v. Griffiths, 26 Ch. Div. 601; Doughty v. Bull, 2 P. Wms. 320; Ramsey v. Hanlon, 33 Fed. 425; Lash v. Lash, 209 Ill. 595, 70 N. E. 1049; Reiff v. Strite, 54 Md. 298; Dutton v. Pugh, 45 N. J. Eq. 426, 18 Atl. 207; Snover v. Squire, (N. J. Eq.) 24 Atl. 365; Lent v. Howard, 89 N. Y. 169; Underwood v. Curtis, 127 N. Y. 523, 28 N. E. 585; Estate of Mustin, 194 Pa. St. 437, 45 Atl. 313, 75 Am. St. Rep. 702; Carr v. Branch, 85 Va. 597, 8 S. E. 476; Lynch v. Spicer, 53 W. Va. 426, 44 S. E. 255; Harrington v. Pier, 105 Wis. 485, 82

N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307. In Bates v. Spooner, 75 Conn. 501, 54 Atl. 305, a will directed the executors to sell the real estate as soon as it could "be done in the exercise of their best business judgment." The court held that the conversion, for the purposes of succession, is to be regarded as if it were completely effected at the testator's decease. See, also, Jones v. Probate Court, (R. I.) 55 Atl. 881 (to sell as soon as convenient). In Boland v. Tiernay, 118 Iowa 59, 91 N. W. 836, a direction to sell when the youngest grandchild should attain the age of twenty-five years was held to work a conversion, for the purpose of distribution, from the date of the testator's death; and in Nelson v. Nelson, (Ind. App.) 72 N. E. 482, a similar effect was given to a direction to sell on the death of testator's wife.

§ 1163. **Time in Contracts of Sale with Option.**—In contracts of sale upon the purchaser's option, the question whether or not a conversion is effected at all cannot, of course, be determined until the purchaser exercises his option; but the moment when he *does* exercise it, the conversion, as between parties claiming title under the vendor, *relates back* to the time of the execution of the contract. Thus where a lessee with an option to purchase—or any other purchaser with an option—duly declares his option after the death of the lessor or vendor, who is the owner

the actual character of the property is, so to speak, equivalent to a gift of the expectancy of the heir at law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will; but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas in the case of a will the conversion does not take place until the death of the testator, and there is no principle on which the court, as between the real and personal representatives (between whom there is confessedly no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs." In *Clarke v. Franklin*, *supra*, Wood, V. C., after referring to *Hewitt v. Wright*, which was a case of conversion of land into personalty, said: "The doctrine of the converse case of personalty directed by deed or will to be converted into land is fully discussed by Lord Eldon in *Wheldale v. Partridge*, 8 Ves. 227, where, upon the special terms of the instrument, it was held not to be one which upon its execution clothed the property with real uses; but Lord Eldon said that but for those special provisions, and if there had been nothing more in the deed, the 'property would, *immediately upon the execution of the deed*, have been impressed with real qualities and clothed with real uses, and the money would have been land'; clearly recognizing the rule that conversion takes effect from the moment of the execution of the deed; and the rights of the parties and the character in which the property is taken by them are to be determined according to that conversion. The principle of these authorities is therefore clearly settled; and where, as here, real estate is settled by deed upon trust to sell for certain specified purposes, and one of those purposes fails, there, whether the trust for sale is to arise in the lifetime of the settlor or not until after his decease, the property to that extent results to the settlor as personalty from the moment the deed is executed."

It should be observed, however, that mortgages, although containing trusts for sale, or powers in trust to sell, constitute an exception to the general rule that such deeds work a conversion from the date of their execution, since the real object of mortgages is simply to raise money and secure the repayment thereof, and not to effect a devolution of the property: *Wright v. Rose*, 2 Sim. & St. 323; *Bourne v. Bourne*, 2 Hare, 35; *Jones v. Davies*, L. R. 8 Ch. Div. 205.

in fee, the realty is thereby converted *retrospectively* as between those claiming under the lessor or vendor, or under his will; that is, as between the heir or devisee on one side and the legatees or next of kin on the other, the proceeds will go to his personal representatives, though the heir or devisee will be entitled to the rents up to the time when the option is declared.^{1a} It should be carefully observed, however, that this rule is confined to conversion as between the parties claiming title under the vendor or lessor,—his heirs or devisees, or his legatees, next of kin, and personal representatives,—and does not apply as between the vendor and purchaser themselves.²

§ 1164. III. Effects of a Conversion—Land Directed or Agreed to be Sold.—So far as is necessary to carry out the lawful purposes of the instrument, will, deed, settlement, or contract, and to determine the property rights of all parties claiming under or through it, equity follows the

¹ Lawes v. Bennett, 1 Cox, 167; Townley v. Bedwell, 14 Ves. 591; Collingwood v. Row, 3 Jur., N. S., 785; Goold v. Teague, 5 Jur., N. S., 116; Weeding v. Weeding, 1 Johns. & H. 424; Woods v. Hyde, 31 L. J. Ch. 295; Ex parte Hardy, 30 Beav. 206; Drant v. Vause, 1 Younge & C. Ch. 580; Emuss v. Smith, 2 De Gex & S. 722; D'Arras v. Keyser, 26 Pa. St. 249; Kerr v. Day, 14 Pa. St. 112, 114; 53 Am. Dec. 526. The cases of Drant v. Vause and Emuss v. Smith may seem to be opposed to this rule, but they were decided upon their very special facts, and their true meaning is explained in Weeding v. Weeding.^b This rule is plainly one which may operate very harshly, since the option might not be declared until possibly years after the vendor's death, and its correctness upon principle has been doubted by the ablest judges. It has recently been decided that it shall not be extended, that its operation is confined to the question of conversion as between the *heir or devisee of the vendor and his personal representatives*, and that it does not apply as between the *vendor and purchaser themselves*; as between these two parties the conversion does not and cannot take place until the purchaser declares his option: Edwards v. West, L. R. 7 Ch. Div. 858, 862, 863.

² Edwards v. West, L. R. 7 Ch. Div. 858, 862, 863.

(a) In re Isaacs, [1894] 3 Ch. 506.

(b) These cases, with In re Pyle, [1895] 1 Ch. 725, establish the rule that when the testator, by a subsequent will, knowing of the existence of the contract, devises the specific

property which is the subject of the contract, without referring in any way to the contract, an intention is indicated to give the devisee all the interest, whatever it may be, that the testator had in it.

doctrine into all of its legitimate consequences, and treats the property, from the time at which the conversion takes place, as to all intents of the kind and form into which it should have been changed, and determines the rights of parties to it as in that kind and form.¹ Land directed or agreed to be sold; although yet unsold, is regarded and treated as money. It will not pass under a devise of land or of real estate.² It will pass under a general gift, transfer, or bequest of personalty, or under a residuary bequest of personal property.^{3 a} In the absence of a will, it goes to the personal representative of the intestate who would have been or was entitled to it. It is therefore always personal assets in the hands of executors and administrators for which they are accountable.^{4 b} As in the case of a cor-

¹ See cases cited *ante*, under §§ 1159, 1162.

² *Elliott v. Fisher*, 12 Sim. 505; but see *Klock v. Buell*, 56 Barb. 398.

³ *Stead v. Newdigate*, 2 Mer. 521; *Farrar v. Earl of Winterton*, 5 Beav. 1; *Wall v. Colshead*, 2 De Gex & J. 683; *Chandler v. Pocock*, L. R. 16 Ch. Div. 648; 15 Ch. Div. 491; *Blake v. Blake*, L. R. 15 Ch. Div. 481; *Fisher v. Banta*, 66 N. Y. 468; *Estate of Dobson*, 11 Phila. 81; and see cases in next following note. And thus such a bequest to a corporation may be valid, although it is incompetent to receive a devise of land: *Dodge v. Williams*, 46 Wis. 70; *Gould v. Taylor Orphan Asylum*, 46 Wis. 106.

⁴ *Ashby v. Palmer*, 1 Mer. 296; *Elliott v. Fisher*, 12 Sim. 505; *Griffith v. Ricketts*, 7 Hare, 299; *Hoddel v. Pugh*, 33 Beav. 489; *Hood v. Hood*, 85 N. Y. 561; *Van Vechten v. Keator*, 63 N. Y. 52; *Moncrief v. Ross*, 50 N. Y. 431; *Fisher v. Banta*, 66 N. Y. 468; *Freeman v. Smith*, 60 How. Pr. 311; *Wurts's Ex'rs v. Page*, 19 N. J. Eq. 365; *Eby's Appeal*, 84 Pa. St. 241; *Jones v. Caldwell*, 97 Pa. St. 42; *McClure's Appeal*, 72 Pa. St. 414; *Brolasky v. Gally's Ex'rs*, 51 Pa. St. 509; *Parkinson's Appeal*, 32 Pa. St. 455; *Johnson v. Bennett*, 39 Barb. 237; *Harris v. Slaght*, 46 Barb. 470; *Ferguson v. Stuart's Ex'rs*, 14 Ohio, 140, 146; *Collier v. Collier's Ex'rs*, 3 Ohio St. 369; *Rawlings's Ex'r v. Landes*, 2 Bush, 158; *Loftis v. Glass*, 15 Ark. 680; *Hurt v. Fisher*, 1 Har. & G. 88, 96; *Carr v. Ireland*, 4 Md. Ch. 251; *Maddox v. Dent*, 4 Md. Ch. 543; *Smithers v. Hooper*, 23 Md. 273; *Washington's Ex'r v. Abra-*

(a) This section is cited in *Hutchings v. Davis*, 68 Ohio 160, 67 N. E. 251. See, also, *Welsh v. Crater*, 32 N. J. Eq. 177.

(b) It is not subject, as land, to the lien of a judgment against the person entitled to the proceeds of

its sale: *Henderson v. Henderson*, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650; *Turner v. Davis*, 41 Ark. 270. A mortgage of it operates as an equitable assignment: *Bailey v. Allegheny Nat. Bank*, 104 Pa. St. 425.

poration, so in that of an alien, a bequest of land thus converted into money is valid, although a devise of land is or may be void.⁵ The same rules apply to the conversion wrought by contracts for the sale of land.⁶

§ 1165. Money Directed or Agreed to be Laid out in Land.—Money and other personal property directed or agreed to be laid out in the purchase of land becomes and is regarded as land in equity. It will therefore pass under a general devise of lands or of real estate; it will descend to the heir; and will not be included in a bequest of money or personal property.^{1a} If the heir die intestate before the purchase has been made, the fund will descend to his heir.² Money will be considered as thus converted, notwithstanding a direction for investment *until* a purchaser can be found.³

ham, 6 Gratt. 66, 77; Siter v. McClanachan, 2 Gratt. 280; Commonwealth v. Martin's Ex'rs, 5 Munf. 117, 127; Brothers v. Cartwright, 2 Jones Eq. 113; 64 Am. Dec. 563; Croom v. Herring, 4 Hawks, 393; Ex parte McBee, 63 N. C. 332; Wilkins v. Taylor, 8 Rich. Eq. 291; and see 1 Lead. Cas. Eq., 4th Am. ed., 1157-1160, 1160-1162.

⁵ Du Hourmelin v. Sheldon, 1 Beav. 79; 4 Mylne & C. 525; Craig v. Leslie, 3 Wheat. 563; Anstice v. Brown, 6 Paige, 448; De Barante v. Gott, 6 Barb. 492, 497; as to corporations, see preceding note.

⁶ Masterson v. Pullen, 62 Ala. 145; and see *ante*, §§ 368, 372, and cases cited.

¹ Biddulph v. Biddulph, 12 Ves. 161; Green v. Stephens, 17 Ves. 64, 77; Hawley v. James, 5 Paige, 318, 443; Gott v. Cook, 7 Paige, 521, 534; Tayloe v. Johnson, 63 N. C. 381; Green v. Johnson, 4 Bush, 164; Collins v. Champ's Heirs, 15 B. Mon. 118; 61 Am. Dec. 179; and see 1 Lead. Cas. Eq., 4th Am. ed., 1162-1171.

² Scudamore v. Scudamore, Prec. Ch. 543; Edwards v. Countess of Warwick, 2 P. Wms. 171; Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 222; Gillies v. Longlands, 4 De Gex & S. 372.

³ Edwards v. Countess of Warwick, 2 P. Wms. 171. There can be no doubt that the fund would be bound in equity by a judgment to the same extent that the land would have been if purchased: See Frederick v. Aynscombe, 1 Atk. 392.

(a) It is said, however, that before the executor consents to the legacy it is not relieved from contributing *pro rata* with other legacies to the payment of debts: Mc-

Fadden v. Hefley, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675.

While the money passes under a general devise of lands, it does not pass under a devise of lands situated

The money of a married woman directed to be laid out in land is liable to her husband's curtesy, and without doubt, under analogous circumstances, such a fund of a husband is liable to his wife's dower.⁴

§ 1166. Limitations on the Effects.—Notwithstanding these very general effects of a conversion, they are not absolutely universal. The doctrine seems to be correctly formulated by saying that the effects extend only to those persons who claim or are entitled to the property under or through the instrument, or directly from or under the author of the instrument. Some of the cases definitely hold that a conversion takes place no further than is necessary for the purposes of the will or other instrument.^{1 a} Two limitations appear to be well settled: one general, that the conversion does not take place as to persons whose claims or rights to the property are purely incidental, not at all connected with its devolution or transfer from the author or through the instrument;^{2 b} and the other special, depending

⁴ Sweetapple v. Bindon, 2 Vern. 536; and see *ante*, vol. 3, § 990, note 4.

¹ See Orrick v. Boehm, 49 Md. 72; Hilton v. Hilton, 2 McAr. 70.

² Franks v. Bollans, L. R. 3 Ch. 717, 718. Where land was devised to trustees to sell and divide the proceeds among the testator's children, one of whom was a married woman, although the lady's share was converted as to her, it was held not to be converted as to her husband so as to enable him to dispose of it in the same manner in which he could dispose of her actual personal property; in other words, *as to him* it was still land.

in a particular locality, though the money was the result of a sale of lands situated in such locality: In re Duke of Cleveland's Settled Estates, [1893] 3 Ch. 244.

(a) See, however, Hutchings v. Davis, 68 Ohio 160, 67 N. E. 251, citing this section of the text.

(b) In Wilder v. Ranney, 95 N. Y. 7, 12, it was held that real estate directed by the will to be converted could not be conveyed by one of the executors without the co-operation of the other. "It physically remained

real estate, taxable as such, controllable as such, and it could only be conveyed as such, and the rules of law generally applicable to real estate remained applicable to this." Where, by statutory provision, a testator is deemed to have died intestate as to any child or children not named or provided for in the will, authority conferred by the will upon the executors to sell the testator's land does not work a conversion of the interest of such child or children in the estate: Northrop v. Marquam, 16

upon considerations of public policy, that the conversion shall not be permitted to take place so as to evade the statutes of mortmain, which invalidate gifts of land to charities.³

§ 1167. Conversion by Paramount Authority — Compulsory Sale of Land under Statute — Sale by Order of Court.— There is another phase of the doctrine of conversion of great importance in England, and a brief summary of the decisions may be useful under analogous circumstances in this country. This has been happily denominated conversion by paramount authority, and includes the particular

³ *Brook v. Badley*, L. R. 3 Ch. 672, 674, per Lord Cairns. A legacy payable out of the proceeds of land directed to be sold is an interest in land *within the statutes of mortmain*, and cannot, while it yet remains unpaid, be bequeathed by the legatee for charitable purposes. The decisions in some of the American states hold that the equitable conversion of partnership lands into personal property is not complete; that it is limited to the payment of partnership debts and to the settlement of the partnership affairs; and that it does not extend to the devolution of the estates of the individual partners: See *Foster's Appeal*, 74 Pa. St. 391, 397; 15 Am. Rep. 553; *Estate of McAvoy*, 12 Phila. 83.^c The doctrine is settled in England that such conversion is complete for all purposes, and embraces the devolution of the individual partners' estates, and extends to all persons claiming under, from, or against them as a firm or individually: *Forbes v. Steven*, L. R. 10 Eq. 178, 188, 189; *Att'y-Gen. v. Brunning*, 8 H. L. Cas. 243, 265; *Darby v. Darby*, 3 Drew. 495, 503; *Myers v. Perigal*, 2 De Gex, M. & G. 599; in which *Matson v. Swift*, 8 Beav. 368, and *Custance v. Bradshaw*, 4 Hare, 315, are explained or overruled.

Oreg. 173, 187, 18 Pac. 449. In *Taylor v. Crook*, 136 Ala. 354, 34 South. 905, it was held that a conversion of real estate, authorized by a will for purposes of division, does not make it personalty, so far as concerns its liability for debts of the estate. See, in general, *James v. Hanks*, 202 Ill. 114, 66 N. E. 1034 (conversion directed by will for purpose of paying legacies does not cause the realty to be regarded as personalty for benefit of heir at law); *Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350 (doctrine is inapplicable to proceeding in county court to recover inheritance

tax); *Baptist Female Univ. v. Borden*, 132 N. C. 476, 44 S. E. 47, 1007 (conversion for division does not change the character of the property with respect to its liability for debts and legacies). It has been said that the doctrine operates only for certain purposes. The remedy or the mode of actual conversion from one species of property into the other is not affected: *McElroy v. McElroy*, 110 Tenn. 137, 73 S. W. 105.

(c) *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Fairchild v. Fairchild*, 64 N. Y. 471; *Greenwood v. Marvin*, 111 N. Y. 423, 436, 19 N. E. 228.

instances of compulsory purchases and taking of land by railway companies, and others possessing such statutory powers, and sales of land by order of court for the purpose of settling the estates of infants and lunatics, or of partition, or of paying debts, and the like.^a In this aspect of the doctrine, the question to be examined is the exact converse of that which arises under the ordinary form of conversion, and which has been discussed in the foregoing paragraphs. The question then was, Is the property, although not actually converted, to be treated as converted? The question now presents itself, Is the property, although *de facto* converted, to be treated to any extent as *not* converted? The special rules which contain the answers to this question are placed in the footnote.¹ Where land is purchased or taken under compulsory powers conferred by statute, and the owner is *sui juris*, a conversion is effected; the purchase-money, although not yet actually paid, becomes to all intents personal property;

¹ Compulsory purchase or taking of land under statutory powers. The mere notice of an intention to take the land prescribed by statute, given to the owner in fee by a railway company or other persons having the compulsory power, does not, of itself, effect a conversion: *Haynes v. Haynes*, 1 Drew. & S. 426; *In re Battersea Park*, 9 Jur., N. S., 883. But as soon as the purchase price is agreed upon in a voluntary negotiation for a purchase with the owner *sui juris*, a conversion takes place, although the price is not yet paid; the owner's interest is personal estate; for him the land becomes money: *Ex parte Hawkins*, 13 Sim. 569; *In re Manchester etc. R'y*, 19 Beav. 365; *Regent's Canal Co. v. Ware*, 23 Beav. 575; *Righton v. Righton*, 36 L. J. Ch. 61; *In re Skeggs*, 2 De Gex, J. & S. 533. Where land has been taken, not by voluntary negotiation, but by the compulsory proceedings authorized by statute, and the money is paid into court, it continues to be real estate until it is taken out by some person having a right to elect to treat it as money,—that is, by some person *sui juris* who is an unfettered owner. If the owner is an infant or a lunatic, or if the land is subject to a settlement, the money necessarily retains its character as real estate: *In re Stewart*, 1 Smale & G. 32, 39; *In re Bagot*, 31 L. J. Ch. 772; *Dixie v. Wright*, 32 Beav. 662; *In re Harrop*, 3 Drew. 726; *Kelland v. Fulford*, L. R. 6 Ch. Div. 491; and such money will not pass by a bequest of personal property: *In re Skeggs*, 2 De Gex, J. & S. 533; see also, as to the effect of a statutory sale, *Pleasants's Appeal*, 77 Pa. St. 356; *Richards v. Att'y-Gen.*, 6 Moore P. C. C. 381.

(a) Quoted in *Hackett v. Moxley*, 68 Vt. 210, 34 Atl. 949.

but if the owner is an infant or a lunatic, or the land is in settlement, the purchase-money remains land; there is no conversion. Where land is sold by order of the court for any purpose, it is a fixed principle, upon which the court always proceeds, that the character of the property should be changed only so far as may be necessary to accomplish the particular purpose.² The court *may* control the acts of

² Sale of land by order of the court. Where land is thus sold, and there is any surplus of money after satisfying the purpose for which the sale was made, such surplus is always regarded and treated as real estate: *Cooke v. Dealey*, 22 Beav. 196; *Jermyn v. Preston*, 13 Sim. 356; but see *Steed v. Preece*, L. R. 18 Eq. 192, per Sir George Jessel.^b *Infants' estates*: In general, a court of equity will not direct a conversion of one kind of property belonging to an infant into another kind;^c *Ex parte Phillips*, 19 Ves. 118, 122. As to the proceeds of timber ordered to be cut on an infant's estate, see *Dyer v. Dyer*, 34 Beav. 504; *Field v. Brown*, 27 Beav. 90; if the infant is owner in fee, the proceeds are realty; if he is a life tenant, they are personalty. *Lunatics' estates*: The court will not, without sufficient cause, change the nature of a lunatic's property: *Oxenden v. Lord Compton*, 2 Ves. 69, 72; *In re Badcock*, 4 Mylne & C. 440. If lunatics' lands are sold by order of court, the surplus of the money always remains real estate: *In re Wharton*, 5 De Gex, M. & G. 33; *In re Sloper*, cited 22 Beav. 198; *In re Barker*, L. R. 17 Ch. Div. 241; and see *Smith v. Bayright*, 34 N. J. Eq. 424. The same rule prevails in sales ordered for purpose of *partition*:^d *Foster v. Foster*, L. R. 1 Ch. Div. 588;

(b) There has been some fluctuation of opinion in the English courts on the matters—not of much practical importance to the American lawyer—embraced within the scope of this note. The tendency of recent decisions appears to be to treat the actual conversion effected by judicial sale of the infant's or lunatic's lands as a conversion for all purposes. See *Hyett v. Mekin*, L. R. 25 Ch. Div. 735, holding that an absolute order of sale made within the jurisdiction of the court in an administration suit operates as a conversion from the date of the order, and referring to *Arnold v. Dixon*, L. R. 19 Eq. 113, and *Wallace v. Greenwood*, L. R. 16 Ch. Div. 365; *Hartley v. Pendarves*, [1901] 2 Ch. 498, a case of sale by order of court of timber grow-

ing on the land of a lunatic; *per Cozens-Hardy, J.*: "All the consequences of conversion must follow, and there is no equity as between the heir and legal personal representative of the owner in fee," approving *Steed v. Preece*, L. R. 18 Eq. 192, *supra*, *Hyett v. Mekin*, 25 Ch. Div. 735, *supra*, and *Dyer v. Dyer*, 34 Beav. 504, *supra*, and disapproving *Field v. Brown*, 27 Beav. 90, *supra*, and *Cooke v. Dealey*, 22 Beav. 196, *supra*. As to charging expenses of repairs and improvements to the realty or the personalty, see *In re Gist*, [1904] 1 Ch. 398.

(c) *In re Norton*, [1900] 1 Ch. 101.

(d) *In re Chapin*, 148 Mass. 588, 20 N. E. 195, 2 L. R. A. 768; *Wentz's Appeal*, 126 Pa. St. 541, 17 Atl. 875; *Turner v. Dawson*, 80 Va. 841.

trustees and direct a conversion, where there is only a mere *power* of sale in the instrument.³

§ 1168. **Conversion as between Life Tenant and Remainderman.**—Many important questions arise in the English courts as between the conflicting rights of life tenants and remaindermen, and some of the cases involving them are collected in the foot-note.¹ When the testator has directed

Mildmay v. Quicke, L. R. 6 Ch. Div. 553; *Mordaunt v. Benwell*, L. R. 19 Ch. Div. 302.

³ Where there is thus a mere *power* of sale, the court will generally order a conversion of the property, if the intention of the testator will be the better effectuated thereby: *Greenway v. Greenway*, 1 Giff. 131; and the greater facility of making a division of the property, where many persons are interested, is an important circumstance in determining the action of the court: *Mower v. Orr*, 7 Hare, 473; *Burrell v. Baskersfield*, 11 Beav. 525; but where a discretion is given to the trustees, the court will not interfere to control its exercise: *Shipperdson v. Tower*, 1 Younge & C. Ch. 441; *Walter v. Maunde*, 19 Ves. 424; *Lucas v. Brandreth*, 28 Beav. 273; *Yates v. Yates*, 28 Beav. 637; *In re Beaumont's Trusts*, 32 Beav. 191.

¹ *Where the testator directs a conversion of his property*,—that is, that it be sold and the proceeds invested in a certain manner,—the questions arise, whether the life tenant is entitled to income, and if so, to what income, before the conversion is effected and the investments made. If any directions are contained in the will, they must, of course, be followed: *Sparling v. Parker*, 9 Beav. 524. In some cases, where the conversion cannot be made in a year after the testator's death, the life tenant is entitled to income as from that time: See *Sitwell v. Barnard*, 6 Ves. 520; *Kilvington v. Gray*, 2 Sim. & St. 396; *Tucker v. Boswell*, 5 Beav. 607. In some cases he is entitled to income from the testator's death: See *Augerstein v. Martin*, Turn. & R. 232; *Hewitt v. Morris*, Turn. & R. 241; *Caldecott v. Caldecott*, 1 Younge & C. Ch. 312; *Allhusen v. Whittell*, L. R. 4 Eq. 295; *Brown v. Gellatly*, L. R. 2 Ch. 751; *La Terriere v. Bulmer*, 2 Sim. 18; *Wilday v. Sandys*, L. R. 7 Eq. 455. Under certain circumstances the property is *considered as converted* at the end of a year from testator's death: See *Douglas v. Congreve*, 1 Keen, 410; *Dimes v. Scott*, 4 Russ. 195; *Morgan v. Morgan*, 14 Beav. 72, 77; *Taylor v. Clark*, 1 Hare, 161; *Macpherson v. Macpherson*, 1 Macq. 243; *Brown v. Gellatly*, *supra*; *Robinson v. Robinson*, 1 De Gex, M. & G. 247. If the property cannot be converted except at a loss, a value will be set on it, and the life tenant will receive interest on such value:^a See *Gibson v. Bott*, 7 Ves. 89; *Meyer v. Simonsen*, 5 De Gex & S. 723; *Brown v. Gellatly*, *supra*.

Where the testator does not direct any such conversion, or sale and investment of his property.—Here the principal questions are, whether a conversion should be made,—that is, whether the property should be sold and the proceeds invested, and the interest thereon paid to the life tenant,—or whether

(a) As to rate of interest, see *In re Woods*, [1904] 2 Ch. 4.

the property to be converted—that is, to be sold and the proceeds invested—the questions generally are as to the life tenant's right to the income. When the testator has not directed such a conversion, the principal questions are as to whether a sale should be made and the proceeds in-

the life tenant is to enjoy the property *in specie*. Where the personal property is given to different legatees in succession, it is generally to be converted into money, and the proceeds invested, and the interest thereon paid to the tenant or tenants for life:^b See *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Thornton v. Ellis*, 15 Beav. 193; *Mills v. Mills*, 7 Sim. 501; *Sutherland v. Cooke*, 1 Coll. C. C. 498; *Johnson v. Johnson*, 2 Coll. C. C. 441; *Blann v. Bell*, 2 De Gex, M. & G. 775; *Hood v. Clapham*, 19 Beav. 90. Certain provisions or deviations in the will are held to show an intention that the life tenant is to enjoy the property *in specie*, and that it should not therefore be converted:^c See *Crowe v. Crisford*, 17 Beav. 507; *Hind v. Selby*, 22 Beav. 373; *Cafe v. Bent*, 5 Hare, 24, 36; *Collins v. Collins*, 2 Mylne & K. 703; *Pickering v. Pickering*, 4 Mylne & C. 289; *Harris v. Poyner*, 1 Drew. 174; *Hubbard v. Young*, 10 Beav. 203; *Hinves v. Hinves*, 3 Hare, 609; *Ellis v. Eden*, 23 Beav. 543; *Holgate v. Jennings*, 24 Beav. 623; *Simpson v. Lester*, 4 Jur., N. S., 1269; *Burton v. Mount*, 2 De Gex & S. 383; *Yates v. Yates*, 28 Beav. 637; *Alcock v. Sloper*, 2 Mylne & K. 699; *Daniel v. Warren*, 2 Younge & C. Ch. 290; *Skirving v. Williams*, 24 Beav. 275; *Rowe v. Rowe*, 29 Beav. 276; *Green v. Britten*, 1 De Gex, J. & S. 649. When specific legacies are given to one for life, and then to another absolutely, the life tenant is entitled to the income *in specie*: *Vincent v. Newcombe*, 1 Younge, 599; and see *Phillips v. Sarjent*, 7 Hare, 33; *Harvey v. Harvey*, 5 Beav. 134; *In re Beaufoy*, 1 Smale & G. 20. If property is taken by a railway company, and the money is paid into court and invested, the life tenant is entitled to the same benefit as if the property had not been taken:^d *Jeffreys v. Conner*, 28 Beav. 328; *In re Phillips*, L. R. 6 Eq. 250; *In re Pfleger*, L. R. 6 Eq. 426; *In re Chamberlain*, cited L. R. 6 Eq. 427; *Littlewood v. Pattison*, 10 Jur., N. S., 875.

(b) See *In re Game*, [1897] 1 Ch. 881. It has been held that the rule in *Howe v. Earl of Dartmouth* does not apply in the case of a settlement by deed, and that it apparently only applies when there is a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession: *In re Van Straubenzee*, [1901] 2 Ch. 779.

(c) *Corle v. Monkhouse*, 47 N. J. Eq. 73, 20 Atl. 367. As to the exceptions, see the following cases discussed in *In re Game*, [1897] 1 Ch.

881:—*Macdonald v. Irvine*, 8 Ch. Div. 101, 124; *Craig v. Wheeler*, 29 Law J. (Ch.) 374, 376; *Wearing v. Wearing*, 23 Beav. 99; *Vachell v. Roberts*, 32 Beav. 140, 142; *Goode-nough v. Tremamondo*, 2 Beav. 512.

(d) By analogy, it has been held that where a building held by a life tenant is accidentally destroyed by fire, the proceeds of the insurance are to be treated as realty: *Green v. Green*, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846.

vested, and the interest thereon paid to the life tenant, or whether he is entitled to enjoy the property *in specie* without any conversion.

SECTION II.

RESULTING TRUST UPON A FAILURE OF THE PURPOSES OF THE CONVERSION.

ANALYSIS.

- § 1169. The questions stated; object and extent of the doctrine.
- § 1170. A total failure of the purpose.
- § 1171. Partial failure; wills directing conversion of land into money.
- § 1172. The same; wills directing the conversion of money into land.
- § 1173. The same; deeds directing the conversion of land into money.
- § 1174. The same; deeds directing the conversion of money into land.

§ 1169. The Questions Stated — Object and Extent of the Doctrine.— The purposes for which a conversion is directed might be unlawful, or circumstances might arise after the execution of the instrument which rendered the conversion unnecessary. In other words, the purposes of a conversion might fail totally or partially, either before the instrument had come into operation, or after the conversion had been *de facto* made by a sale of the land or by a laying out of the money in land. The questions would then arise, To whom will the property—the entire amount in one case, the portion undisposed of in the other—then result,—the author of the trust, his heir, or his personal representatives? and in what form will it thus result,—in its original or in its converted form, as real or as personal estate?¹

¹ All the fundamental questions involved in this discussion may be exhibited by a very simple case. A will devises all of the testator's real estate to trustees, upon trust, to sell the same and divide the proceeds equally between A and B, who are strangers, so that a lapse would be possible. If both A and B should die during the testator's lifetime, the object of the conversion would totally fail; there would be a lapse; no necessity would exist for converting the land into money by a sale; the land would remain entirely undisposed of; and by the well-settled doctrine of resulting trusts, it would

The case of a total failure is simple; that of a partial failure presents questions of greater difficulty; and in discussing this branch of the subject it will be expedient to consider separately cases arising under wills, and those arising under deeds of settlement and other instruments *inter vivos*.

§ 1170. **A Total Failure.**—Where a conversion of land into money or of money into land is directed, either by a will or by an instrument *inter vivos*, and the purposes and objects for which such conversion was intended totally fail before the directions for a conversion are carried into effect, the property thus directed to be converted will remain in its original condition; it will result in its original unchanged form to the heirs or to the personal representatives of the testator, and to the settlor, or to his heirs or his personal representatives, as the case may be. If land is to be sold and converted into money, the property results as real estate to the heirs; if money is to be laid out in land, the fund results as personal estate to the personal representatives. This rule is universal.¹

result to the testator's heir. It should be observed, however, that under modern statutes it *might* result to the residuary devisee. If one only should die, say A, the purpose of the conversion would only partially fail; there would still remain the necessity of converting the whole land into money by a sale so as to pay to B his share of the proceeds, and the other half only would remain undisposed of, but in the actual condition of money. The question must arise, To what extent is the trust for a conversion still in force? Who is to benefit by the lapse,—the heir or the personal representatives of the testator? And in what character will either of them take the undisposed of surplus,—as real or personal estate? If any case, however complicated, is stripped of its incidental and unessential circumstances, the really important questions involved will be reduced to these three. From the great number, variety, and complication of trusts in wills and settlements so common in England, many subordinate questions have arisen before the English courts, generally depending upon the particular provisions of the instrument; and the decisions involving such questions are numerous. As these questions do not arise, and many of them could not arise, before our American tribunals, any detailed discussion of them is plainly unnecessary, and I shall simply refer to the more important cases of this kind in the foot-notes.

¹ Ackroyd v. Smithson, 1 Brown Ch. 503; 1 Lead. Cas. Eq., 4th Am. ed., 1171, 1181, 1197; Clarke v. Franklin, 4 Kay & J. 257; Smith v. Claxton, 4 Madd. 484, 492; Ripley v. Waterworth, 7 Ves. 425, 435; Chitty v. Parker, 2 Ves. 271; Wilson v. Major, 11 Ves. 205; Edwards v. Tuck, 23 Beav. 268;

§ 1171. **Partial Failure—Wills Directing Conversion of Land into Money.**—Where the purpose for converting land into money directed by a will wholly fails, it has been shown that the land results to the heir. Where the purpose only partially fails, the conversion must still be made by selling the land, in order to satisfy the purposes which remain effective. With respect to the surplus which is left after satisfying those purposes, the intention was shown by the testator to deprive the heir of it *for a particular object only*, and that object having failed, there is no reason which can be inferred from this disposition why it should not belong to the heir. In the absence of a contrary intent appearing from other provisions of the will, the undisposed of portion or surplus will therefore result to the heir. Since the conversion has, however, actually taken place,

McCarty v. Deming, 4 Lans. 440, 443; Giraud v. Giraud, 58 How. Pr. 175; Slocum v. Slocum, 4 Edw. Ch. 613; Davis's Appeal, 83 Pa. St. 348; Morrow v. Brenizer, 2 Rawle, 184; Commonwealth v. Martin's Ex'rs, 5 Munf. 117; Smith v. McCrary, 3 Ired. Eq. 204; but see Evans's Appeal, 63 Pa. St. 183. The general subject of a resulting trust upon a total or a partial failure of the purposes of the conversion is also discussed with more or less fullness in the following American cases:^a Craig v. Leslie, 3 Wheat. 563, 582; Holland v. Cruft, 3 Gray, 162, 180; Wood v. Cone, 7 Paige, 471, 476; Wood v. Keyes, 8 Paige, 365, 369; Hawley v. James, 5 Paige, 318, 323, 486; Arnold v. Gilbert, 3 Sand. Ch. 531, 556; Arnold v. Gilbert, 5 Barb. 190, 195; Bogert v. Hertell, 4 Hill, 492, 495, 500; Wright v. Trustees etc., Hoff. Ch. 202, 205, 219; Marsh v. Wheeler, 2 Edw. Ch. 156, 160; Pennell's Appeal, 20 Pa. St. 515; Nagle's Appeal, 13 Pa. St. 260-264; Burr v. Sim, 1 Whart. 252, 262; 29 Am. Dec. 48; Pratt v. Taliaferro, 3 Leigh, 419, 423; Lindsay v. Pleasants, 4 Ired. Eq. 320, 323; Proctor v. Ferebee, 1 Ired. Eq. 143, 146; 36 Am. Dec. 34; Newby v. Skinner, 1 Dev. & B. Eq. 488; 31 Am. Dec. 397; North v. Valk, Dud. Eq. 212, 216. It should be remembered that modern statutes have quite generally placed the residuary devisee in the same position as a residuary legatee; and therefore, in case of a will directing land to be sold, the land might result to the residuary devisee instead of the heir.

(^a) Rizer v. Perry, 58 Md. 112; Roy v. Monroe, 47 N. J. Eq. 356, 20 Atl. 481; Parker v. Linden, 113 N. Y. 28, 20 N. E. 858, 861; Read v. Williams, 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748; Sweeney v. Warren, 127 N. Y. 426, 28 N. E.

413, 24 Am. St. Rep. 468; Rudy's Estate, 185 Pa. St. 359, 64 Am. St. Rep. 654, 39 Atl. 968; Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 65 Am. St. Rep. 106, 40 L. R. A. 724.

this surplus results to the heir as personal property, and not as real estate. The rule may be thus formulated: Wherever it is necessary to sell the land for purposes directed by a will which are effective, and the proceeds of the sale are only partially disposed of for such purposes, unless the will in some other provision shows a contrary intention, then the remaining portion or surplus results to the heir of the testator as money, and in case of *his* death, will go to his personal representatives even though the sale did not take place until his death.¹

¹ The main branch of this rule, that the surplus results to the heir, was settled by the great case of *Ackroyd v. Smithson*, 1 Brown Ch. 503; 1 Lead. Cas. Eq., 4th Am. ed., 1171, 1181, 1197. The other branch, as to the form in which it results, was first decided by *Smith v. Claxton*, 4 Madd. 484; see also *Wright v. Wright*, 16 Ves. 188; *Jessopp v. Watson*, 1 Mylne & K. 665; *Hatfield v. Pryme*, 2 Coll. C. C. 204; *Collins v. Wakeman*, 2 Ves. 683; *Watson v. Hayes*, 5 Mylne & C. 125; *Jones v. Mitchell*, 1 Sim. & St. 290, 294; *Buchanan v. Harrison*, 1 Johns. & H. 662; *Fitch v. Weher*, 6 Hare, 145; *Taylor v. Taylor*, 3 De Gex, M. & G. 190; *Wall v. Colshead*, 2 De Gex & J. 683; *Spencer v. Wilson*, L. R. 16 Eq. 501; *McCarty v. Deming*, 4 Lans. 440, 442; *Wood v. Cone*, 7 Paige, 471; *Wright v. Trustees etc.*, Hoff. Ch. 202; *Lindsay v. Pleasants*, 4 Ired. Eq. 320; *Newhy v. Skinner*, 1 Dev. & B. Eq. 488; 31 Am. Dec. 397; *North v. Valk*, Dud. Eq. 212; *Craig v. Leslie*, 3 Wheat. 563; 4 L. ed. 460.

In *Steed v. Preece*, L. R. 18 Eq. 192, *Jessel, M. R.*, held that this rule did not apply where a sale of land had been made by order of court, but the surplus of the proceeds went to the personal representatives as personal estate. This rule is, however, directly opposed to other authorities, and it seems best to preserve the symmetry of the doctrine without arbitrary exceptions.

The English decisions are very strong in favor of the heir. The foregoing cases show that nothing less than an express *gift* of the undisposed surplus — not even a declaration that nothing shall result, or that the heir shall not take — will prevent it from resulting under the rule stated in the text. Even when by the directions of the will the proceeds of the realty and of the personal property are blended together into one common fund, this does not render the entire mass personal property so as to change the mode of devolution. The two kinds of proceeds are still separated, and the rule of the text is applied to that portion of the fund which comes from the sale of the land; it results to the heir: See *Ackroyd v. Smithson*, *supra*; *Taylor v. Taylor*, *supra*; *Jessopp v. Watson*, 1 Mylne & K. 665; *Cruse v. Barley*, 3 P. Wms. 20, 22, note by Mr. Cox; *Edwards v. Tuck*, 23 Beav. 268; *Wall v. Colshead*, 2 De Gex & J. 683; *Bective v. Hodgson*, 10 H. L. Cas. 656; *Amphlett v. Parke*, 2 Russ. & M. 221; *Robinson v. Governors of London Hospital*, 10 Hare, 19; *Barrs v. Fewkes*, 2 Hem. & M. 60; 11 Jur., N. S., 669;

§ 1172. **The Same. Wills Directing the Conversion of Money into Land.**—Where a will directs that money shall be laid out in land, and the purpose of the conversion wholly fails, the fund, as has been shown, results to the personal representatives of the testator in its original form. Where the failure of the purpose is but partial, the same rule controls the devolution. It is settled, by analogy with the foregoing case of real estate trusts, that the undisposed of portion or surplus of the fund results to the personal representatives of the testator for his next of kin or residuary legatee, as the case may be; and that it thus devolves in its original

Spencer v. Wilson, L. R. 16 Eq. 501. But the tendency of some at least of the American cases is not so strongly in favor of the heir; an intention on the part of the testator to effect a complete conversion into personalty as between the heir and the personal representatives, next of kin, or residuary legatees is more readily and easily inferred. Thus it has been held that a direction to blend the proceeds of the realty and personalty into one common fund for the purposes of the will, even though not in pursuance of the English view "for all intents and purposes," will render the conversion of the whole complete, and will change the devolution of the undisposed surplus, when some of the purposes of the conversion failed: See especially Craig v. Leslie, 3 Wheat. 563; 4 L. ed. 460; also Morrow v. Brenizer, 2 Rawle, 185; Burr v. Sim, 1 Whart. 252; 29 Am. Dec. 48.^a Even in England the *residuary* bequest may interfere with the operation of the general rule, and may cause the undisposed of surplus to devolve upon the residuary legatee instead of the heir, when there is a partial failure of the purpose of the conversion. Where the land has been directed to be sold, and out of the proceeds thereof and the personal estate combined debts and legacies are to be paid, and the whole of the surplus consisting of the proceeds of the realty and of the personalty blended is given in the *residuary* bequest as personal property, then the proceeds of the land thus bequeathed will be personal estate, and will go to the residuary legatee, and not to the heir: See Mallabar v. Mallabar, Cas. t. Talb. 78; Hutcheson v. Hammond, 3 Brown Ch. 128, 148; Durour v. Motteux, 1 Ves. Sr. 320; 3 P. Wms. 22, note 1; Kennell v. Abbott, 4 Ves. 802; Byam v. Munton, 1 Russ. & M. 503; Green v. Jackson, 2 Russ. & M. 238; Wildes v. Davies, 1 Smale & G. 475, 482; Salt v. Chattaway, 3 Beav. 576, per Lord Langdale.

It is for this reason that I have inserted the modification "in the absence of a contrary intention shown by the testator" in formulating the general rule. The rule is ordinarily stated by text-writers in a more general manner, but such a limitation seems to be necessary to its perfect accuracy.

(^a) See, also, Hutchings v. Davis, 68 Ohio 160, 67 N. E. 251, citing the text.

unconverted form as personal property; for it could go to the executor as assets in no other form.^{1a}

§ 1173. **The Same. Deeds Directing a Conversion of Land into Money.**—Where a deed, settlement, or other instrument *inter vivos* directs land to be sold and converted into money, and the purposes thereof wholly fail, then, as in case of a will, the land results unconverted as real estate to the settlor or to his heir.¹ Where the failure of the purpose is only partial, the analogy to the case of a will is not perfect; the difference arises from the time at which a conversion takes place. According to the well-settled rule, the equitable conversion takes place at the date of the instrument, although the actual sale is postponed. The author of the instrument takes the undisposed of surplus converted in his lifetime as personal property; it forms a part of his general personal estate, and must devolve as such.²

§ 1174. **The Same. Deeds Directing the Conversion of Money into Land.**—If a deed directs money to be laid out in land, and the purposes of the conversion totally fail, clearly the

§ 1172, ¹Cogan v. Stephens, 1 Beav. 482, note; 5 L. J., N. S. Ch., 17; Reynolds v. Godlee, Johns. 536, 582; Hereford v. Ravenhill, 1 Beav. 481; 5 Beav. 51; Hawley v. James, 5 Paige, 318.

Where personal property is bequeathed upon trust for conversion into land to be held upon trusts which ultimately fail, it has recently been held that land purchased before such failure goes to the next of kin *as real estate*, and passes as such to the real representatives — heirs or devisees — of such next of kin, overruling Reynolds v. Godlee, *supra*, upon this point: Curteis v. Wormald, L. R. 10 Ch. Div. 172.

§ 1173, ¹See *ante*, § 1171.

§ 1173, ²Clarke v. Franklin, 4 Kay & J. 257; Hewitt v. Wright, 1 Brown Ch. 86; In re Newberry's Trusts, L. R. 5 Ch. Div. 746; and see Van v. Barnett, 19 Ves. 102. In Clarke v. Franklin, there was a conveyance by deed upon trust, first for the settlor during his life, then upon trusts, first to sell, then out of the proceeds to pay certain sums, which were valid trusts, and all the remaining trusts were for charity and invalid. The effect of the deed was, that immediately upon its execution the whole property was impressed with a valid trust for conversion; in other words, an equitable conversion of the land into personalty at once took place, and at the same time a result-

(a) The text is cited and followed 8 S. E. 241, 17 Am. St. Rep. 78, 1 in Phillips v. Ferguson, 85 Va. 509, L. R. A. 837.

fund results to the author of the instrument or to his estate as personal property. If the purposes partially fail, the trust for conversion must still be carried out, and the portion then undisposed of will result to the author or his heir as land.¹

SECTION III.

RECONVERSION.

ANALYSIS.

- § 1175. Definition: *Rationale* of the doctrine.
- § 1176. Who may elect to have a reconversion.
- § 1177. Mode of election.
- § 1178. Double conversion.

§ 1175. Definition — *Rationale of the Doctrine.*— By reconversion is meant “that notional or imaginary process by which a prior *constructive* conversion is annulled and taken away, and the *constructively* converted property is restored, in contemplation of a court of equity, to its original actual quality.”¹ Thus real estate is devised upon trust to sell and to pay the proceeds to A. By virtue of this absolute

ing trust arose in favor of the settlor as to that portion of this personalty which was invalidly given to charity.

§ 1174, 1 *Lechmere v. Lechmere*, Cas. t. Talb. 80; *Pulteney v. Earl of Darlington*, 1 Brown Ch. 223. As an illustration, a man, by marriage settlement, covenants to pay a certain sum to trustees, to be laid out in land, to be settled to the use of himself for life, remainder to the use of his wife for life, remainder to the children of the marriage, remainder to his own right heirs. If his wife should die in his lifetime without issue, all the uses in the land, except for the benefit of the settlor himself, would be gone. The purposes of the trust for conversion would have utterly failed. There would be no obligation on the settlor to pay it out, and no room for the application of the maxim that equity considers that as done which ought to be done. In the language used by English courts, the money would be “at home in the settlor’s pocket.” If, on the other hand, the wife should survive the settlor, no matter for how short a time, but without issue, then the trust would not have wholly failed; there would be an obligation to pay the money to be laid out in land; the maxim would apply, and equity would, at the suit of the settlor’s heir, compel the money to be laid out in land for him or to be paid over to him.

§ 1175, 1 Haynes’s *Outlines of Equity*, 367.

direction, the land is, in equity, converted into personal estate; it belongs to A as personalty. It may, however, be made A's property as real estate; that is, A may prefer to receive it in its original unconverted form as land. In that event it is said to be reconverted, and the process is called reconversion. The *rationale* of this doctrine is clearly found in the right which every absolute owner or donee has to dispense with or forbid the execution of any trust in the performance of which he alone is interested. Reconversion is the result of an election expressly made or inferred by a court of equity. It depends wholly upon the right of election held by the person entitled to the property to choose whether he will take the property in its converted condition or in its original and unconverted form. The whole discussion consists of answers to the questions, Who may thus elect? and how may such an election be made?^{2 a}

§ 1176. Who may Elect to have a Reconversion.—As to personal capacities, the party, in order to elect, must be *sui juris*, or at least must not be subject to any incapacity which prevents him from effectively dealing with his own

² Some writers have described reconversion as being of two kinds: 1. By voluntary act of the party,—an election; 2. By act of law. This is an erroneous conception. The so-called reconversion by act of the law is simply an instance where, under special circumstances, the party's election is inferred or presumed. It depends upon the notion of his voluntary election as much as any other instance. The subject of reconversion is one of great importance and interest in England; the cases involving it are numerous, and many of the questions are difficult. Although the doctrine *theoretically* belongs to our jurisprudence, it can hardly be said to have any *practical* existence in the law of many of the states; it has very rarely come before any of the American courts, and then in its simplest form. I shall attempt, therefore, to give no more than a bare outline of the doctrine, but shall cite cases sufficient in number and importance to enable the reader to pursue a more thorough and detailed examination.

(a) The right to elect to receive the property in its original form exists where the trustee or executor has a mere power to convert, as well as where the direction to convert is imperative: *Howell v. Tompkins*, 42 N. J. Eq. 305, 11 Atl. 333. For

American authorities on the general doctrine of reconversion, see *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118, citing this paragraph of the text and many cases. The text is also cited in *Carr v. Branch*, 85 Va. 597, 8 S.

property.¹ With regard to the nature and quantity of interest which must be owned in order that the party may effect a reconversion, if he is entitled to the whole *absolute interest in possession*, either to the land to be sold for money, or to the money to be laid out in land, then he may, of course, elect, since his election could affect no other person's rights. If he owns, not the whole subject-matter, but only an undivided share or a partial interest, the general rule is settled that he may elect, and can only elect, when such election could not by possibility injuriously affect

¹ A person absolutely entitled and *sui juris*: *Benson v. Benson*, 1 P. Wms. 130; *Sisson v. Giles*, 32 L. J., N. S., (Ch.) 606; 3 De Gex, J. & S. 614; *Prentice v. Janssen*, 79 N. Y. 478.

Infants cannot elect, but the court may, for their advantage:^a See *Seeley v. Jago*, 1 P. Wms. 389; *Carr v. Ellison*, 2 Brown Ch. 56; *Van v. Barnett*, 19 Ves. 102; *Robinson v. Robinson*, 19 Beav. 494; *In re Harrop*, 3 Drew. 726, 734.

Lunatics cannot: *Ashby v. Palmer*, 1 Mer. 296; *In re Wharton*, 5 De Gex, M. & G. 33; *In re Barker*, L. R. 17 Ch. Div. 241.

Married women.—Under the former law they could only elect by means of a fine, or by a consent in open court: *Oldham v. Hughes*, 2 Atk. 452, 453; *Binford v. Bawden*, 1 Ves. 512; 2 Ves. 38; *Frank v. Frank*, 3 Mylne & C. 171; *May v. Roper*, 4 Sim. 360; *Standerling v. Hall*, L. R. 11 Ch. Div. 652; *Wallace v. Greenwood*, L. R. 16 Ch. Div. 362. Under the statute 3 & 4 Wm. IV., c. 74, sec. 77, a wife may elect by means of a deed in which her husband joins, and which is properly acknowledged by her: *Briggs v. Chamberlain*, 11 Hare, 69; *Bowyer v. Woodman*, L. R. 3 Eq. 313; *Tuer v. Turner*, 20 Beav.

E. 476; and quoted, in *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160.

The recent case of *In re Appleby*, [1903] 1 Ch. 565, is of some importance. It is there said that the right of election is "only a consequence from the doctrine of equity that the persons who take the proceeds of sale are regarded in equity as the beneficial owners." Another consequence of the doctrine is, that when the direction for sale is invalid, within the rule against perpetuities, but the beneficiaries are ascertainable, and it is evident that the trust for sale is a mere piece of

machinery for the purpose of division, the beneficiaries take the property as real estate independently of any election by them; following *Goodier v. Edmunds*, [1893] 3 Ch. 455; *In re Daverson*, [1893] 3 Ch. 421; *Goodier v. Johnson*, L. R. 18 Ch. Div. 441.

(^a) See *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; *Swann v. Garrett*, 71 Ga. 566 (election by the court on infant's behalf; but see strong dissenting opinion of Jackson, C. J.); *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

the rights and interests of those who are associated with him in the total ownership as co-owners, life tenants, remaindermen, reversioners, and the like.²

§ 1177. *Mode of Election.*— It being assumed that the party entitled to the property has the capacity to elect to receive it in its unconverted form, and thus to effect a re-conversion, the further question remains, how such election must or may be made. An express declaration of the intention in language is always sufficient, but is not necessary.¹ An election may be inferred from acts or writ-

560; *Forbes v. Adams*, 9 Sim. 462. A deed by husband and wife, not so acknowledged, or by either alone, would be insufficient: *Sisson v. Giles*, 32 L. J., N. S., Ch. 606; 3 De Gex, J. & S. 614; *Franks v. Bollans*, L. R. 3 Ch. 717. In this country a married woman can doubtless elect by means of any instrument sufficient to enable her to convey real estate.^b

² The general question whether such a partial owner may elect to reconvert must be answered somewhat differently when the subject-matter consists of land to be turned into money, and when it consists of money to be laid out in land. A *co-owner*: When the direction is to turn land into money, one co-owner *cannot elect to keep his share in land*. The others are entitled to have their share sold so as to receive the money, and plainly the sale of an undivided share of the land would produce a comparatively less amount than would result from a sale of the whole: *Holloway v. Radcliffe*, 23 Beav. 163; *Deeth v. Hale*, 2 Molloy, 317; *Fletcher v. Ashburner*, 1 Brown Ch. 497, 500.^c On the contrary, when the direction is to lay out money in land for co-owners, one co-owner can elect to take his share in money; for this would plainly produce no injury to the others: *Seeley v. Jago*, 1 P. Wms. 389; and see *Elliott v. Fisher*, 12 Sim. 505. *Remaindermen* and other holders of future interests: The earlier cases seem to admit or assume that a remainderman may elect, but not so as to affect the interests of the owners of the prior estates. The recent decisions tend to a denial of any power in the remainderman to make an *absolute* election as against the life tenants and other prior owners. All the decisions admit that he may make an election binding upon his own real and personal representatives, whether the property shall devolve to one or the other of them as real or as personal estate: *Triquet v. Thornton*, 13 Ves. 345; *Gillies v. Longlands*, 4 De Gex & S. 372, 379; *Sisson v. Giles*, 32 L. J., N. S., Ch. 606; 3 De Gex, J. & S. 614; *Meek v. Devenish*, L. R. 6 Ch. Div. 566; *Walrond v. Rosslyn*, L. R. 11 Ch. Div. 640; *Cookson v. Cookson*, 12 Clark & F. 121; *Prentice v. Janssen*, 79 N. Y. 478.

¹ *Pulteney v. Earl of Darlington*, 1 Brown Ch. 223, 236, 237; *Wheldale v.*

(b) See *Howell v. Tompkins*, 42 N. J. Eq. 305, 11 Atl. 333.

(c) See, also, *McWilliams v. Gough*, 116 Wis. 576, 93 N. W. 550, citing

the text and other authorities; *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118, and cases cited.

ings. Any act or writing which shows an unequivocal intention to possess the property in its actual state and condition will amount to a valid election.²

§ 1178. **Double Conversion.**—Somewhat similar in its effects to a reconversion, but entirely different in its operation, is a double conversion. The one, as has been shown, operates in disregard of the direction in the will or deed; the other, in conformity with that direction, which it carries into effect. A double conversion takes place when land is directed to be sold and converted into money, and

Partridge, 8 Ves. 226, 236; Van v. Barnett, 19 Ves. 102, 109; Bradish v. Gee, Amb. 229.

² The intention shown by the act need not be *to reconvert*; an intention *to take the property in its actual condition* is enough: Harcourt v. Seymour, 2 Sim., N. S., 12, 46; Cookson v. Cookson, 12 Clark & F. 121, 146; Biddulph v. Biddulph, 12 Ves. 161 (by a will); Prentice v. Janssen, 79 N. Y. 478; Beatty v. Byers, 18 Pa. St. 105.^a

Particular acts, where land was directed to be sold, etc.: Entry on the land and receiving rents and profits: In re Gordon, L. R. 6 Ch. Div. 531; Kirkman v. Miles, 13 Ves. 338;^b Granting leases: Crabtree v. Bramble, 3 Atk. 680; Mutlow v. Bigg, L. R. 1 Ch. Div. 385. Retaining the land unsold a long time: Dixon v. Gayfere, 17 Beav. 433; Griesbach v. Fremantle, 17 Beav. 314; but see Kirkman v. Miles, *supra*.^c Acts showing that the trust is at an end: Davies v. Ashford, 15 Sim. 42; Sharp v. St. Sauveur, L. R. 7 Ch. 343; In re Davidson, L. R. 11 Ch. Div. 341. Money directed to be laid out in land; actually receiving the money or securities, and other similar acts: Cookson v. Cookson, 12 Clark & F. 121, 147; Harcourt v. Seymour, 2 Sim., N. S., 12; Trafford v. Boehm, 3 Atk. 440; Rook v. Worth, 1 Ves. Sr. 460, 461; In re Pedder, 5 De Gex, M. & G. 890; Gillies v. Longlands, 4 De Gex & S. 372; Lingen v. Sowray, 1 P. Wms. 172, 176.

As a particular application of the same doctrine, where money directed or agreed to be laid out in land *comes into the hands of the person* who would be absolutely entitled to the land if purchased, it is then said to be "*at home*," and it will thenceforth be considered as money, in the absence of

(^a) That the intention to reconvert must be manifested by some unequivocal act, and must be pleaded and proved by the party relying thereon, see Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Mellen v. Mellen, 139 N. Y. 210, 34 N. E. 925; Wayne v. Fouts, 108 Tenn. 145, 65 S. W. 471.

(^b) For circumstances under which

continued receipt of rents is no evidence of such intention, see Foxwell v. Lewis, 30 Ch. Div. 656.

(^c) See, also, Atlee v. Bullard, 123 Iowa 274, 98 N. W. 889 (where all the persons interested were parties to a partition suit); Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160 (partition of the land by all the parties interested).

these proceeds are directed to be laid out again in land, the whole forming one continuous obligation. The property in such case is considered to be in that state in which it is ultimately to be converted,—that is, to be land.^{1a} Where real estate is directed to be sold and the proceeds invested in the purchase of other lands, the persons who would be interested in the latter if purchased take, in general, the same interests in the former until a sale is effected.²

evidence of a contrary intention, and will devolve as money. In other words, a presumption thence arises that the party intended to reconvert the property by electing to keep it as money, and thus to impress upon it the character of personal estate as between his real and his personal representatives. If, however, the money is in the hands of some third person, the absolute owner *must do some act* showing an election to take it as money. The foregoing rule constitutes the conversion “by act of the law” according to the nomenclature of some writers: See *Pulteney v. Earl of Darlington*, 1 Brown Ch. 223; *Wheldale v. Partridge*, 8 Ves. 226, 235; *Chichester v. Bickerstaff*, 2 Vern. 295; *In re Pedder*, 5 De Gex, M. & G. 890.

¹ *Pearson v. Lane*, 17 Ves. 101; *In re Pedder*, 5 De Gex, M. & G. 890; *White v. Howard*, 46 N. Y. 144.

² *Pearson v. Lane*, 17 Ves. 101.

(a) The text is cited to this effect N. W. 1031, 65 Am. St. Rep. 559, 38 in *Lane v. Eaton*, 69 Minn. 141, 71 L. R. A. 669.

CHAPTER FIFTH.

MORTGAGES OF LAND.

SECTION I.

THE ORIGINAL OR ENGLISH DOCTRINE.

ANALYSIS.

- § 1179. The common-law doctrine: Statute of 7 Geo. II., c. 20.
- § 1180. Origin and development of the equity jurisdiction; the “equity of redemption.”
- § 1181. The equitable theory.
- § 1182. The double system at law and in equity.
- § 1183. The legal and the equitable remedies.
- § 1184. Peculiarities of the English system.
- § 1185. Subsequent mortgages equitable, not legal.

§ 1179. The Common-law Doctrine.—In no other department has the equity jurisprudence as administered in this country departed so widely from that administered in England as in the department which is concerned with mortgages, and the respective rights, liabilities, and remedies of the mortgagor and the mortgagee. No correct notion can be obtained of equity as it now exists within the United States without an accurate and full appreciation of these differences.¹ At the common law the ordinary mortgage

¹ The subject of mortgages is so large, involving such a vast mass of detail, and presents so many differing aspects in the various states of our own country, that whole treatises are required for its adequate discussion. As in the case of trusts, I shall only attempt a statement of the principles and more general doctrines which constitute its framework; for the more special rules and practical applications the reader must be referred to more elaborate works. I desire at the outset to acknowledge the great assistance which I have received from Mr. Jones's most excellent treatise. I shall not dwell at large upon the ancient common-law dogmas, nor describe in detail the growth of the equity doctrines by which the effect of these dogmas was de-

was to all intents and purposes a conveyance of the legal estate. A mortgage in fee immediately vested the mortgagee with the legal title, subject, however, to be defeated by the mortgagor's performing the condition by paying the money upon the prescribed pay-day. If on that very day the mortgagor performed the condition by paying the money, he thereby put an end to the mortgagee's estate; the legal estate was re-vested in himself, and with it he had the right at once to re-enter upon the land, and to recover its possession by an appropriate action at law. But if the mortgagor for any reason suffered the pay-day to go by without paying or tendering the amount due, all his right was utterly and forever lost; the estate of the mortgagee, which had before been upon condition, now became absolute, with all the features and incidents of absolute legal ownership. This purely legal theory of the mortgage has continued in force in England to the present day, until the existing judicature act went into operation;² and during that interval it has constantly prevailed and been acted upon in the English courts of law without any modification except that introduced by a statute passed during the reign of George II.³ This statute has always been strictly con-

stroyed. It will suffice to state in general terms the two legal and equitable theories which exist simultaneously in England, and then to explain with some more fullness the modifications which have been made in the American states, and the resulting systems which form a part of our equity jurisprudence. It will be seen that little aid can be derived from the English decisions expounding the theory which prevails in that country, even in those very few states whose jurisprudence on this subject bears some resemblance to the English, while in a majority of the states the modern decisions of the English courts have no application whatever. It may be added that in all of the succeeding discussion I assume that the mortgage is in fee, which is almost invariably the fact in this country, although in England mortgages in fee are not, I believe, very common. Mortgages of long terms of years, so frequent in England, are virtually unknown with us.

² See this act, 36 & 37 Vict., c. 66, secs. 24, 25, *ante*, vol. 1, § 40, note 1. Since this act declares that the rules of equity shall prevail over those of the law when conflicting, in all the courts, it seems to follow as a necessary consequence that the purely legal theory of the mortgage can no longer be enforced.

³ 7 Geo. II., c. 20. This statute enacted that when an action at law was brought on the bond, or ejectment to recover possession of the land on the

strued, and held applicable only in the cases mentioned by its express terms, where a suit at law is brought by the mortgagee.⁴

§ 1180. **Origin and Development of the Equity Jurisdiction — The "Equity of Redemption."** — As this common-law doctrine, with all of its accompanying incidents, was exceedingly harsh in its operation, and often worked grievous wrong to mortgagors, equity interfered, and by degrees built up a distinct theory of mortgages which is one of the most magnificent triumphs of equity jurisprudence. The basis of this system was the fundamental maxim that equity looks at the intent, rather than the form, and the resulting general principle that equity could and should relieve against legal penalties and forfeitures, when the person in whose behalf they were enforced could be fairly and sufficiently compensated by an award of money.¹ As early as

mortgage, the mortgagor might, pending the suit, pay to the mortgagee the debt, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, might bring such money into court where the action was pending, which moneys so paid or brought into court were declared to be a satisfaction of the mortgage, and the court was required to compel, by an order of the court, the mortgagee to assign, surrender, or reconvey the mortgaged premises to the mortgagor. This statute has been substantially re-enacted in several of the American states: *New Jersey*: Nixon's Digest, 4th ed., 608; *Connecticut*: Gen. Stats. 1875, 471;^a *Virginia*: Code 1873, c. 131, sec. 21.^b

⁴ *Goodtitle v. Notitle*, 11 Moore, 491; *Doe v. Clifton*, 4 Ad. & E. 809; *Shields v. Lozeur*, 34 N. J. L. 496; 3 Am. Rep. 256; *Davis v. Teays*, 3 Gratt. 283; 1 Jones on Mortgages, sec. 9. In *Shields v. Lozeur*, *supra*, Depue, J., said: "In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction to enforce a redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a reconveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to by compelling a reconveyance on equitable terms."

¹ See *ante*, vol. 1, §§ 378, 381, 382, 433, where this maxim and its effects are explained.

(a) *Connecticut*.—Gen. Stats. 1888, sec. 1054.

(b) *Virginia*.—Code 1887, sec. 2742.

the reign of James I. the court of chancery had begun to relieve the mortgagor; and in the reign of Charles I. his right to redeem after a failure to perform the condition — that is, to come in and pay the debt and interest and recover the land after the pay-day — had become fully established and recognized as a part of the equity jurisprudence.² This equitable right of the mortgagor was termed his “equity of redemption,” which is simply an abbreviation of his “right to redeem in equity.” At first this right of the mortgagor was regarded as a mere *right* or thing in action; and at the close of the reign of Charles II. the equity of redemption was said to be a *mere right* to recover the land in equity after a failure to perform the condition, and not to be an *estate in the land*.³ This narrow view, however, was soon abandoned; the equitable theory was developed and became more consistent and complete, until, in 1737, Lord Hardwicke laid down the doctrine as already established, and which has since been regarded as the very central conception of the equitable theory that an equity of redemption is (in equity) an estate in the land which may be devised, granted, or entailed with remainders; that it cannot be considered as a mere right only, but such an estate whereof there may be a seisin; and that the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.⁴

² Emanuel College v. Evans, 1 Rep. in Ch. 18; 1 Jones on Mortgages, secs. 6, 7; Coote on Mortgages, 4th ed., 15.

³ Rosecarrick v. Barton, 1 Cas. in Ch. 217; 1 Jones on Mortgages, sec. 6. In this case, Lord Chief Justice Hale protested very vehemently against these encroachments of equity, and especially against any further extension of the right of redemption. He said, among other things: “By the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed.”

⁴ Casborne v. Scarfe, 1 Atk. 603. It was argued in this case that where a wife was the mortgagor, her equity of redemption was not an estate in the land so that her husband could be entitled to curtesy therein; that she was not seised, since the legal estate was vested in the mortgagee, but she only

§ 1181. *The Equitable Theory.*^a—While the mortgagee is still regarded at law as vested with the legal title followed by all of its incidents, the following general theory is established as a part of the equity jurisprudence. The mortgagor, both after and before a breach of the condition, is regarded as the real owner of the land subject to the lien of the mortgage, and liable to have all his estate, interest, and right finally cut off and destroyed by a foreclosure. Prior to such foreclosure, he is vested with an equitable estate in the land which has all the incidents of absolute ownership; it may be conveyed or devised, will descend to his heirs, may be cut up into lesser estates, and generally may be dealt with in the same manner as the absolute legal ownership, always subject, however, to the lien of the mortgage. On the other hand, the mortgage is regarded primarily as a security; the debt is the principal fact, and the mortgage is collateral thereto; the interest which it confers on the mortgagee is a *lien on* the land, and not an *estate in* the land; it is a thing in action, and may therefore be assigned and transferred without a conveyance of the land itself; it is personal assets, and on the death of the mortgagee it passes to his executors or administrators, and not to his heirs.^{1 b}

§ 1182. *The Double System at Law and in Equity.*—As these two conflicting theories have existed side by side, it follows that the rights, liabilities, and remedies of the

had a right of action whereby she might compel a reconveyance of the land to herself upon payment of the amount due. This narrow view was rejected by the court.

¹ 3 Washburn on Real Property, c. 16, sec. 4.

(a) This section is cited in *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; *Bredenberg v. Landrum*, 32 S. C. 215, 10 S. E. 956.

(b) Its descent as personalty is not altered by the fact that the mortgagee had been in possession for three years, and that thereafter his

widow, as life tenant, remained in possession until the equity of redemption was barred by the statute of limitations: *In re Loveridge*, [1902] 2 Ch. 859, following *Attorney-General v. Vigor*, 8 Ves. 256, 277, and *Flack v. Longmate*, 8 Beav. 420, 424.

mortgagor and the mortgagee in England have been very different when administered by the courts of law or the court of chancery. In law, the mortgagee is clothed with the entire legal estate, while the mortgagor has no estate whatever, and after a default no right except that given by the statute, mentioned in a former paragraph.¹ In equity, the mortgagee has no estate, but only a lien; while the mortgagor is clothed with the equitable estate called the "equity of redemption," which is to all intents and purposes the full ownership, except that it is subject to be cut off and destroyed by a proceeding to enforce the mortgage. It should be carefully noticed that by this theory the mortgagor's estate is wholly an equitable one; *neither in equity nor at law is he regarded as retaining the legal estate*. In law, the mortgagee is entitled to possession of the land even before the condition is broken, and may recover such possession upon his legal title, either before or after condition broken, in an action of ejectment against the mortgagor, or against any other person not having a paramount title; while the mortgagor cannot maintain ejectment for the possession even against a third person, since the legal title is outstanding in the mortgagee, and a plaintiff can recover in ejectment only upon the strength of his own legal title.² In equity, neither the mortgagee nor the mortgagor can maintain an action for the *mere possession*, since that remedy is wholly a legal one; but the mortgagor may maintain a suit to redeem from the mortgagee in possession, and having thus redeemed is entitled to a reconveyance and delivery of possession. In law, the mortgagee may convey the land itself by deed, or devise it by will, and

¹ See *ante*, sec. 1179.

² The English law is strictly logical in these conclusions, but the American legal theory, by a curious inconsistency, rejects them. The difference between the English legal theory and the American legal theory in this respect should be carefully noted. Even in those states which have preserved the legal and the equitable theories distinct, and which have to some extent adopted the English system, the legal theory has been more or less modified by the equity doctrines.

on his death intestate, it will descend to his heirs. In equity, his interest is a mere thing in action assignable as such, and a deed of the land by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator.^{3 a}

§ 1183. **The Legal and Equitable Remedies.**—The mortgagee can avail himself of both legal and equitable remedies; he may sue at law for the debt, or recover possession of the land by ejectment, or resort to the equitable remedy of foreclosure. As a matter of fact, the mortgagee, in England, ordinarily enforces his security, upon the mortgagor's default, by obtaining possession of the land and appropriating the rents and profits. This possession he acquires either by voluntary surrender from the mortgagor or by a recovery in ejectment. Having obtained the possession, he may by a suit in equity cut off and destroy the mortgagor's estate or equity of redemption by a decree for a strict foreclosure. The method of foreclosing by a decree for a sale of the premises, which so generally prevails in the United States, is very seldom adopted in England. The mortgagee having obtained possession either by voluntary surrender, by entry, or by ejectment, the mortgagor may regain his title by means of the equitable suit for a redemption, whereby the mortgagee is compelled to account for the rents and profits which he has received, the amount due to him is fixed, and on its payment the interest of the mortgagee is ended, and the mortgagor becomes entitled to a reconveyance and the possession.¹

§ 1184. **Peculiarities of the English System.**—The peculiarity of this double system should be remarked: that while

³ 1 Washburn on Real Property, c. 16, secs. 4, pars. 10-14, 34.

¹ 1 Washburn on Real Property, c. 16, secs. 5, pars. 16-18.

(a) Quoted in *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331.

equity has carefully built up its own theory, so different in all points from that prevailing at law, it has never attempted to interfere directly with the legal doctrines, nor have the law courts modified their own legal theory by voluntarily introducing equitable notions. The two theories have stood side by side, each administered by its own tribunals as though the other had no existence. Equity has so refrained from any direct invasion of the legal domain, that whenever a mortgagor has redeemed after a default, either by a payment of the debt voluntarily accepted or by means of a decree in a suit to redeem, the legal title does not thereby return to the mortgagor; having once been vested in the mortgagee, it can only be restored to the mortgagor by a legal conveyance. After a redemption of any kind, therefore, a deed from the mortgagee to the mortgagor is necessary to invest the latter with the full legal title, and a decree in a suit for redemption directs such a conveyance to be executed as the only means of restoring the mortgagor to his original legal estate.^{1 a}

§ 1185. **Subsequent Mortgages Equitable.**—Another striking, but strictly logical, result of the system exists when the same mortgagor, being originally the legal owner, gives successive mortgages on the same land to different persons, which are all outstanding together. If the legal owner in fee gives a first mortgage in fee to A, he thereby, as has been shown, conveys the entire legal estate, and A becomes vested with the legal title; and it is then impossible for the mortgagor to convey the legal estate to other persons by any subsequent deed or mortgage while the prior mortgage to A is outstanding, for he does not himself hold such legal estate. If, therefore, the mortgagor executes any subsequent mortgage or mortgages to B, C, D, upon the same land, these subsequent mortgagees do not thereby ob-

¹ 1 Washburn on Real Property, c. 16, sec. 5, pars. 16-18.

(a) This section is cited in *Huguley Mfg. Co. v. Galetton Cotton Mills*, 94 Fed. 269, 36 C. C. A. 236.

tain the legal estate; they are not regarded, even by courts of law, as vested with a legal title; their estate and title are purely equitable, and such subsequent mortgages are in every sense, even in courts of law, regarded and treated as *equitable* and not legal mortgages. The same doctrine is expressed by the statement that a mortgage of the equity of redemption is necessarily an equitable mortgage.¹

SECTION II.

THE AMERICAN DOCTRINE.

ANALYSIS.

- § 1186. In general: Two methods prevailing.
- § 1187. First method: Both the legal and the equitable theories; states arranged alphabetically in foot-note.
- § 1188. Second method: The equitable theory alone; states arranged in foot-note.
- § 1189. The same: The mortgagee in possession.
- § 1190. The same: Equitable remedies of the parties.
- § 1191. Definition of mortgage.

§ 1186. In General — Two Methods Prevailing.—The English system, with the two theories, legal and equitable, standing so opposed to each other in every point, and each complete in itself, has not been wholly adopted in any of

¹ By the legal theory the mortgagor, having parted with his legal estate, cannot, of course, convey it by a second deed to another person,—he has at law no estate left. By the equitable theory the mortgagor's estate—his equity of redemption—is purely equitable, and a conveyance of it simply transfers this equitable estate to the grantee, while a mortgage of it is simply the mortgage of an equitable estate, and therefore itself equitable. The fact that the first mortgagee has a legal title, while the subsequent mortgagees obtain only an equitable interest even at law, is the foundation of the English doctrine of "tacking": See *ante*, vol. 2, secs. 767-769.

By a strange inconsistency, this logical result of the legal theory is rejected by the courts of those states which have adopted the double system of law and of equity concerning mortgages; and they hold that in a series of prior and subsequent mortgages each and every mortgagee obtains the legal estate. This is one of the marked differences between the *legal* system in England and that prevailing in American states.

our states. The equitable principles have penetrated the legal theory, and more or less modified it in every state. The result is, that even in those states which preserve the legal theory at all, and regard the mortgage as in any sense conveying a legal estate, many of the incidents of such legal title are abandoned; the mortgagee is the legal owner only for certain purposes and to a certain extent,—the legal owner as between himself and the mortgagor,—clothed with the legal title only so far as is considered necessary to preserve the mortgage as a valid security; while for all other purposes, and as against all other persons not claiming under or through the mortgagee, the mortgagor is regarded, even at law, as retaining the legal estate with all of its incidents and qualities.¹ The courts and legislatures of nearly one half of the states have taken a further step, and by adopting the equitable theory alone have completely reversed the positions occupied by the mortgagor and the mortgagee under the English system. In the jurisprudence of the various states and territories of this country, two differing conceptions of the total nature and effect of mortgages now exist,—two distinct modes of regarding and regulating the rights, liabilities, and remedies of the parties. These two methods must be separately described, and the states adopting them must be arranged in two corresponding classes.

§ 1187. **First Method—Both the Legal and the Equitable Theories.**—The essential feature of this system, adopted by the courts of all the states in which the system prevails,

¹ See *Glass v. Ellison*, 9 N. H. 69; *Barnard v. Eaton*, 2 Cush. 294, 304; *Conard v. Atlantic etc. Co.*, 1 Pet. 386, 441; *Evans v. Merriken*, 8 Gill & J. 39, 47; *Clark v. Reyburn*, 1 Kan. 281; *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632. This conception of the mortgage is undoubtedly illogical and anomalous, a hybrid union of legal and equitable doctrines, and even more confusing than the sharply defined double system of the English jurisprudence. Such a result necessarily follows from the action of courts in admitting equitable principles to be blended with the legal dogmas, but without accepting those principles in all their length and breadth, and abandoning wholly the legal theory maintained by the English courts of law. This last step, when taken, produces a system single, uniform, consistent, and just.

is the doctrine that as between the mortgagor and the mortgagee, the mortgagee acquires and holds the legal estate *at law*, while the estate of the mortgagor — his equity of redemption — is entirely an equitable estate. To this extent the system agrees with that prevailing in the English courts; but this agreement is only partial.¹ In all the

¹ I complete the general description of the text by adding a brief statement of the special and incidental doctrines adopted in each of the states which have followed this type. The reader will thus be enabled to compare the exact system of his own state with those prevailing in other commonwealths, and to determine how far the decisions in other states agree with the methods pursued by the courts of his own, and how far they may therefore be regarded as having authority.

Alabama.—The legal estate of the mortgagee and the equitable interest of the mortgagor are preserved very distinct. As against the mortgagor, the mortgagee is entitled to possession; but as against all other persons but the mortgagee and those holding under him, the mortgagor is the owner, and entitled to possession:^a *Knox v. Easton*, 38 Ala. 345; *Welsh v. Phillips*, 54 Ala. 309; 25 Am. Rep. 679. The mortgage conveys the legal estate, and the mortgagee is entitled to immediate possession, unless the mortgage itself shows that the mortgagor may retain possession: *Knox v. Easton*; *Doe v. McLoskey*, 1 Ala. 708. After default, the mortgagee's legal estate is absolute, his right to possession complete, and the mortgagor's only interest is equitable:^b *Paulling v. Barron*, 32 Ala. 9; *Barker v. Bell*, 37 Ala. 354. After default, it seems doubtful whether the mortgagor can regain the legal estate by mere payment, without a reconveyance from the mortgagee: *Barker v. Bell*; *Powell v. Williams*, 14 Ala. 476; 48 Am. Dec. 105.^c

Arkansas.—The legal estate passes to the mortgagee, and he is entitled to possession at once, unless the mortgage itself shows a contrary intent, but he is certainly entitled to possession upon a default by the mortgagor: *Kanady v. McCarron*, 18 Ark. 166; *Terry v. Rosell*, 32 Ark. 478. The mortgagee may recover possession by ejectment, and upon the mortgagor's default may sue at law for the debt, and in ejectment to recover possession of the land, and in equity for a foreclosure and sale, pursuing all or any of these remedies at the same time:^d *Fitzgerald v. Beebe*, 7 Ark. 310; 46 Am. Dec. 285; *Gilchrist v. Patterson*, 18 Ark. 575; *Reynolds v. Canal etc. Co.*, 30 Ark. 520.

Connecticut.^e—The mortgagee acquires the legal estate in a modified and

(a) *Alabama.*—See *Cotton v. Carlisle*, 85 Ala. 175, 4 South. 670, 7 Am. St. Rep. 29, and note.

(b) See *High v. Hoffman*, 129 Ala. 359, 29 South. 658; *Fields v. Clayton*, 117 Ala. 538, 67 Am. St. Rep. 189, 23 South. 530.

(c) But the doubt is now resolved in favor of the mortgagor by statute: See *Farris v. Houston*, 78 Ala. 250.

(d) *Arkansas.*—See *Chollar v. Temple*, 39 Ark. 238. Although the mortgagee is entitled to possession, until he takes it legally, the possession of the mortgagor is not illegal: *Stewart v. Scott*, 54 Ark. 187, 15 S. W. 463.

(e) *Connecticut.*—*O'Brien v. Miller*, 117 Fed. 1000.

states which have adopted the method, the mortgagor *while in possession* is considered, at law as well as in equity, both after and before a breach of the condition, to be the legal owner as against all persons except the mortgagee

partial sense; that is, as against the mortgagor, and for the purpose of preserving his security, and by virtue of this estate, he may obtain possession by ejectment: *Rockwell v. Bradley*, 2 Conn. 1, 5; *Beach v. Clark*, 6 Conn. 354; *Chamberlain v. Thompson*, 10 Conn. 243, 251; 26 Am. Dec. 390; *Middletown Sav. Bank v. Bates*, 11 Conn. 519, 523. Against all persons except the mortgagee and his assigns, the mortgagor is the owner; his estate as against the mortgagee is purely equitable, but as against others it is to all intents the legal ownership with all its incidents and qualities: *Ibid.* While the mortgagor is in possession, he is so far treated as possessing a legal right that he may maintain trespass against the mortgagee; but the mortgagee's estate is so much a legal one, that after a default the mortgagor's only right is in equity, and his only remedy is equitable,—a suit to redeem: *Chamberlain v. Thompson*, *supra*. If the mortgage is paid after a default, it is no longer an encumbrance, but may be a cloud upon the mortgagor's title; which implies that payment under such circumstances does not *ipso facto* revest the mortgagor with the full legal estate: *Griswold v. Mather*, 5 Conn. 435, 440; *Doton v. Russell*, 17 Conn. 146, 154; *Town of Clinton v. Town of Westbrook*, 38 Conn. 9; *New Haven etc. Bank v. McPartlan*, 40 Conn. 90; and in such a case, if the mortgagee retains the legal title, he holds it as a trustee for the mortgagor: *Dudley v. Cadwell*, 19 Conn. 218, 227; *Cross v. Robinson*, 21 Conn. 379, 387.

Delaware.—The theory of this state is peculiar, and except for one feature of it, the state should be placed in the second class. Prior to any default of the mortgagor, the legal title remains in him; the mortgagee has only a lien, and is not entitled to possession either in law or in equity. But after the mortgagor makes default and the mortgagee obtains possession, the legal title vests in the latter, and he can hold such possession against the mortgagor, who is then thrown upon his equitable remedy of redemption: *Doe v. Tunnell*, 1 Houst. 520.^(f) It seems, however, that upon a breach of the condition the mortgagee may recover possession from the mortgagor in ejectment, and this is the single feature which ranges the state in the first class. It is held that after default the mortgagee may pursue *all the remedies* which the law gives, and this seems to include ejectment, *sed quære*: *Newbold v. Newbold*, 1 Del. Ch. 310. As against all persons but the mortgagee and his assigns, the mortgagor is the true and legal owner: *Cooch's Lessee v. Gerry*, 3 Harr. (Del.) 280.

Illinois.—The legal and equitable theories are maintained in this state with great distinctness. The mortgagee acquires such a legal estate as against the mortgagor that he can recover the possession at once, unless the mortgage itself provides for possession to be retained by the mortgagor; and upon default in any payment he is always entitled to possession: *Delahay v. Clement*, 3

(f) *Delaware*.—See *Fox v. Wharton*, 5 Del. Ch. 200.

(g) *Illinois*.—See *Taylor v. Adam*, 115 Ill. 570, 4 N. E. 837; and

and those claiming under him; and in most of the states he is regarded, against all such persons, as the legal owner, and as entitled to the possession, although he may not be in actual possession. The mortgage being a conveyance

Scam. 201; Vansant v. Allmon, 23 Ill. 30; Carroll v. Ballance, 26 Ill. 9; 79 Am. Dec. 354; Nelson v. Pinegar, 30 Ill. 473; Jackson v. Warren, 32 Ill. 331; Pollock v. Maison, 41 Ill. 516; Harper v. Ely, 70 Ill. 581. Against all persons except the mortgagee and those holding under him, the mortgagor is the legal owner;^b while as against the mortgagee and his assigns, his estate is purely equitable, and his remedies after condition broken are wholly equitable: Ibid.; Fitch v. Pinckard, 4 Scam. 69; Vallette v. Bennett, 69 Ill. 632. The mortgagee is permitted to pursue all his remedies at the same time,—action at law for the debt, ejectment for the possession, and in equity for a strict foreclosure or for a sale of the premises: Karnes v. Lloyd, 52 Ill. 113; Erickson v. Rafferty, 79 Ill. 209. Although the legal title is in the mortgagee as against the mortgagor, still a third person not claiming under the mortgagee cannot defeat the mortgagor's action of ejectment against himself by setting up such title outstanding in the mortgagee, even after that title has been made *legally* absolute by a breach of the condition: Hall v. Lance, 25 Ill. 277.

Kentucky.—The theory, legal and equitable, is the same as in Illinois. The mortgage is a conveyance of the legal estate to the mortgagee; he is entitled to possession after a default, and also before a default unless the mortgage itself provides for possession by the mortgagor. The mortgagor's estate as between him and the mortgagee is purely equitable,—a mere equity of redemption: Redman v. Sanders, 2 Dana, 68; Brookover v. Hurst, 1 Met. 665; Stewart v. Barrow, 7 Bush, 368; see Woolley v. Holt, 14 Bush, 788. It is held that a mortgagor cannot prevent the legal operation of the mortgage—that is, cannot defend an action at law—by showing that its execution was obtained from him by fraud: Brookover v. Hurst, *supra*.

Maine.¹—The mortgagee acquires the legal estate, and may recover possession before default if the mortgage does not otherwise provide: Blaney v. Bearce, 2 Me. 132. The mortgagee's possession is even declared by express statute: Rev. Stats. 1871, c. 90, sec. 2. As against the mortgagee and those holding under or through him, the mortgagor's estate is equitable only; but as

especially Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331. In Kransz v. Uedelhofen, 193 Ill. 477, 62 N. E. 239, it is said, however, "that the equitable theory of a mortgage has, in process of time, made material encroachments upon this legal theory." Hence it is now held that the mortgagee cannot sue for possession before condition

broken. See cases cited in Kransz v. Uedelhofen, *supra*.

(b) Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801.

(1) *Maine*.—Morse v. Stafford, 95 Me. 31, 49 Atl. 45; Golder v. Golder, 95 Me. 259, 49 Atl. 1050. See, however, Hussey v. Fisher, 94 Me. 301, 47 Atl. 525.

of the legal estate, and not a mere lien between the immediate parties thereto, the mortgagee is entitled to the possession of the premises, at least after the condition is broken, and may recover such possession from the mort-

against all others, it is the legal ownership with all of its incidents: *Wilkins v. French*, 20 Me. 111.

Maryland.—The mortgagee obtains the legal estate, and with it the right to immediate possession: *Brown v. Stewart*, 1 Md. Ch. 87; *McKim v. Mason*, 3 Md. Ch. 186; *Leighton v. Preston*, 9 Gill, 201; *Jamieson v. Bruce*, 6 Gill & J. 72; 26 Am. Dec. 557; *Sumwalt v. Tucker*, 34 Md. 89; *Annapolis etc. R. R. v. Gantt*, 39 Md. 115. The mortgagee is permitted to enforce all his remedies at the same time: *Brown v. Stewart*; *Wilhelm v. Lee*, 2 Md. Ch. 322. Although he has the equitable estate only as against the mortgagee, as against third persons the mortgagor is the true owner, and holds the legal title subject to the rights of the mortgagee. The mortgagor, when permitted by the mortgagee to retain the possession, may recover in ejectment against a third person who cannot defend by the outstanding legal title in the mortgage: *Georges Creek etc. Co. v. Detmold*, 1 Md. 225, 237; and as owner he may maintain a legal action for injury done to the estate by a third person: *Annapolis etc. R. R. v. Gantt*.

Massachusetts.—In this state the English theory is retained with more fullness than in any other of the states; and the absence of a full equitable jurisdiction through a large part of its judicial history has made the legal aspect of mortgages, and the legal remedies of mortgagees, more important perhaps than the equitable view. The legal estate of the mortgagee is complete, and accompanied with all its incidents; the mortgagor's estate is wholly equitable as between the parties, but as against third persons it has more the qualities of a legal ownership. The view of the Massachusetts courts can be most clearly explained in the language of one or two leading cases. In *Ewer v. Hobbs*, 5 Met. 1, 3, *Shaw, C. J.*, said: "The first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is, to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose,—that of securing the mortgagee. Hence it is that, as between the mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee; because that construction best secures him in his remedy and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure [*i. e.*, a strict foreclosure], when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor. And all statutes upon the subject are to be so construed; and

(9) *Maryland.*—*Commercial Bldg. & Loan Assn. v. Robinson*, 90 Md. 615, 45 Atl. 449.

gagor by a legal action; but in many, and even in most, of these states the mortgagor may retain the possession until a default is made. In respect to the foregoing essential features there is a general agreement in the jurisprudence

all rules of law, whether administered in law or equity, are to be so applied as to carry these objects into effect." In *Howard v. Robinson*, 5 Cush. 119, 123, the same judge said: "Mortgaging is not such a conveying away of the estate as divests the entire title of the owner. It is a charge or encumbrance created out of that estate, and may amount to a small part only of its value. Although, as between the mortgagor and mortgagee, it is a transmission of the fee, which gives the mortgagee a remedy in the form of a real action, and constitutes a legal seisin, yet as to most other purposes a mortgage, before the entry of the mortgagee, is but a pledge and real lien, leaving the mortgagor to most purposes the real owner." The mortgagee is entitled to enter and to hold possession; and after a default by the mortgagor an ordinary form of remedy by the mortgagee is a recovery of possession by an appropriate action at law,—a real action. Having thus obtained possession he is regarded as the legal owner, subject to the mortgagor's equitable remedy of redemption; he may convey the land, and on his death intestate it descends to his heirs. His legal estate is ordinarily made absolute by a strict foreclosure, rather than by a decree for a judicial sale: *Bradley v. Fuller*, 23 Pick. 1, 9; *Hapgood v. Blood*, 11 Gray, 400; *Sparhawk v. Bagg*, 16 Gray, 583; *Steel v. Steel*, 4 Allen, 417; *Silloway v. Brown*, 12 Allen, 30; *Norcross v. Norcross*, 105 Mass. 265. Able text-writers who are accustomed to and familiar with the theory prevailing in Massachusetts and other New England states have sometimes failed, I think, to appreciate the extent to which the purely equitable system has been followed in other states, and have been inclined to represent the Massachusetts type as adopted throughout the entire country, with the exception of a very few states, and they have thus conveyed an erroneous impression concerning the general American doctrine. See, for example, the chapters on mortgages in Professor Washburn's great work on real property.

Mississippi.—This state, like Delaware, should be placed in the second class, were it not for a single feature of the system. As against all third persons, and as against the mortgagee himself until a breach of the condition, the legal estate, both in law and in equity, remains in the mortgagor, and the interest of the mortgagee is merely an equitable lien. But upon the mortgagor's default in not complying with the condition, the legal title is considered as passing to the mortgagee, and with it the right to recover possession of the land by an action of ejectment: *Harmon v. Short*, 8 Smedes & M. 433; *Hill v. Robertson*, 24 Miss. 368; and this rule is established by statute: Rev. Code 1880, sec. 1204. But even after possession has thus been acquired, the mortgagee's interest is not a full legal estate; it is still a lien or pledge, and is personal rather than real property. The single fact that the mortgagee may thus recover possession by a legal action before foreclosure is the only feature which preserves any resemblance to the old common-law system, and practically the equitable theory seems to prevail over the legal. In *Buckley v.*

of all the states which compose this first class; but with regard to other and incidental matters there is a divergence in their rules which prevents any further generalization. It should be added, however, that in most of these states the

Daley, 45 Misa. 338, 345, Peyton, C. J., speaking of the mortgagee's interest after he had thus obtained possession, said: "The relation of debtor and creditor exists, and the equity of redemption is unimpaired. Although the mortgagee has a chattel interest only, yet, in order to render his pledge available, and give him the intended benefit of his security, it is considered as real property to enable him to maintain ejectment for the recovery of the possession of the land mortgaged; when contemplated in every other point of view, it is personal property." See also *Carpenter v. Bowen*, 42 Miss. 28, 49; *Buck v. Payne*, 52 Miss. 271. It is very plain that the legal estate of the mortgagee in possession is nominal only, and is very different from the mortgagee's estate under the same circumstances in Massachusetts.

Missouri.—The doctrine is similar to that in Mississippi. The mortgagor holds the legal estate against all third persons, and against the mortgagee himself, until a breach of the condition; but upon a default, the legal interest passes to the mortgagee to such an extent that he may recover possession of the premises by a legal action: *Walcop v. McKinney's Heirs*, 10 Mo. 229; *Kennett v. Plummer*, 28 Mo. 142; *Sutton v. Mason*, 38 Mo. 120; *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513; *Johnson v. Houston*, 47 Mo. 227; *Reddick v. Gressman*, 49 Mo. 389. And if the debt is payable in installments, a failure to pay any one of them is such a default that the mortgagee may at once recover possession by a legal action: *Reddick v. Gressman*. This legal interest, however, is so far from being a full and complete estate, and it partakes so much of the nature of a mere lien, that upon payment of the debt it is *ipso facto* destroyed, and the mortgagor becomes at once vested with an absolute legal estate, without any reconveyance: *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124. Practically, therefore, the equitable theory prevails in this state.

New Hampshire.—The theory and the practice resemble those in Massachusetts. The mortgage is a conveyance and passes the legal title, the seisin, and the right of possession immediately to the mortgagee. As against him the mortgagor has, before default, the mere legal right to regain the title by a performance of the condition; while after a default he has nothing but an equity of redemption: *Brown v. Cram*, 1 N. H. 169; *McMurphy v. Minot*, 4 N. H. 251, 255; *Southerin v. Mendum*, 5 N. H. 420; *Hobart v. Sanborn*, 13 N. H. 226; 38 Am. Dec. 483; *Tripe v. Marcy*, 39 N. H. 439. Against all other persons, however, not holding under the mortgagee, the mortgagor is so far the legal owner that he may recover possession of the land by an action at law: *Ellison v. Daniels*, 11 N. H. 274; *Parish v. Gilmanton*, 11 N. H. 293, 298; *Great Falls Co. v. Worster*, 15 N. H. 412, 444; *Whittemore v. Gibbs*, 24 N. H. 484. The mortgagee, unless prevented by some provision in the mortgage, may recover possession at any time, the possession of the mortgagor being, in theory, a wrongful withholding; but as long as the mortgagee does not exercise his

(*) *Missouri*.—*Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045.

equitable theory is the one which chiefly prevails in practice; mortgagors are ordinarily left in possession and treated as the owners, and the common remedy of the mortgagee is a decree of foreclosure and for the sale of the mort-

right, and permits the mortgagor to remain in possession, such possession is treated as retained by the mortgagee's permission, and the mortgagor is not accountable for the rents and profits during the continuance of this permissive holding: *Chellis v. Stearns*, 22 N. H. 312, 315; *Furbush v. Goodwin*, 29 N. H. 321, 332.

New Jersey.—The legal estate is conveyed to the mortgagee immediately upon the execution of the mortgage; but the legal doctrines have been so modified by equitable principles that he does not obtain a right to enter upon the land, and recover its possession by an action at law, until the mortgagor has made a default: *Sanderson v. Price*, 21 N. J. L. 646, note; *Shields v. Lozear*, 34 N. J. L. 496; 3 Am. Rep. 256, per Depue, J. But the mortgage is still regarded so much as a mere security for the debt, and the mortgagee's legal title as merely a means for enforcing this security, that after a default, and even after the mortgagee's obtaining possession, his estate is destroyed, and the legal title *ipso facto* reverts in the mortgagor, by a payment of the debt, without any reconveyance:¹ *Shields v. Lozear*, *supra*; *Osborne v. Tunis*, 25 N. J. L. 633, 651; *Montgomery v. Bruere*, 4 N. J. L. 260, 279, per Southard, J.; 5 N. J. L. 865.

North Carolina.—The legal estate of the mortgagee entitling him to possession, and the equitable estate of the mortgagor entitling him to redeem after default, are preserved distinct. If the mortgagor is suffered to retain possession, he is not responsible for the rents and profits received during his holding: *Hemphill v. Ross*, 66 N. C. 477; *Ellis v. Hussey*, 66 N. C. 501; *State v. Ragland*, 75 N. C. 12.^m

Ohio.—As between the parties, the mortgagee acquires a legal estate, and can recover the possession by an action at law after a default, but *not before default*. As against all persons except the mortgagee and his assigns, the legal estate remains in the mortgagor, and the mortgagee's legal title is merely a security for payment of the debt: *Harkrader v. Leiby*, 4 Ohio St. 602; *Allen v. Everly*, 24 Ohio St. 97, 114; *Rands v. Kendall*, 15 Ohio, 671.ⁿ

Pennsylvania.—As between the parties, the mortgage is a conveyance of the legal estate to the mortgagee, which enables him to enter at once and hold the land, or recover the possession by ejectment, as well before as after default,

(1) *New Jersey*.—*Wade v. Miller*, 32 N. J. Law 296, 303; *Marshall's Ex'rs v. Hadley*, 50 N. J. Eq. (5 Dick.) 547, 25 Atl. 325.

(m) *North Carolina*.—*Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251, 17 Am. St. Rep. 672; *Kiser v. Combs*, 114 N. C. 640, 19 S. E. 664 (mortgagee may maintain ejectment).

(n) *Ohio*.—*Ranney v. Hardy*, 43 Ohio St. 157, 1 N. E. 523. As between mortgagor and mortgagee, the legal title is in the latter after condition broken. He may either bring ejectment or sue for foreclosure: *Bradfield v. Hale*, 67 Ohio St. 316, 65 N. E. 1008.

gaged premises. In a few states, however, it is customary for the mortgagee to recover possession, by action at law if necessary, and to cut off the mortgagor's equity of redemption by a strict foreclosure. The states which have adopted

unless otherwise stipulated in the instrument itself; this legal estate of the mortgagee is full and complete, subject only to the mortgagor's equity: *Youngman v. Elmira etc. R. R.*, 65 Pa. St. 278, 285; *Brobst v. Brock*, 10 Wall. 519. As to all persons except the mortgagee and his assigns, the mortgage is a lien, and the legal estate remains in the mortgagor both in law and in equity: *Brobst v. Brock*, *supra*. In *Tryon v. Munson*, 77 Pa. St. 250, Agnew, J., very clearly and accurately describes the legal interest of the mortgagee according to this theory: "Thus we perceive an interest or estate in the land itself, capable of enjoyment, and enabling the mortgagee to grasp and hold it actually, and not a mere *lien or potentiality to follow it by legal process and condemn it for payment*. The land passes to the mortgagee by act of the party himself, and needs no legal remedy to enforce the right. But a lien vests no estate, and is a mere incident of the debt, to be enforced by a remedy at law, which may be limited. It is true, if the mortgagee be held [kept] out, he may have to resort to ejectment; but this is to avoid a conflict and the statutory penalties for a forcible entry, for otherwise he may take *peaceable* possession, and is not liable as a trespasser." From the absence of a full equitable jurisdiction until very recent legislation, the remedies of the mortgagee in this state have been to a great extent obtained by means of legal actions.◦

Rhode Island.—The English legal and equitable theory is adopted with the same modifications as in Massachusetts. The mortgage is a true conveyance; the mortgagee obtains a full legal estate, and may recover possession, the mortgagor's interest after a default being a mere equity of redemption. The mortgagee's legal estate is so complete that he may recover *at law* against the mortgagor for waste to the land during the latter's possession: *Carpenter v. Carpenter*, 6 R. I. 542; *Waterman v. Matteson*, 4 R. I. 539, 545. In the latter case, Ames, C. J., said: "Formerly the right of the mortgagor was, upon a breach of the condition, wholly gone at law, and his equity to redeem was recognized only by the tribunal able to enforce such a right. It is true that in modern times the courts of law have, for many purposes, treated the mortgagor in possession as the real owner of the estate, looking upon a mortgage in the same light that a court of equity does, as a mere security for the mortgage debt; but we can see no reason why such courts should recognize in a mortgagor in possession under a forfeited mortgage *greater* rights over the estate than courts of equity do." It was therefore held that waste done by a mortgagor left in possession was a *legal* wrong, and that the mortgagee could maintain an action of replevin for wood and timber cut on the land in such a manner as to constitute waste.

Tennessee.—The mortgagee obtains the legal title, and may recover posses-

(◦) *Pennsylvania*.—The mortgagor, also, may redeem against the mortgagee in possession by means of an

equitable action of ejectment: *Wells v. Van Dyke*, 109 Pa. St. 330.

this method in its substantial elements are Alabama, Arkansas, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia.

§ 1188. **Second Method — The Equitable Theory Alone.**— In this method of treating mortgages, the conflict between the legal and the equitable conceptions is entirely removed. Partly through the adoption of equitable doctrines by the law courts, and partly through the operation of statutes, the legal theory of mortgages has been abandoned, and the equity theory has been left in full force, furnishing a single and uniform collection of rules recognized and administered, so far as necessary, alike by courts of law and of

sion of the land at once by an action at law; and as against him the mortgagor's interest is wholly equitable: *P Henshaw v. Wells*, 9 Humph. 568; *Vance's Heirs v. Johnson*, 10 Humph. 214.

Vermont. — The mortgagee acquires the legal estate by means of the mortgage itself, but the statute secures the possession of the mortgagor until he makes a default: Gen. Stats. 1870, c. 40, sec. 12. Upon a default, the mortgagee is entitled to possession, and may enter, or may immediately bring ejectment: *Lull v. Matthews*, 19 Vt. 322; *Hagar v. Brainerd*, 44 Vt. 294. While the mortgagor is permitted to retain the possession, he is so far the owner that he is not accountable for the rents and profits to the mortgagee, and with respect to all other persons he is regarded as the legal owner for all purposes: *Ibid.*: *Hooper v. Wilson*, 12 Vt. 695; *Wilson v. Hooper*, 12 Vt. 653; 36 Am. Dec. 366; *Walker v. King*, 44 Vt. 601.

Virginia and West Virginia. — The distinction between the legal estate of the mortgagee, and the equity of redemption of the mortgagor, is sharply maintained. Unless restrained by the terms of the mortgage itself, the mortgagee may take possession at once, and after a default he may always recover the possession, and is then the legal owner of the land. The mortgagor's only remedy in such case is by a suit to redeem: *Faulkner v. Brockenbrough*, 4 Rand. 245. ^a

(^p) *Tennessee.* — *Lincoln Sav. Bank v. Ewing*, 12 Lea 598; *Vaughn v. Vaughn*, 100 Tenn. 282, 45 S. W. 677 (upon satisfaction of the mortgage debt, the legal title reverts *eo instanti*).

(^a) *Virginia.* — The mortgagee may pursue his remedies at law upon the debt and in equity upon the mortgage at the same time: *Priddy v. Hartsook*, 81 Va. 67.

equity.¹ The mortgage is not a conveyance, nor does it confer upon the mortgagee any estate *in* the land. It creates a lien *on* the land, or, in the apt language already quoted, “a potentiality to follow the land by

¹ I shall arrange the states and territories composing this class, with a reference to important decisions and statutes in each, so that the extent and workings of the equitable theory may be fully illustrated.

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California. — The equitable theory is carried to its logical consequences. The mortgage creates a lien on the land as security for the debt, and under no circumstances does it convey any legal title or estate to the mortgagee, whose interest is the same in law and equity. The mortgagor retains the full legal estate subject to the lien, until divested by a foreclosure sale. This view, which was originally announced by the courts, has been fully established by statute, and is incorporated into the Civil Code: Cal. Civ. Code, secs. 2920, 2926, 2927, 2936; Practice Act 1851, sec. 260; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Haffley v. Maier*, 13 Cal. 13; *Goodenow v. Ewer*, 16 Cal. 461, 467; 76 Am. Dec. 540; *Boggs v. Fowler*, 16 Cal. 559; 76 Am. Dec. 561; *Fogarty v. Sawyer*, 17 Cal. 589; *Dutton v. Warschauer*, 21 Cal. 609, 623; 82 Am. Dec. 765; *Kidd v. Temple*, 22 Cal. 255; *Skinner v. Buck*, 29 Cal. 253; *Bludworth v. Lake*, 33 Cal. 255; *Jackson v. Lodge*, 36 Cal. 28; *Mack v. Wetzlar*, 39 Cal. 247; *Carpentier v. Brenham*, 40 Cal. 221; *Harp v. Calahan*, 46 Cal. 222; *Frink v. Le Roy*, 49 Cal. 314.^c The principles and reasons of this theory have been so ably explained and presented by the California supreme court that I shall quote at length some passages from one or two leading decisions, which will apply to all the states of this class, and will form a very appropriate introduction to the general discussion. In *McMillan v. Richards*, 9 Cal. 365, 407, 70 Am. Dec. 655, Field, J., examined the grounds of the doctrine with great care. After describing the common-law view of the mortgage, he proceeds: “But in equity a mortgage is regarded in a very different light. The settled doctrine of equity is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or encumbrance, and that the equity of redemption is the real

(a) *Alaska.*—*Lewis v. Wells*, 85 Fed. 896.

(b) *Arizona.*—*Bryan v. Kales*, 162 U. S. 411, 16 Sup. Ct. 802, 40 L. ed. 1020 (affirming 3 Ariz. 423, 31 Pac. 517); *Bryan v. Brasius*, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. ed. 1022 (affirming 3 Ariz. 433, 31 Pac. 519).

(c) *California.*— See, also, *McGurren v. Garrity*, 68 Cal. 566, 9 Pac. 839; *Tapia v. Demartini*, 77 Cal.

383, 19 Pac. 641, 11 Am. St. Rep. 288 (declaration of trust in mortgagee's interest may be made by parol); *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200 (deed absolute in form, but intended as a mortgage, conveys no right of possession); *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957 (same).

proper process, and condemn it for payment" of the debt. The debt is the principal fact, and the mortgage is wholly incidental or collateral thereto, and intended to secure its payment. The right or interest

and beneficial estate in the land, which may be sold and conveyed by the mortgagor, in any of the ordinary modes of assurance, subject only to the lien of the mortgage. This equitable doctrine, established to prevent the hardships springing by the rules of law from a failure in the strict performance of the conditions attached to the conveyance, and to give effect to the just intent of the parties in contracts of this description, has been, in most of the states, gradually adopted by the courts of law, although in some instances to a limited extent only." He cites decisions from various states illustrating the foregoing proposition, and proceeds (p. 409): "A provision more extensive in effect than the New York statute is embodied in our Practice Act. Section 260 reads as follows: 'A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.' This section takes from the instrument its common-law character, and restricts it to the purposes of security. It does not, it is true, in terms change the estates at law of the mortgagor and mortgagee, but by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine. . . . The just and liberal doctrines of equity respecting mortgages have been adopted in this state, and asserted either directly or indirectly in repeated instances by this court." He quotes, in illustration, passages from several prior cases in the California reports, and adds: "The decisions from which the above citations are taken were made, with one exception, in equity cases; but the language of the court does not appear in any instance to have been governed by a consideration of the tribunal in which the remedy was sought, but entirely from a consideration of the nature of the contract. The mortgage being a mere security for a debt, it must follow that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. Indeed, in those courts, with some few exceptions, where the common-law view of mortgages is the most strictly adhered to, payment of the debt is held to revest the estate without a reconveyance in the mortgagor, though it is difficult to see upon what principle. If the mortgage is a conveyance after default, it must be equally so before; the only difference being that in the one case the estate conveyed is conditional, and in the other absolute. If after default the estate be absolute, it is not easy to perceive how the grantee can be divested without deed, under the statute of frauds; and yet, according to the general doctrine of the modern cases, payment has that effect. This is one of the inconsistencies arising from a partial adoption of the equitable doctrines by the courts of law. In truth, *the original character of mortgages has undergone a change*. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished

of the mortgagee from being a legal estate is changed into an equitable right enforceable by an equitable proceeding; it is for all purposes and under all circumstances personal assets; it may be assigned, and passes to

on the other. They pass no estate in the land, but are mere securities; and default in the payment of the money secured does not change their character. Proceedings for the *foreclosure* of mortgages, in the sense in which the term is used in England and in several of the states, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit by our law results only in a legal ascertainment of the amount due, and a decree directing a sale of the premises for its satisfaction, the surplus, if any, going to subsequent encumbrancers, or to the owners of the premises." In *Dutton v. Warschauer*, 21 Cal. 609, 621, 82 Am. Dec. 765, the same distinguished judge again explains the theory in the clearest and most accurate manner: "'In this state,' as we said in *Goodenow v. Ewer*, 16 Cal. 467, 76 Am. Dec. 540, 'a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a lien or encumbrance only. Here the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common-law doctrine—that the mortgage is a conveyance of a conditional estate—there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common-law views of the subject, and a hesitation by the courts to carry either view to its logical consequences.' . . . The counsel of the defendant do not controvert the doctrine thus stated as applicable to mortgages executed since the statute of 1851 [quoted *ante*], but appear to consider that it was not intended to embrace mortgages previously executed. In this view, they are only partially correct. The doctrine was established not merely from a consideration of the provisions of the statute, but also from a consideration of the real object and intention of the parties in executing and receiving instruments of this kind. In truth, mortgages had long before lost, for nearly all purposes, their common-law character as conveyances, and been regarded as transactions by which security was furnished by a pledge of real estate for the payment of debts. Courts of equity, from an early date, had so regarded them; and courts of law, by 'a gradual and almost insensible progress,' had adopted the equitable view of the subject, though, we may add, not always carrying the equitable doctrine to its logical result. The equitable doctrine had prevailed to such an extent that in nearly all the states the interest of the mortgagee was treated by courts of law as real estate only so far as was necessary for the protection of the mortgagee, and to give him the full benefit of his security [citing

the mortgagee's personal representatives on his death. The mortgagee is not entitled to possession of the mortgaged premises, and can maintain no legal action for their recovery, either before or after a breach of the condition;

cases from other states]. It was from a consideration of the character of the instrument, as settled by these decisions and the modern cases generally, that we were induced to adopt the equitable doctrine as the true doctrine; and it was from a consideration of the provisions of the statute which led us to go beyond those cases, and carry the doctrine to its legitimate and logical result, and regard the mortgage as a security under all circumstances, both at law and in equity. Mortgages, therefore, executed before the statute, can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded at all times as mere securities, creating only a lien or encumbrance, and not as passing any estate in the premises: *Fogarty v. Sawyer*, 17 Cal. 592; *Lord v. Morris*, 18 Cal. 487, 488." In applying these doctrines it is further held that the interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage; by his obtaining possession his right does not become a legal title. A mortgagee after default, whether in or out of possession, cannot convey a legal title to the land, and his deed of the land, without an assignment of the debt, is a mere nullity. When, however, the mortgagee takes possession after default, with permission of the mortgagor, it will be presumed that such possession was with the understanding that the mortgagee is to receive the rents and profits and apply them on the debt; and unless a limitation on the length of his possession was fixed, it will be considered as extending until the debt is satisfied. This peculiar possessory right thus obtained by the mortgagee may be assigned by an instrument purporting to assign it in express terms, but will not pass by a mere ordinary deed of the land: *Dutton v. Warschauer*, *supra*; *Nagle v. Macy*, 9 Cal. 426; *Frink v. Le Roy*, 49 Cal. 314. These conclusions as to the mortgagee in possession seem to agree with the view taken by the latest New York decisions on the subject: See *post*, § 1189.

Colorado.—The same doctrine prevails: *Drake v. Root*, 2 Colo. 685. A mortgagee who obtains peaceable possession will not be dispossessed until the debt is paid, and he may even maintain ejectment against a third person not holding under the mortgagor: *Eyster v. Gaff*, 2 Colo. 228.

Dakota.—Civ. Code, secs. 1722, 1723, 1727, 1731, 1733: Substantially the same as in California.

Florida.—Bush's Dig. of Stats. 1872, pp. 611, 612.^d A trust deed to secure a debt is held not to be a mortgage: *Soutter v. Miller*, 15 Fla. 625.

Georgia.—The mortgage only creates a lien; the mortgagee has no right to the possession, except by means of a foreclosure; the mortgagor is en-

(^d) *Florida*.—McLellan's Digest, 1881, c. 153, sec. 3. See, also, *Coe v. Finlayson*, 41 Fla. 169, 26 South. 704 (mortgagee has a mere lien and can-

not sue for possession until he becomes the owner by purchase at foreclosure sale).

in fact, the mortgagor's default produces no change in the relations of the parties or in the nature of their respective interests, except that the mortgagee thereupon becomes enabled to enforce his lien by a proceeding of foreclosure.

titled to possession until he is removed after a decree and a sale thereunder; and the rents and profits belong to him: Code 1880, sec. 1954; *Burnside v. Terry*, 45 Ga. 621; *Vason v. Ball*, 56 Ga. 268; *Davis v. Anderson*, 1 Ga. 176; *Ragland v. Justices etc.*, 10 Ga. 65; *Elfe v. Cole*, 26 Ga. 197; *Jackson v. Carswell*, 34 Ga. 279; *United States v. Athens Armory*, 35 Ga. 344; *Seals v. Cashin*, 2 Ga. Dec. 76.

Indiana.—The common-law and equitable theories in combination formerly prevailed; but the equitable theory is now established by statute, which provides that the mortgagor may retain possession until his estate is extinguished by foreclosure; the mortgage creates only a lien; the legal estate, subject thereto, remains in the mortgagor: 2 *Gavin and Hord's Rev. Stats.* 355; *Fletcher v. Holmes*, 32 Ind. 497, 513; *Grable v. McCulloh*, 27 Ind. 472; *Morton v. Noble*, 22 Ind. 160; *Francis v. Porter*, 7 Ind. 213; *Reasoner v. Edmundson*, 5 Ind. 393.^f

Iowa.^g—Similar statute and the same doctrine: Code 1880, sec. 1938; *White v. Rittenmyer*, 30 Iowa, 268; *Courtney v. Carr*, 6 Iowa, 238; *Hall v. Savill*, 3 G. Greene, 37; 54 Am. Dec. 485.

Kansas.^h—The same: *Dassler's Comp. Laws* 1881, c. 68, sec. 1; *Life Ass'n etc. v. Cook*, 20 Kan. 19; *Chick v. Willetts*, 2 Kan. 384, 391. In this case, *Crozier, C. J.*, stated the doctrine and some of its necessary results with much freedom and force, but with perfect truth: "Some of the states still adhere to the common-law view, more or less modified by the real nature of the transaction; but in most of them practically all that remains of the old theories is their nomenclature. In this state a clear sweep has been made by statute. The common-law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning, except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things." There is a profound truth in this remark, which applies to a large part of the American jurisprudence. Nothing has done so much to confuse the minds of judges and lawyers, and to retard the operation of legal reforms, as the constant retention and use of former names and phrases when the facts or rules which they represented have been

(e) *Indiana*.—1 *Rev. Stats.* 1888, sec. 1086.

(f) But a mortgagee who obtains possession legally may retain it until paid: *Jewett v. Tomlinson*, 137 Ind. 326, 36 N. E. 1106.

(g) *Iowa*.—*Harrington v. Foley*, 108 Iowa 287, 79 N. W. 64 (grantee in absolute deed intended as a mortgage is not entitled to possession).

(h) *Kansas*.—*Kelso v. Norton*, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308.

The mortgagee's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unencumbered, by a payment of the debt secured by it at any time before the premises are actually sold under a decree

wholly abrogated. The prejudicial effects of this practice are felt in all the states which have adopted the reformed procedure.

Louisiana.—The jurisprudence of this state being based upon the civil law, the common-law notions concerning the mortgage were never accepted. The mortgage is a lien, and the whole title subject thereto is left in the mortgagor. Indeed, the law of Louisiana is silent upon any division of estates into legal and equitable: Civ. Code 1875, secs. 3278, 3279, 3290. The ordinary mortgage is a "right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment." "Mortgage is a species or pledge, the thing mortgaged being bound for the payment of the debt or fulfillment of the obligation." There is also a kind of mortgage known as the "conventional mortgage." In the conception of the civil law a mortgage is a species of alienation, not, however, of the property itself,—the dominion or ownership of the thing,—but of a certain right in respect to the thing, which right is really identical with our "equitable lien" as distinguished from our "common-law lien". See *Duclaud v. Rousseau*, 2 La. Ann. 168.

Michigan.—A mortgage merely creates a lien, and no estate in the mortgagee, the full legal estate, subject to the lien, remaining in the mortgagor. The statute prohibits the mortgagee or owner of the mortgage from maintaining any action to recover possession of the land, until he has obtained the title through a sale under a foreclosure: Comp. Laws 1871, p. 1775; *Gorham v. Arnold*, 22 Mich. 247; *Caruthers v. Humphrey*, 12 Mich. 270; *Wagar v. Stone*, 36 Mich. 364.

Minnesota.—Similar statute and the same doctrine: Gen. Stats. 1878, c. 75, p. 818; *Adams v. Corrison*, 7 Minn. 456; *Donnelly v. Simonton*, 7 Minn. 167; *Berthold v. Holman*, 12 Minn. 335; 93 Am. Dec. 233; *Berthold v. Fox*, 13 Minn. 501; 97 Am. Dec. 243; *Rice v. St. Paul etc. R. R.*, 24 Minn. 464; *Parsons v. Noggle*, 23 Minn. 328. The opinion of Emmett, C. J., in *Adams v. Corrison*, gives a very instructive statement of the doctrine.

Nebraska.—Similar statute and the same doctrine: Gen. Stats. 1873,

(1) *Michigan.*—Howell's Stats. 1882, sec. 7847. See, also, *Dawson v. Peter*, 119 Mich. 274, 77 N. W. 997; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 33 C. C. A. 113, 90 Fed. 379.

(2) *Minnesota.*—Kelly's Stats. 1891, sec. 5407. See, also, *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889; *Meighen v. King*, 31 Minn. 115, 16 N. W. 702; *Rogers v. Benton*, 39

Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613 (if mortgagee lawfully in possession so remains until right of redemption is barred, he becomes vested with the absolute legal title); *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354.

of foreclosure; the estate does not then *revest* in the mortgagor, since it has never gone out of him. On the other hand, the mortgagor's interest, instead of being an equi-

c. 61, sec. 55; ^k Kyger v. Ryley, 2 Neb. 20, 28; Davidson v. Cox, 11 Neb. 250; 9 N. W. 95; Hurley v. Estes, 6 Neb. 386. A deed of trust to secure payment of a debt is regarded as a mortgage, the legal title remaining in the grantor: Kyger v. Ryley; Webb v. Hoselton, 4 Neb. 308; 19 Am. Rep. 638.

Nevada.^l—Statute borrowed from the legislation of California, and substantially the same; the same doctrine prevails: 1 Comp. Laws, sec. 1323; Hyman v. Kelly, 1 Nev. 179; Whitmore v. Shiverick, 3 Nev. 288.

New York.—This state was one of the earliest to modify the doctrine concerning mortgages, by discarding the old common-law theory and adopting the equitable view alone. Although prior to the Revised Statutes the mortgagee was able after default to recover possession of the premises by ejectment, yet his title was legal only so far as was considered necessary for his security; it did not enable him to convey the land: Waters v. Stewart, 1 Caines Cas. 47, per Kent, J.; Jackson v. Willard, 4 Johns. 41; Runyan v. Mersereau, 11 Johns. 534; 6 Am. Dec. 393; Stanard v. Eldridge, 16 Johns. 254; Jackson v. Bronson, 19 Johns. 325; Waring v. Smyth, 2 Barb. Ch. 119, 135; 47 Am. Dec. 299. The Revised Statutes of 1830 swept away all semblance of legal estate in the mortgagee by depriving him of the right to recover possession even after default; and the doctrine has since become fully established that the mortgage creates a lien only, and no estate, and that the legal title and estate remain in the mortgagor: 2 Rev. Stats., p. 312, sec. 57; ^m Astor v. Hoyt, 5 Wend. 603; Phyfe v. Riley, 15 Wend. 248; 30 Am. Dec. 55; Astor v. Miller, 2 Paige, 68; Bell v. Mayor etc. of N. Y., 10 Paige, 49; Waring v. Smyth, 2 Barb. Ch. 119, 135; Packer v. Rochester etc. R. R., 17 N. Y. 283; Power v. Lester, 23 N. Y. 527; Merritt v. Bartholick, 36 N. Y. 44; Trimm v. Marsh, 54 N. Y. 599; 13 Am. Rep. 623; Calkins v. Calkins, 3 Barb. 305; Bryan v. Butts, 27 Barb. 503. If the mortgagee, with the consent of the mortgagor, or in any other lawful manner, obtains possession of the land, his possession is protected; the mortgagor cannot recover it by an action at law, but is left to his equitable remedy by redemption. This apparent anomaly, however, is explained by the latest de-

(^k) *Nebraska.*—Comp. Stats. 1891, c. 73, sec. 55. See, also, Burnham v. Doolittle, 14 Nebr. 214, 15 N. W. 606; Clark v. Missouri, K. & T. Tr. Co., 59 Nebr. 53, 80 N. W. 257 (mortgagor entitled to possession). A deed absolute in form but intended as a mortgage passes the legal title: First Nat. Bank v. Tighe, 49 Nebr. 299, 68 N. W. 490.

(^l) *Nevada.*—Orr v. Ulyatt, 23 Nev. 134, 43 Pac. 916 (a mere security).

(^m) *New York.*—Code Civ. Proc., sec. 1498. In re Kellogg, 113 Fed. 120. A deed absolute in form, but intended as a mortgage, conveys no right of possession: Shattuck v. Bascom, 105 N. Y. 39, 12 N. E. 233; Thorn v. Sutherland, 123 N. Y. 236, 25 N. E. 362.

table estate, or right in equity to redeem the land from the mortgagee's ownership, is, for all purposes, under all circumstances, and between all parties, the legal estate, with

cisions, and does not require any assumption of a legal estate in the mortgagee;^m *Packer v. Rochester etc. R. R.*, *supra*; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *Mickles v. Townsend*, 18 N. Y. 575, 584; *White v. Rittenmyer*, 30 Iowa, 268.

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Oregon.—The statute protects the mortgagor's possession and confirms his legal estate until a sale under a decree for a foreclosure: Code Civ. Proc., sec. 323; ^q *Besser v. Hawthorn*, 3 Or. 129. If the mortgagee obtains possession with the mortgagor's assent, then, as in California, his possession may continue until the debt is paid out of the rents and profits, or otherwise; until such payment the mortgagor cannot regain possession by an action at law: *Roberts v. Sutherland*, 4 Or. 219.

South Carolina.—Similar statute and same general doctrine: Rev. Stats. 1873, p. 536; ^r *Thayer v. Cramer*, 1 McCord Eq. 395; *Nixon v. Bynum*, 1 Bail. 148; *Annely v. De Saussure*, 12 S. C. 488.

Texas.—*Wright v. Henderson*, 12 Tex. 43; *Mann's Ex'x v. Falcon*, 25 Tex. 271; *Walker v. Johnson*, 37 Tex. 127, 129; and a deed of trust to secure a debt is treated in this respect as a mortgage: *Ibid.*^s

Utah: Civ. Prac. Act 1870, sec. 260.

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Wisconsin.—Similar statute and same doctrine: Rev. Stats. 1871, p. 1671; ^u

(^m) *Townshend v. Thompson*, 139 N. Y. 152, 34 N. E. 891.

(^o) *North Dakota*.—The mortgage conveys no title or estate in the land; nor does it, either before or after condition broken, entitle the mortgagee to possession: *McClary v. Ricks*, 11 N. Dak. 38, 88 N. W. 1042.

(^p) *Oklahoma*.—The grantee in an absolute deed intended as a mortgage is not entitled to possession: *Yingling v. Redwine*, 12 Okl. 64, 69 Pac. 810.

(^q) *Oregon*.—Code of Proc. 1891, sec. 539. See *Adair v. Adair*, 22 Oreg. 115, 29 Pac. 193; *Thomson v. Shirley*, 69 Fed. 484

(^r) *South Carolina*.—Gen. Stats. 1882, c. 91. See, also, *Bredenberg v. Landrum*, 32 S. C. 215, 10 S. E. 956

(McGowan, J., says, in this case, referring to the author's classification:—"He very properly places our state in the latter class"); *Team v. Baum*, 47 S. C. 410, 25 S. E. 275, 58 Am. St. Rep. 893.

(^s) *Texas*.—*Kerr v. Galloway*, 94 Tex. 641, 64 S. W. 858.

(^t) *Washington*.—*Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268. A mortgagee has no right to possession in the absence of a stipulation in the mortgage allowing it: *State v. Superior Court of Kittitas County*, 21 Wash. 564, 58 Pac. 1065; but he may obtain such right by agreement: *Brundage v. Home Sav. & Loan Ass'n*, 11 Wash. 277, 39 Pac. 666.

(^u) *Wisconsin*.—2 Sanborn and Berryman's Stats. 1889, sec. 3095.

all the incidents and qualities of legal ownership, but at the same time encumbered by or subject to the lien of the mortgage, and liable, therefore, to be cut off and divested by a sale under a decree of foreclosure if the debt is not paid according to the terms of the mortgage. It is an entire misuse of language to apply the name "equity of redemption" to this *legal* estate of the mortgagor;¹ and the continued employment of the phrase in the legal nomenclature of the states which have adopted this theory of the mortgage is to be regretted, since it is the occasion of constant misapprehension and confusion of thought.² It is the natural and inevitable result of this system that in all the states where it prevails the mortgagor is not *ordinarily*, under *ordinary* circumstances, compelled to apply to a court of equity for relief. Being entitled to retain possession of the premises after a default, he is generally in a position to act on the defensive, and is not obliged to bring a suit in equity for a redemption. On the other hand, the mortgagee, not being permitted to recover possession and hold the land, is compelled to enforce his lien by a suit in equity, in which he obtains a decree for a sale of the mortgaged premises. In several of the states, the remedy of a strict foreclosure has been denied to him by statute. The mode of treating the mortgage thus described has been adopted in the following states and territories: California, Colorado, Dakota, Florida, Georgia, Indiana,

Wood v. Trask, 7 Wis. 566; 76 Am. Dec. 230. A mortgagee who after default obtains possession of the land with consent of the mortgagor or in any other lawful and peaceable manner has the right to retain the possession, as in New York, California, Oregon, etc.: Gillett v. Eaton, 6 Wis. 30; Tallman v. Ely, 6 Wis. 244; Fladland v. Delaplaine, 19 Wis. 459; Hennesy v. Farrell, 20 Wis. 42; Avery v. Judd, 21 Wis. 262; Brinkman v. Jones, 44 Wis. 498.

² See Trimm v. Marsh, 54 N. Y. 599; 13 Am. Rep. 623, per Earl, J.; Chick v. Willetts, 2 Kan. 384, per Crozier, C. J.

See McCormick v. Herndon, 78 Wis. 661, 47 N. W. 939.

effect in Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92.

(v) This section is cited to this

Iowa, Kansas, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New York, Oregon, South Carolina, Texas, Utah, and Wisconsin.³

§ 1189. *The Mortgagee in Possession under This Method.*^a—The foregoing system, as it is administered in many of the states, contains one apparent inconsistency which requires a brief explanation. While the mortgagee is declared to have no legal estate, and is unable to recover possession of the land against an unwilling mortgagor or owner of the fee subject to the mortgage, yet if the mortgagee, while the mortgage is still subsisting, does in any lawful manner obtain the possession, the courts have established the doctrine that his interest under the mortgage enables him to retain such possession, and to defend it against the mortgagor or those succeeding to *his* title. In other words, the mortgagor is not permitted to recover back the possession, in an action at law, upon the strength of his own acknowledged legal estate; but his only remedy is in equity by a suit to redeem. Undoubtedly this doctrine, when first admitted, was the result of the old common-law notions still lingering in the minds of the judges before the purely equitable theory had become fully developed; but it is certainly difficult to reconcile the doctrine, *on principle*, with this theory. The more recent decisions have perceived and admitted the incongruity; and the courts, while retaining the doctrine as settled, have guarded against any inference from it that the mortgagee has acquired a legal estate by his possession; his right to retain possession does not depend upon an estate held by him; his possession is protected by his lien. It is certainly more simple and just that the mortgagee should be left in possession, and the

³ To these might perhaps be added Delaware, Mississippi, and Missouri: See *ante*, under preceding paragraph.

(a) This section is cited in Kelso 93 Am. St. Rep. 308; *Cross v. Knox*, v. Norton, 65 Kan. 778, 70 Pac. 896, 32 Kan. 725, 5 Pac. 32.

mortgagor forced to redeem, than that the mortgagor should be permitted to recover the possession by an action at law, and be immediately liable to the consequences of a foreclosure suit in equity brought by the mortgagee.^{1 b}

§ 1190. **Equitable Remedies of the Parties under This Method.**^a— It is plain from the foregoing outline that in the commonwealths named in the second division a complete revolution has been wrought in the equity jurisprudence concerning mortgages. According to the original theory as it has been administered in England and in a portion of the states, the estate of the *mortgagor* being wholly equitable, the jurisdiction of equity deals chiefly, almost exclusively, with *his* interests, by protecting his rights, by enabling him to redeem the land from the mortgagee, and by compelling a reconveyance of the legal title which had been forfeited by his failure to perform the condition, and by thus putting him in a position to regain the possession. On the other hand, the mortgagee, being vested with the legal estate by means of the mortgage itself, and being able to obtain possession of the land by a legal action, is clothed with all the attributes of legal ownership, deals with the land as though it were his own, is amply protected by the legal remedies, and seldom resorts to the equitable remedy

¹ Hubbell v. Moulson, 53 N. Y. 225; 13 Am. Rep. 519; Mickles v. Townsend, 18 N. Y. 575, 584; Packer v. Rochester etc. R. R., 17 N. Y. 283, 295; Waring v. Smyth, 2 Barb. Ch. 119, 135; 47 Am. Dec. 299; White v. Rittenmyer, 30 Iowa, 268; Frink v. Le Roy, 49 Cal. 314; Nagle v. Macy, 9 Cal. 426; Dutton v. Warschauer, 21 Cal. 609; 82 Am. Dec. 765; Roberts v. Sutherlin, 4 Or. 219; Avery v. Judd, 21 Wis. 262; Hennesy v. Farrell, 20 Wis. 42; Fladland v. Delaplaine, 19 Wis. 459; Gillett v. Eaton, 6 Wis. 30; Briukman v. Jones, 44 Wis. 498; Martin v. Fridley, 23 Minn. 13.

(b) Hooper v. Young, 140 Cal. 274, 98 Am. St. Rep. 56, 74 Pac. 140; Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137; Jewett v. Tomlinson, 137 Ind. 326, 36 N. E. 1106; Stouffer v. Harlan, (Kan.) 74 Pac. 611; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Rogers v. Benton, 39 Minn. 39,

38 N. W. 765, 12 Am. St. Rep. 613; Townshend v. Thompson, 139 N. Y. 152, 34 N. E. 891; Calhoun v. Lumpkin, 60 Tex. 185; Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296.

(a) This section is cited in Kelso v. Norton, 65 Kan. 778, 70 Pac. 896, 93 Am. St. Rep. 308; Cross v. Knox, 32 Kan. 725, 5 Pac. 32.

of a strict foreclosure by which the mortgagor's right of redemption is extinguished. In the second class of states and territories, the change is complete; the positions of the two parties are exactly reversed. Equity deals primarily and almost exclusively with the mortgagee. His interest under the mortgage is no longer an estate; it is in all courts, of common law, of probate, and of equity, a mere lien, an appendage of the debt, personal assets, a thing in action assignable with the debt, but incapable of being separated from the debt and transferred by itself. He has no legal remedy on the mortgage, no power to recover possession of the land, and can enforce the lien against the land in no legal action. The remedy which the courts of equity grant is based upon the notion that his interest is a mere equitable lien, and not an estate. The relief no longer consists in an extinguishment of the mortgagor's right, by which the absolute title is left in the mortgagee. Its primary object is an enforcement of the lien by a sale of the mortgaged premises and an application of the proceeds upon the debt. The mortgagor's estate is, of course, destroyed, or, to speak more accurately, *is transferred to the purchaser at the judicial sale*. The term "foreclosure" is still applied to this process, but is evidently a misnomer when used to describe the effect produced on the mortgagor's interest; no "equity of redemption" is foreclosed or cut off, but a legal estate is taken from the mortgagor and transferred to the purchaser. The mortgagee is permitted to buy in the land at the sale, and may thus acquire the title; but he acquires it, not as mortgagee, but as purchaser. The mortgagor, on the other hand, retaining the full legal estate, subject only to the encumbrance, and being entitled to the possession, use, rents, and profits of the land up to the time when his title is finally divested by a judicial sale in a proceeding to enforce the lien, is enabled to defend his estate and possession, not only against third persons, but against the mortgagee himself, by legal actions; and as long as he does not either expressly or

impliedly *surrender* the possession to the mortgagee, he has no need nor occasion to invoke the aid of equity. There is, indeed, one situation possible in which he *must* resort to equity for relief. If, through his express consent, or through any other lawful means, the mortgagee has been permitted to obtain possession of the land, the mortgagor's only remedy is the equitable suit for a redemption, in which an account of the rents and profits received can be adjusted, the amount of the debt ascertained, the mortgage extinguished, and the mortgagor restored. The situation which requires this interposition of equity on behalf of the mortgagor is comparatively of very rare occurrence.¹ The foregoing description of the equitable jurisdiction is especially applicable to the commonwealths which I have grouped in the second division; but it is also practically correct with reference to several of those assigned to the first division. A practical and accurate criterion, I think, would be found in the kind of remedy to enforce the mortgagee's rights which commonly prevails. In states where the remedy by strict foreclosure is the ordinary one, the double system of law and equity *must* necessarily exist in practice as well as in theory. Where the remedy by judicial sale under a decree is the usual one, the common-law notions, if they exist at all, must be virtually theoretical.

§ 1191. **Definition of Mortgage.**—A concise definition of mortgage which should embrace both its equitable and its legal character is virtually impossible. Considered in its modern character, as stripped of its legal notions and embodying purely equitable principles throughout a large portion of the United States, the definition given by the

¹ The equitable suit which may be brought by a mortgagor who is in undisturbed possession of the land, for the purpose of compelling the mortgagee to accept payment of the debt which is due and to discharge the mortgage, is ordinarily called a "suit for redemption"; but it plainly has nothing in common with the real suit to redeem, by which the mortgagor redeems—or buys back—his lost legal estate; it is simply a suit to remove the encumbrance or cloud upon his legal title.

California Civil Code seems to be complete and accurate.¹ Several forms of definition, regarding the mortgage as a common-law conveyance, are added in the foot-note. These attempted definitions are all erroneous, upon any theory of the instrument; they do not go beyond the literal import of the language in which a mortgage is usually expressed; and they utterly ignore all the equitable elements, which are as much and as truly constituent parts of the mortgage as the legal elements. Any true definition based upon the original common-law and equitable system must embody and express all the double nature of the mortgage, — that it is both a lien in equity and a conveyance at law.

¹ Cal. Civ. Code, sec. 2920: "A mortgage is a contract by which specific property is *hypothecated* for the performance of an act, without the necessity of a change of possession." The term "hypothecated" is here used in its strict technical sense, and with appropriateness of application.

The following are examples of faulty and defective descriptions: "A mortgage is a conditional conveyance of land designed as a security for the payment of money, the fulfillment of some contract, or the performance of some act, and to be void upon such payment, fulfillment, or performance": *Mitchell v. Burnham*, 44 Me. 286, 299. "At common law a mortgage is defined to be a deed conveying lands conditioned to be void upon the payment of a sum of money, or the doing of some other act": *Lund v. Lund*, 1 N. H. 39, 41; 8 Am. Dec. 29. "A mortgage is defined to be a conveyance of an estate, by way of pledge, to secure a debt or the performance of some act, such as the payment of money or the furnishing of an indemnity, and to become void on payment or performance agreeably to the prescribed condition": *Wing v. Cooper*, 37 Vt. 169, 179. See also *Erskine v. Townsend*, 2 Mass. 493, 495; 3 Am. Dec. 71; *Carter v. Taylor*, 3 Head, 30; *Montgomery v. Bruere*, 4 N. J. L. 260, 268. From these definitions no one would obtain even a suggestion of the modifications which equity has made in the nature of the mortgage. The following more full and correct description, as viewed from the double system of the English jurisprudence, is given by a standard text-book: "A mortgage may be described to be a conveyance of lands by a debtor to his creditor as a pledge and security for the repayment of a sum of money borrowed, with a proviso that such conveyance shall be void on payment of the money and interest on a certain day; and in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law, yet the mortgagor has still an equity of redemption, — that is, a right in equity, on payment of the principal, interest, and costs, within a reasonable time, to call for a reconveyance of the lands": *Powell on Mortgages*, 4; see also *Coote on Mortgages*, 1; *Fisher on Mortgages*, Introduction, p. 2; 1 *Washburn on Real Property*, c. 16, sec. 1.

SECTION III.

VARIOUS FORMS AND KINDS OF MORTGAGE.

- § 1192. In equity, a mortgage is a security for a debt.
- § 1193. Once a mortgage, always a mortgage.
- § 1194. Mortgage, and conveyance with an agreement of repurchase, distinguished.
- § 1195. The general criterion: the continued existence of a debt.
- § 1196. A conveyance absolute on its face may be a mortgage.
- §§ 1197-1199. Mortgage to secure future advances.
 - § 1197. As between the immediate parties.
 - § 1198. As against subsequent encumbrancers and purchasers.
 - § 1199. As affected by the recording act.
- §§ 1200-1203. Mortgages to secure several different notes.
 - § 1200. As between the original parties.
 - § 1201. Assignees of the notes; order of priority among them.
 - § 1202. Effect of an assignment of the notes.
 - § 1203. Priority between an assignee and the mortgagee.

§ 1192. In Equity, a Mortgage is a Security for a Debt.^a— In the equitable view, a mortgage may be described in general terms as an assurance or pledge of or charge upon property, real or personal, for an antecedent, present, or future debt or loan, as security for and redeemable on the repayment of such debt.¹ The fundamental principle of equity is, that whenever a conveyance of land is given for the purpose of securing payment of an existing debt, it is a mortgage. If the fact is established that a debt exists between the parties, and the transaction did not amount to a present payment, satisfaction, or discharge of that debt, but recognized it as still continuing, to be paid at some future time, and was intended to be a security for such payment, then the instrument is always regarded in equity as a mortgage, whatever be its form.²

¹ Seton v. Slade, 7 Ves. 265, 273.

² A court of equity will look beyond the external form, at the real relations between the parties, and will protect the debtor's equity of redemption, if

(a) The text, §§ 1192-1196, is cited in Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394, 12 U. S. App. 274.

§ 1193. **Once a Mortgage, Always a Mortgage.*** — In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been firmly established from an early day that when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of

necessary, in opposition to the literal terms of the instrument. This principle lies at the base of the entire equitable doctrine, and is applied to mortgages in the ordinary form, to deeds with a separate defeasance, to deeds absolute on their face, to deeds with accompanying agreements to reconvey, and to every other form of assurance which is in reality a security:^b *Stinchfield v. Milliken*, 71 Me. 567; *Moors v. Albro*, 129 Mass. 9; *Hassam v. Barrett*, 115 Mass. 256; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671; *McIntier v. Shaw*, 6 Allen, 83; *French v. Burns*, 35 Conn. 359; *Budd v. Van Orden*, 33 N. J. Eq. 143; *Judge v. Reese*, 24 N. J. Eq. 387; *Sweet v. Parker*, 22 N. J. Eq. 453; *Vanderhaize v. Hugues*, 13 N. J. Eq. 244, 411; *Danzeisen's Appeal*, 73 Pa. St. 65; *Sweetzer's Appeal*, 71 Pa. St. 264; *Harper's Appeal*, 64 Pa. St. 315; *Houser v. Lamont*, 55 Pa. St. 311; 93 Am. Dec. 755; *Baughner v. Merryman*, 32 Md. 185; *Anthony v. Anthony*, 23 Ark. 479; *Church v. Cole*, 36 Ind. 34; *Hunter v. Hatch*, 45 Ill. 178; *Ewart v. Walling*, 42 Ill. 453; *Reigard v. McNeil*, 38 Ill. 400; *Wilson v. Patrick*, 34 Iowa, 362; *Holliday v. Arthur*, 25 Iowa, 19; *Richardson v. Barrick*, 16 Iowa, 407; *Holton v. Meighen*, 15 Minn. 69.

If the instrument be in fact a mortgage, it is entirely immaterial that there is no provision for a redemption, or no day fixed for the payment: *Joynes v. Statham*, 3 Atk. 388; *Bell v. Carter*, 17 Beav. 11.

(b) *Hoile v. Bailey*, 58 Wis. 434, 448, 17 N. W. 322; *Swift v. Lumber Co.*, 71 Wis. 482, 37 N. W. 441.

(a) The text, §§ 1193-1219, is cited in *Jackson v. Lynch*, 129 Ill. 72, 22

N. E. 246. This section is cited in *Lounshury v. Norton*, 59 Conn. 170, 22 Atl. 153; *Harrington v. Foley*, 108 Iowa 287, 79 N. W. 64.

his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right.¹

¹ This doctrine is based upon the relative situation of the debtor and the creditor; it recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will. The doctrine is universal in its application, and underlies many special rules of equity. It extends to stipulations limiting the time of redemption, or the parties who may redeem; notwithstanding all such stipulations, the right to redeem is general:^b *Howard v. Harris*, 1 Vern. 33; *Newcomb v. Bonham*, 1 Vern. 7; *Willett v. Winnell*, 1 Vern. 488; *Jennings v. Ward*, 2 Vern. 520; *East I. Co. v. Atkyns*, Comyn, 346; *Spurgeon v. Collier*, 1 Eden, 55; *Jason v. Eyres*, 2 Ch. Cas. 33; *Floyer v. Lavington*, 1 P. Wms. 268; *Goodman v. Grierson*, 2 Ball & B. 274, 278; *Cowdry v. Day*, 1 Giff. 316; *Pritchard v. Elton*, 38 Conn. 434; *Henry v. Davis*, 7 Johns. Ch. 40; *Clark v. Henry*, 2 Cow. 324; *Rankin v. Mortimere*, 7 Watts, 372; *Jaques v. Weeks*, 7 Watts, 261, 275; *Woods v. Wallace*, 22 Pa. St. 171; *Hiester v. Maderia*, 3 Watts & S. 384, 388; *Johnston v. Gray*, 16 Serg. & R. 361, 365; 16 Am. Dec. 577; *Clark v. Condit*, 18 N. J. Eq. 358; *Vanderhaize v. Hugues*, 13 N. J. Eq. 244, 410; *Robinson v. Farrelly*, 16 Ala. 472; *Heirs of Stover v. Heirs of Bounds*, 1 Ohio St. 107; *Cherry v. Bowen*, 4 Sneed, 415; *Burrow v. Henson*, 2 Sneed, 658; *McNees v. Swaney*, 50 Mo. 388, 391; *Wilson v. Drumrite*, 21 Mo. 325; *Pierce v. Robinson*, 13 Cal. 116, 125; *Lee v. Evans*, 8 Cal. 424; *Rogan v. Walker*, 1 Wis. 527; but see *Glendenning v. Johnston*, 33 Wis. 347. And stipulations inserted in a mortgage, giving the mortgagee a collateral advantage not properly belonging to the contract of mortgage, are invalid:^c *Chambers v. Goldwin*, 9 Ves. 254, 271;

(b) This note is cited in *Stoutz v. Rouse*, 84 Ala. 309, 4 South. 170. This portion of the note is quoted in *Jackson v. Lynch*, 129 Ill. 72, 22 N. E. 246. See, also, *Parmer v. Parmer*, 74 Ala. 285; *Reed v. Reed*, 75 Me. 264.

(c) This rule has been thoroughly re-examined and affirmed in a series of recent English cases, the most im-

portant of which is *Noakes & Co., Ltd., v. Rice*, [1902] App. Cas. 24, affirming *Rice v. Noakes*, [1900] 2 Ch. 445. The stipulation condemned in that case was a covenant on the part of a mortgagor of a leasehold to buy liquors of the mortgagee only, the covenant to continue after the mortgage debt was paid and during the continuance of the term of the

§ 1194. Mortgage, and Conveyance with Agreement of Repurchase, Distinguished.— The principle that equity looks beneath the external form in determining questions connected with mortgage has frequently been applied to a particular mode of dealing with real property. Where land is con-

Langstaffe v. Fenwick, 10 Ves. 405; Leith v. Irvine, 1 Mylne & K. 277; Broad v. Selfe, 9 Jur., N. S., 885; Barrett v. Hartley, L. R. 2 Eq. 789, 795; Matthison v. Clarke, 3 Drew. 3; Chapple v. Mahon, 5 I. R. Eq. 225; Comyns v. Comyns, 5 I. R. Eq. 583. On the other hand, an agreement with the mortgagor that the mortgagee shall have a preference of purchasing — a pre-emption — in case of a sale by the mortgagor is valid: Orby v. Trigg, 2 Eq. Cas. Abr. 599, pl. 24; 9 Mod. 2; Cookson v. Cookson, 8 Sim. 529. The mortgagor may, at any time after the execution of the mortgage, by a separate and distinct transaction, sell or release his equity of redemption to the mortgagee: Trull v. Skinner, 17 Pick. 213; Remsen v. Hay, 2 Edw. Ch. 535; Hicks v. Hicks, 5 Gill & J. 75; McKinstry v. Conly, 12 Ala. 678; Wynkoop v. Cowing, 21 Ill. 570.^d This is a transaction, however, which a court of equity will examine strictly, in order to be satisfied that it is a perfectly fair and independent proceeding, entirely

lease. Speaking of the principle, "Once a mortgage, always a mortgage," Lord Davey says (p. 33), "The meaning of that is, that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest and costs, from getting back the mortgaged property in the condition in which he parted with it." See, also, Bradley v. Carritt, [1903] App. Cas. 253, reversing Carritt v. Bradley, [1901] 2 K. B. 550, and disapproving Santley v. Wilde, [1899] 1 Ch. 747; Jarrah Timber & Wood Paving Co., Ltd., v. Samuel, [1902] 2 Ch. 479, [1903] 2 Ch. 1; Samuel v. Jarrah Timber & Wood Paving Co., [1904] App. Cas. 323 (option given to the mortgagee in the mortgage contract to purchase the mortgaged property at a price named, at any time within twelve months); Biggs v. Hodinott, [1898] 2 Ch. 307, 67 Law J. (Ch.) 540, 78 Law T. (N. S.) 201, 47 Wkly. Rep. 84.

(^d) See, also, Reeves v. Lisle, [1902] App. Cas. 461, affirming Lisle v. Reeves, [1902] 1 Ch. 53 (subsequent agreement giving mortgagee the option to purchase the property); Stoutz v. Rouse, 84 Ala. 309, 4 South. 170; McMillan v. Jewett, 85 Ala. 476, 5 South. 145; Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. Rep. 160; Seymour v. Mackay, 126 Ill. 341, 18 N. E. 552. In Illinois it is held that when land has been transferred by a deed absolute in form, though intended as a security for the payment of a debt, the payment of the debt may be abandoned, and the deed treated as an absolute conveyance, although originally intended as a mortgage, and that such arrangement may be made by parol, and be binding: Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869; Maxfield v. Patchen, 29 Ill. 39. In Texas a contrary conclusion is reached: Keller v. Kirby, (Tex. Civ. App.) 79 S. W. 82.

veyed by an absolute deed, and an instrument is given back as a part of the same transaction, not containing the condition ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a specified time, the two taken together may be what on their face they purport to be,—a mere sale with a contract of repurchase,—or they may constitute a mortgage. In the first case, where the transaction is merely a sale and a contract of repurchase, the agreement must be fulfilled according to its terms. If the grantor fails to pay the money at the stipulated time, all his rights, either at law or in equity, under the contract are gone; there is no equity of redemption.^{1 a} In the second case, if the transaction be a mort-

unconnected with the original contract of mortgage: *c* Webb v. Rorke, 2 Schoales & L. 661, 673; Villa v. Rodriguez, 12 Wall. 323, 20 L. ed. 406; Russell v. Southard, 12 How. 139, 154, 13 L. ed. 927; Hyndman v. Hyndman, 19 Vt. 9; 46 Am. Dec. 171; Mills v. Mills, 26 Conn. 213; Holridge v. Gillespie, 2 Johns. Ch. 30; Baugher v. Merryman, 32 Md. 185; Locke's Ex'r v. Palmer, 26 Ala. 312, 323; Brown v. Gaffney, 28 Ill. 149.

¹ Barrell v. Sabine, 1 Vern. 268; Davis v. Thomas, 1 Russ. & M. 506; Williams v. Owen, 5 Mylne & C. 303; Perry v. Meadowcroft, 4 Beav. 197; Alderson v. White, 2 De Gex & J. 97; French v. Sturdivant, 8 Me. 246; Rich v. Doane, 35 Vt. 125; Macaulay v. Porter, 71 N. Y. 173; Morrison v. Brand, 5 Daly, 40; Glover v. Payn, 19 Wend. 518; Holmes v. Grant, 8 Paige, 243; Brown v. Dewey, 2 Barb. 28; Merritt v. Brown, 19 N. J. Eq. 286; Haines v. Thomson, 70 Pa. St. 434; Ransone v. Frayser's Ex'rs, 10 Leigh, 592; Moss v. Green, 10 Leigh, 251; 34 Am. Dec. 731; Kelly v. Bryan, 6 Ired. Eq. 283; McLaurin v. Wright, 2 Ired. Eq. 94; Haynie v. Robertson, 58 Ala. 37; Pearson v. Seay, 35

(e) See Franklin v. Ayer, 22 Fla. 654; Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283; Linnell v. Lyford, 72 Me. 280; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; Hall v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Vangilder v. Hoffman, 22 W. Va. 1; Liskey v. Snyder, (W. Va.) 49 S. E. 515. See, however, Melbourne Banking Co. v. Brougham, 7 App. Cas. (Priv. Coun.) 307, where it is said that, inasmuch as the relation

between the parties is not a confidential one, the burden of justifying the release does not rest upon the mortgagee. See, also, De Martin v. Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115. To the effect that the relation is not confidential, see Adler v. Van Kirk L. & C. Co., 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133.

(a) Quoted in Bigler v. Jack, 114 Iowa 667, 87 N. W. 700. This section is cited in Keithley v. Wood, 151

gage, all the qualities and incidents of a mortgage attach, whatever be its external form, and whatever be the collateral stipulations. The maxim, Once a mortgage, always a mortgage, applies to this condition of fact with especial emphasis. The rights of the two parties are reciprocal: that of the grantor to redeem after a default in payment at the specified time is complete; that of the grantee to foreclose and cut off this equity of redemption is no less clear.^{2 b}

Ala. 612; 38 Ala. 643; *McKinstry v. Conly*, 12 Ala. 678; *Johnson's Ex'r v. Clark*, 5 Ark. 340; *Turner v. Kerr*, 44 Mo. 429; *Holmes v. Fresh*, 9 Mo. 200, 206; *Lane v. Dickerson*, 10 Yerg. 373; *Slutz v. Desenberg*, 28 Ohio St. 371; *Wilson v. Carpenter*, 62 Ind. 495; *Cornell v. Hall*, 22 Mich. 377; *Price v. Karnes*, 59 Ill. 276; *Hanford v. Blessing*, 80 Ill. 188; *Carr v. Rising*, 62 Ill. 14; *Pitts v. Cable*, 44 Ill. 103; *Smith v. Croshy*, 47 Wis. 160, 2 N. W. 104; *McNamara v. Culver*, 22 Kan. 661; *Farmer v. Grose*, 42 Cal. 169; *Page v. Vilhac*, 42 Cal. 75; *Henley v. Hotaling*, 41 Cal. 22; *Conway's Ex'rs v. Alexander*, 7 Cranch, 218, 3 L. ed. 321; and see *Tufts v. Tapley*, 129 Mass. 380.

² *Goodman v. Grierson*, 2 Ball & B. 274; *Russell v. Southard*, 12 How. 139, 13 L. ed. 927; *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4,847; *Wing v. Cooper*, 37 Vt. 169; *Carpenter v. Snelling*, 97 Mass. 452; *Rice v. Rice*, 4 Pick. 349; *Peterson v. Clark*, 15 Johns. 205; *Sweetzer's Appeal*, 71 Pa. St. 264; *McClurkan v. Thompson*, 69 Pa. St. 305; *Spering's Appeal*, 60 Pa. St. 199; *Houser v. Lamont*, 55 Pa. St. 311; 93 Am. Dec. 755; *Kellum v. Smith*, 33 Pa. St. 158; *Rankin v. Mortimere*, 7 Watts, 372; *Hiester v. Maderia*, 3 Watts & S. 384; *Baughner v. Merryman*, 32 Md. 185; *Artz v. Grove*, 21 Md. 456; *Dougherty v. McColgan*, 6 Gill & J. 275; *Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Robinson v. Willoughby*, 65 N. C. 520; *Lindsay v. Matthews*, 17 Fla. 575; *McNeill v. Norsworthy*, 39 Ala. 156; *Locke's Ex'r v. Palmer*, 26 Ala. 312; *Weathersley v. Weathersley*, 40 Miss. 462, 469; 90 Am. Dec. 344; *Scott v. Henry*, 13 Ark. 112; *Heath v. Williams*, 30 Ind. 495; *Watkins v. Gregory*, 6 Blackf.

Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265. See, also, *Manchester, etc., R'y Co. v. North Central, etc., Co.*, 13 App. Cas. (H. L.) 554, affirming *North Central, etc., Co. v. Manchester, etc., R'y Co.*, 35 Ch. Div. 191, and 32 Ch. Div. 477; *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. 81, 28 L. ed. 670; *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. ed. 619; *Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. ed. 631; *Cowell v. Craig*, 79 Fed. 685; *Douglas v.*

Moody, 80 Ala. 61; *Eames v. Hardin*, 111 Ill. 634; *Carroll v. Tomlinson*, 192 Ill. 399, 61 N. E. 484, 85 Am. St. Rep. 344; *Yost v. First Nat. Bank*, 66 Kan. 605, 72 Pac. 209; *Stahl v. Dehn*, 72 Mich. 645, 40 N. W. 922; *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; *Kerr v. Hill*, 27 W. Va. 576.

(b) *Lanahan v. Sears*, 102 U. S. 318, 26 L. ed. 180; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394, 12 U. S. App. 274; *Turner v. Wilkinson*, 72

§ 1195. **The General Criterion—The Continued Existence of a Debt.**—Whether any particular transaction does thus amount to a mortgage or to a sale with a contract of repurchase must, to a large extent, depend upon its own special circumstances; for the question finally turns, in all cases, upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence.^a A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a *doubt*, the American courts, from obvious motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still

113; *McKinney v. Miller*, 19 Mich. 142; *Bishop v. Williams*, 18 Ill. 101; 15 Ill. 553; *Miller v. Thomas*, 14 Ill. 428; *White v. Lucas*, 46 Iowa, 319; *Wilson v. Patrick*, 34 Iowa, 362, 370; *Hughes v. Sheaff*, 19 Iowa, 335, 342; *Trucks v. Lindsey*, 18 Iowa, 504; *Hickox v. Lowe*, 10 Cal. 197; *Polhemus v. Trainer*, 30 Cal. 685. A grantor may, however, lose his right of redemption from a purchaser of the grantee by his fraudulent conduct: *Tufts v. Tapley*, 129 Mass. 380.

Ala. 361; *Wofford v. Wyly*, 72 Ga. 863; *Helbreg v. Schumann*, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; *Keithley v. Wood*, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; *Rubelman v. Rummel*, 72 Iowa 40, 33 N. W. 354; *Overstreet v. Baxter*, 30 Kan. 55, 1 Pac. 825; *Snow v. Pressey*, 82 Me. 552, 20 Atl. 78; *Bunker v. Barron*, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; *Pearce v. Wilson*, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243. Of course, where the instrument given by the grantee is a de-

feasance, in terms, the transaction is clearly a mortgage: *Dubuque Nat. Bank v. Weed*, 57 Fed. 513; *Reilly v. Cullen*, 101 Mo. App. 32, 74 S. W. 370; *Grogan v. Grass Valley Trading Co.*, (Mont.) 76 Pac. 211; *Knowles v. Knowles*, (R. I.) 56 Atl. 775; *Turner v. Cochran*, 30 Tex. Civ. App. 549, 70 S. W. 1024.

(a) Quoted in *Bigler v. Jack*, 114 Iowa 667, 87 N. W. 700. This section is cited in *Holladay v. Willis*, 101 Va. 274, 43 S. E. 616.

left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments.^b On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase.¹ The writings *may* show on

¹ The practical test is, whether there is a liability, notwithstanding or independent of the conveyance and contract of reconveyance, which the grantee can enforce against the grantor. If a loan is made to the grantor at the time of executing the conveyance, and the continued existence of his indebtedness therefor is evidenced by some collateral engagement given by the grantor, such as a note or bond, the case would be simple, and the transaction clearly a mortgage. In the second place, if the conveyance is given in consideration of an antecedent debt due from the grantor, and this debt yet remains, so that the grantee may enforce his claim at some time or another against the grantor, the transaction is also a mortgage. But if this antecedent debt is wholly satisfied and extinguished by the conveyance, so that no liability remains under any circumstances against the grantor, then there is no mortgage, since there is no debt to be secured thereby. In such a case the surrender up by the grantee of the written evidences of original indebtedness, or his cancellation thereof, would be very material circumstances. Thirdly, there may be neither a present loan nor an antecedent debt, but the grantee may undertake to assume some outstanding liability of the grantor, or to pay off some claim against the grantor, so that an obligation to reimburse him would rest upon the grantor, and the conveyance may be intended to indemnify the grantee and to secure the performance of the grantor's future continuing obligation, in which case it would clearly be a mortgage. These conclusions are fully sustained by the course of modern decision.

Cases in which the transaction has amounted to a mortgage:^c French v. Burns, 35 Conn. 359; McIntier v. Shaw, 6 Allen, 83; Pardee v. Treat, 18 Hun,

(b) Quoted in Lounsbury v. Norton, 59 Conn. 170, 22 Atl. 153; Hodge v. Weeks, 31 S. C. 276, 9 S. E. 953; Keithley v. Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265.

(c) *Cases in which the transaction has amounted to a mortgage:* Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394, 12 U. S. App. 274; Whittemore v.

Fisher, 132 Ill. 243, 24 N. E. 636; Helbreg v. Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; Keithley v. Wood, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394; Manufacturers' Bank v. Rugee, 59 Wis. 223, 18 N. W. 251.

their face that the relation of debtor and creditor still continues, and that its existence and consequences are contemplated by the parties; or they may entirely fail to show any such fact, and may consist simply of an absolute conveyance and of a naked agreement to reconvey. While in the former case parol evidence is clearly inadmissible to contradict the terms of the writings, and to destroy their necessary character as a mortgage, in the latter case extrinsic parol evidence is always admissible to show the real

298; *Horn v. Keteltas*, 46 N. Y. 605; *Fiedler v. Darrin*, 50 N. Y. 437, 441; 59 Barh. 651; *Tibbs v. Morris*, 44 Barh. 138; *Marvin v. Prentice*, 49 How. Pr. 385; *Phillips v. Hulsizer*, 20 N. J. Eq. 308; *Sweet v. Parker*, 22 N. J. Eq. 453; *Harper's Appeal*, 64 Pa. St. 315; *Danzeisen's Appeal*, 73 Pa. St. 65; *Sweetzer's Appeal*, 71 Pa. St. 264; *Davis v. Demming*, 12 W. Va. 246; *Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268; *Clark v. Lyon*, 46 Ga. 202; *Lindsay v. Matthews*, 17 Fla. 575; *Crews v. Threadgill*, 35 Ala. 334; *Freeman v. Wilson*, 51 Miss. 329; *Sharkey v. Sharkey*, 47 Mo. 543; *Davis v. Clay*, 2 Mo. 161; *Wilson v. Giddings*, 28 Ohio St. 554; *Cotterell v. Long*, 20 Ohio, 464; *Ehert v. Chapman*, 8 Baxt. 27; *Blizzard v. Craigmiles*, 7 Lea, 693; *Bennett v. Union Bank*, 5 Humph. 612; *Heath v. Williams*, 30 Ind. 495; *Church v. Cole*, 36 Ind. 34; *Clark v. Finlon*, 90 Ill. 245; *Carr v. Rising*, 62 Ill. 14; *Hunter v. Hatch*, 45 Ill. 178; *Smith v. Doyle*, 46 Ill. 451; *Dwen v. Blake*, 44 Ill. 135; *Ragan v. Simpson*, 27 Wis. 355; *Yates v. Yates*, 21 Wis. 473; *Plato v. Roe*, 14 Wis. 453; *Knowlton v. Walker*, 13 Wis. 264; *White v. Lucas*, 46 Iowa, 319; *Scott v. Mewhirter*, 49 Iowa, 487; *Wilson v. Patrick*, 34 Iowa, 362; *Richardson v. Barrick*, 16 Iowa, 407; *Brush v. Peterson*, 54 Iowa, 243, 6 N. W. 287; *Archambau v. Green*, 21 Minn. 520; *Weide v. Gehl*, 21 Minn. 449; *Holton v. Meighen*, 15 Minn. 69; *Phoenix v. Gardner*, 13 Minn. 430; *Moore v. Wade*, 8 Kan. 380; *Leahigh v. White*, 8 Nev. 147; *Sears v. Dixon*, 33 Cal. 326; *Polhemus v. Trainer*, 30 Cal. 685; *Hickox v. Lowe*, 10 Cal. 197.

Cases of sale and contract to repurchase:^(a) *Williams v. Owen*, 5 Mylne & C. 303; *Alderson v. White*, 2 De Gex & J. 97; *Conway's Ex'rs v. Alexander*, 7 Cranch, 218; *Lund v. Lund*, 1 N. H. 39; 8 Am. Dec. 29; *Macaulay v. Porter*, 71 N. Y. 173; *Randall v. Sanders*, 87 N. Y. 578; *Morrison v. Brand*, 5 Daly, 40; *Glover v. Payn*, 19 Wend. 518; *Galt v. Jackson*, 9 Ga. 151; *Haynie v. Robertson*, 58 Ala. 37; *Slutz v. Desenberg*, 28 Ohio St. 371; *Wilson v. Carpenter*,

(a) *Cases of sale and contract to repurchase.*—*Bogk v. Gassert*, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. ed. 631; *Cowell v. Craig*, 79 Fed. 685; *Vincent v. Walker*, 86 Ala. 333, 5 South. 465; *Mitchell v. Wellman*, 80 Ala. 16; *Lounsbury v. Norton*, 59 Conn. 170, 22 Atl. 153; *Carroll v. Tomlinson*,

192 Ill. 399, 61 N. E. 484, 85 Am. St. Rep. 344; *Yost v. First Nat. Bank*, 66 Kan. 605, 72 Pac. 209; *Fabrigus v. Cherokee & P. C. & M. Co.*, (Kan.) 77 Pac. 584; *Thomas v. Holmes Co.*, 67 Miss. 754, 7 South. 552; *Morrison v. Jones*, (Mont.) 77 Pac. 507.

situation of the parties, the existence of a debt, their intention to secure payment of that debt, and the actual character of the instruments as constituting a mortgage. While each case must involve its own special facts, the following circumstances are regarded by the courts as important, and as throwing much light upon the real intent and nature of the transactions: The existence of a collateral agreement by the grantor to pay money; his liability to pay interest; where a debt existed antecedent to the conveyance, the surrender or cancellation of the evidences of such indebtedness, or the suffering them to remain outstanding and operative, or the substitution of others in their place; the price of the conveyance being inadequate; the grantor still left in possession; an application or negotiation for a loan preceding or pending the transaction.²

62 Ind. 495; Price v. Karnes, 59 Ill. 276; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104; Turner v. Kerr, 44 Mo. 429; McNamara v. Culver, 22 Kan. 661; Farmer v. Grose, 42 Cal. 169; Page v. Vilhac, 42 Cal. 75; Henley v. Hotaling, 41 Cal. 22.

Antecedent debt.—If left existing, the conveyance is a mortgage; if satisfied, it is not a mortgage: Henry v. Davis, 7 Johns. Ch. 40; Clark v. Henry, 2 Cow. 324; Slee v. Manhattan Co., 1 Paige, 48; Holmes v. Grant, 8 Paige, 243; Rice v. Rice, 4 Pick. 349; Todd v. Campbell, 32 Pa. St. 250; Hamet v. Dundass, 4 Pa. St. 178; Robinson v. Willoughby, 65 N. C. 520; McKinstry v. Conly, 12 Ala. 678; Hoopes v. Bailey, 28 Miss. 328; Mason v. Moody, 26 Miss. 184; Ruffier v. Womack, 30 Tex. 332; Honore v. Hutchings, 8 Bush, 687; Slowey v. McMurray, 27 Mo. 113, 116; 72 Am. Dec. 251; Sutphen v. Cushman, 35 Ill. 186, 197; Goulding v. Bunster, 9 Wis. 513.

² McNamara v. Culver, 22 Kan. 661; Clark v. Finlon, 90 Ill. 245; Davis v. Demming, 12 W. Va. 246; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104; Freeman v. Wilson, 51 Miss. 329; Price v. Karnes, 59 Ill. 276; Henley v. Hotaling, 41 Cal. 22; Horn v. Keteltas, 46 N. Y. 605; Klinck v. Price, 4 W. Va. 4; 6 Am. Rep. 268. It is held in Price v. Karnes and Henley v. Hotaling, *supra*, that where the writings do not show on their face the existing relation of debtor and creditor, but appear to be absolute, the evidence, in order to establish their character as a mortgage, must be clear, unequivocal, and convincing. This ruling seems to be inconsistent with the doctrine that in case of doubt the court will lean strongly in favor of the mortgage. In fact, the tendency of the

(e) *Antecedent debt.*—Perdue v. Ala. 126; Pace v. Bartles, 47 N. J. Bell, 83 Ala. 396, 3 South. 698; Eq. 170, 20 Atl. 352.
Rapier v. Gulf City Paper Co., 77

§ 1196. A Conveyance Absolute on its Face may be a Mortgage.^a—Any conveyance of land absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of repurchase, or other agreement, may, in equity, by means of extrinsic and parol evidence, be shown to be in reality a mortgage as between the original parties, and as against all those deriving title from or under the grantee, who are not *bona fide* purchasers for value and without notice. The principle which underlies this doctrine is the fruitful source of many other equitable rules:¹ that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as a security, and therefore in reality as a mortgage. The general doctrine is fully established, and certainly prevails in a great majority of the states, that the grantor and his representatives are always allowed in equity to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a

recent decisions, in some of the states at least, is decidedly opposed to any such doctrine.^f

¹ Among others, of the familiar doctrine concerning the specific performance of verbal contracts for the sale of land which have been part performed. The principle, in its broadest generality, prohibits statutes and legal rules designed to prevent fraud from being so used as to produce equitable fraud.

(f) As to the leaning of the courts in favor of the mortgage, see *Franklin v. Ayer*, 22 Fla. 654, 661; *Carveth v. Winegar*, (Mich.) 94 N. W. 381; *De Bruhl v. Maas*, 54 Tex. 464, 472.

(a) This section is quoted in *Oberdorfer v. White*, 25 Ky. Law Rep. 1629, 78 S. W. 436; and cited generally in *Bigler v. Jack*, 114 Iowa 667, 87 N. W. 700.

mortgage; if there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be, an absolute conveyance of the land; to overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail.^{2b} Whenever a deed ab-

² There are some decisions which limit the operation of this doctrine, even in equity, to cases where the absolute form of the conveyance is the result of fraud, mistake, or accident. This narrow view seems to have resulted from an erroneous conception of the principle upon which the doctrine rests; the equitable notion of fraud in the grantee's insisting upon the conveyance as absolute, when it was given and accepted only as a security, is carried back to the inception of the instrument, and is improperly made to involve the existence of fraud in the very execution of the deed. The doctrine as stated in the text is followed by nearly if not quite all the recent decisions: *Maxwell v. Lady Mountacute*, Prec. Ch. 526; *Cotterell v. Purchase*, Cas. t. Talb. 61; *Walker v. Walker*, 2 Atk. 98; *Young v. Peachy*, 2 Atk. 254, 257; *Joynes v. Statham*, 3 Atk. 388; *Spurgeon v. Collier*, 1 Eden, 55; *Dixon v. Parker*, 2 Ves. Sr. 219, 225; *Holmes v. Mathews*, 9 Moore P. C. C. 413; *Barnhart v. Green-shields*, 9 Moore P. C. C. 18; *Langton v. Horton*, 5 Beav. 9; *Douglas v. Cul-*

(b) This section is cited to this effect in *Rogers v. Beach*, 115 Ind. 413, 17 N. E. 609; *Edwards v. Wall*, 79 Va. 321; *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; *Holladay v. Willis*, 101 Va. 274, 43 S. E. 616. In general, see *Satterfield v. Malone*, 35 Fed. 445, 1 L. R. A. 35; *Lewis v. Wells*, 85 Fed. 896; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. 116; *Winston v. Burnell*, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289; *Seiler v. Northern Bank*, 36 Ky. 128, 5 S. W. 536; *Knapp v. Bailey*, 79 Me. 201, 1 Am. St. Rep. 295, 9 Atl. 122; *Randall v. Sanders*, 87 N. Y. 578; *Calhoun v. Lumpkin*, 60 Tex. 188; *Vangilder v. Hoffman*, 22 W. Va. 1; *Swift v. Lumber Co.*,

71 Wis. 482, 37 N. W. 441; *McFarlane v. Loudon*, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883. In the following cases the deeds were held to be mortgages: *Glass v. Hieronymus*, 125 Ala. 140, 28 South. 71, 82 Am. St. Rep. 225; *Rose v. Gandy*, 137 Ala. 329, 34 South. 239; *Husheon v. Husheon*, 71 Cal. 412, 12 Pac. 410; *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; *De Leonis v. Walsh*, 140 Cal. 175, 73 Pac. 813; *Franklin v. Ayer*, 22 Fla. 654; *Helm v. Boyd*, 124 Ill. 370, 16 N. E. 85; *Cullen v. Carey*, 146 Mass. 50, 15 N. E. 131; *McMillan v. Bissell*, 63 Mich. 66, 29 N. W. 737; *Evans v. Thompson*, 89 Minn. 202, 94 N. W. 692; *Hargadine v. Henderson*, 97 Mo. 375, 11 S. W. 218; *State Bank v. Mathews*, 45

solute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the lia-

verwell, 3 Giff. 251; Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775; Andrews v. Hyde, 3 Cliff. 516, Fed. Cas. No. 377; Amory v. Lawrence, 3 Cliff. 523, Fed. Cas. No. 336; Villa v. Rodriguez, 12 Wall. 323, 20 L. ed. 406; Morgan's Assignees v. Shinn, 15 Wall. 105, 21 L. ed. 87; Russell v. Southard, 12 How. 139, 13 L. ed. 927; Babcock v. Wyman, 19 How. 289, 15 L. ed. 644; Stinchfield v. Milliken, 71 Me. 567; Wing v. Cooper, 37 Vt. 169; Campbell v. Dearborn, 109 Mass. 130; 12 Am. Rep. 671; French v. Burns, 35 Conn. 359; Odell v. Montross, 68 N. Y. 499; Morris v. Budlong, 78 N. Y. 543, 552; Carr v. Carr, 52 N. Y. 251; Horn v. Keteltas, 46 N. Y. 605; Brown v. Clifford, 7 Lans. 46; Marvin v. Prentice, 49 How. Pr. 385; Budd v. Van Orden, 33 N. J. Eq. 143; Judge v. Reese, 24 N. J. Eq. 387; Kline v. McGuckin, 24 N. J. Eq. 411; Sweet v. Parker, 22 N. J. Eq. 453; Crane v. Decamp, 21 N. J. Eq. 414; Danzeisen's Appeal, 73 Pa. St. 65; Sweetzer's Appeal, 71 Pa. St. 264; Fessler's Appeal, 75 Pa. St. 483; Plumer v. Guthrie, 76 Pa. St. 441, 455; Odenbaugh v. Bradford, 67 Pa. St. 96; McGinity v. McGinity, 63 Pa. St. 38, 45; Baugher v. Merryman, 32 Md. 185; Snavelly v. Pickle, 29 Gratt. 27; Gulley v. Macy, 84 N. C. 434; Carter v. Hallahan, 61 Ga. 314; Phillips v. Croft, 42 Ala. 477; Klein v. McNamara, 54 Miss. 90; Littlewort v. Davis, 50 Miss. 403; Nichols v. Cabe, 3 Head, 92; Barnard v. Jennison, 27 Mich. 230; Emerson v. Atwater, 7 Mich. 12; Smith v. Brand, 64 Ind. 427; Graham v. Graham, 55 Ind. 23; Butcher v. Stultz, 60 Ind. 170 (actual fraud); Wright v. Gay, 101 Ill. 233; Bartling v. Brasuhn, 102 Ill. 441; Hancock v. Harper, 86 Ill. 445; Klock v. Walter, 70 Ill. 416; Smith v. Cremer, 71 Ill. 185; Ruckman v. Alwood, 71 Ill. 155; Mag-

Nehr. 659, 63 N. W. 930, 50 Am. St. Rep. 565; Tanyhill v. Pepperl, (Nebr.) 96 N. W. 1005; Jasper v. Hazen, 4 N. Dak. 1, 58 N. W. 454, 23 L. R. A. 58; Yingling v. Redwine, 12 Okla. 64, 69 Pac. 810; Stephens v. Allen, 11 Oreg. 188, 3 Pac. 168; Gaines v. Brockerhoff, 136 Pa. St. 175, 19 Atl. 958; Stafford v. Stafford, (Tex. Civ. App.) 71 S. W. 984; Peck v. Girard F. & M. Ins. Co., 16 Utah 121, 15 Pac. 255, 67 Am. St. Rep. 600; Tuggle v. Berkeley, 101 Va. 83, 43 S. E. 199; Snyder v. Parker, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726; Butler v. Carvin, 33 Wash. 621, 74 Pac. 813; Thacker v. Morris, 52 W. Va. 220, 43 S. E. 141, 94 Am. St. Rep. 928; Hursey v. Hursey, (W. Va.) 49 S. E. 367. In the following cases the evidence was not sufficiently clear, unequivocal, and

convincing to overcome the presumption that an instrument is what it purports to be: Coyle v. Davis, 116 U. S. 109, 6 Sup. Ct. 314, 29 L. ed. 583; Cadman v. Peter, 118 U. S. 73, 6 Sup. Ct. 957, 30 L. ed. 78; Harman v. May, 40 Ark. 146; Falk v. Witt-ram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184; Emery v. Lowe, 140 Cal. 379, 73 Pac. 981; Armor v. Spalding, 14 Colo. 302, 23 Pac. 789; Ensminger v. Ensminger, 75 Iowa 89, 39 N. W. 208, 9 Am. St. Rep. 462; Wright v. Wright, 122 Iowa 549, 98 N. W. 472; Weise v. Anderson, (Mich.) 96 N. W. 575; Sloan v. Becker, 34 Minn. 491, 26 N. W. 730; A. J. Dwyer Pine Land Co. v. Whitman, (Minn.) 99 N. W. 362; Cake v. Shull, 45 N. J. Eq. 208, 16 Atl. 434; Waters v. Crabtree, 105 N. C. 394, 11 S. E. 240; Fisher v. Witham,

bilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees. The grantee may maintain

nusson v. Johnson, 73 Ill. 156; Wilson v. McDowell, 78 Ill. 514; Shays v. Norton, 48 Ill. 100; Lindauer v. Cummings, 57 Ill. 195, 200; Wells v. Somers, 4 Ill. App. 297; Butler v. Butler, 46 Wis. 430, 1 N. W. 70; Wilcox v. Bates, 26 Wis. 465; Zuver v. Lyons, 40 Iowa, 510; Roberts v. McMahan, 4 G. Greene, 34; Weide v. Gehl, 21 Minn. 449; O'Neill v. Capelle, 62 Mo. 202; Moore v. Wade, 8 Kan. 380; Whitsett v. Kershow, 4 Col. 419; Pierce v. Traver, 13 Nev. 526; Montgomery v. Spect, 55 Cal. 352; Kuhn v. Rumpff, 46 Cal. 299; Raynor v. Lyons, 37 Cal. 452; Vance v. Lincoln, 38 Cal. 586; Pierce v. Robinson, 13 Cal. 116.

It is held, however, that the deed conveys the legal title to the grantee therein: Hughes v. Davis, 40 Cal. 117; Espinosa v. Gregory, 40 Cal. 58;^c and therefore the right of redemption is cut off by a conveyance from the grantee to a *bona fide* purchaser for value and without notice,—he holds the land free from the equity: Brophy Min. Co. v. Brophy and Dale Min. Co., 15 Nev. 101;^d but the right still continues against a purchaser from the grantee with notice: Graham v. Graham, 55 Ind. 23.

The doctrine of the text is applied under every variety of circumstances where the essential fact exists. If the vendee in a contract for the sale of land assigns the contract to A, as security for a debt which he owes to A, and this assignee afterwards fulfills the contract, and receives an absolute deed of the land from the vendor, such deed is still a mortgage as between the grantee, A, and the original vendee: Carr v. Carr, 52 N. Y. 251; Smith v. Cremer, 71 Ill. 185.^e

132 Pa. St. 488, 19 Atl. 276; Wallace v. Smith, 155 Pa. St. 78, 25 Atl. 807, 32 Wkly. Notes Cas. 470, 35 Am. St. Rep. 868; Hodge v. Weeks, 31 S. C. 276, 9 S. E. 953; Miller v. Price, 66 S. C. 85, 44 S. E. 584; Pumilia v. De George, (Tex. Civ. App.) 74 S. W. 813. In certain states the doctrine stated in the text does not prevail. A deed absolute on its face cannot, in such states, be shown by parol to be a mortgage: Crutcher v. Muir, 90 Ky. 142, 13 S. W. 435, 29 Am. St. Rep. 366; Lohrer v. Russell, 207 Pa. St. 105, 56 Atl. 333 (even a written defeasance is not sufficient unless acknowledged and recorded within sixty days from the date of the deed). And see Eberly v. Shirk, 206 Pa. St. 414, 55 Atl. 1071. In Mississippi, by statute, an absolute deed cannot be declared a mortgage

on the parol evidence of the grantor alone: Schwartz v. Lieber, (Miss.) 32 South. 954.

(c) Groves v. Williams, 69 Ga. 614; but see *contra*, Healy v. O'Brien, 66 Cal. 519, 6 Pac. 386; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Hall v. Arnot, 80 Cal. 348, 22 Pac. 200; Peck v. Girard F. & M. Ins. Co., 16 Utah 121, 51 Pac. 255, 67 Am. St. Rep. 600; Snyder v. Parker, 19 Wash. 276, 53 Wash. 59, 67 Am. St. Rep. 726.

(d) See, also, Frink v. Adams, 36 N. J. Eq. 485; Pancake v. Cauffman, 114 Pa. St. 113, 7 Atl. 67. On the other hand, the right to redeem *survives* the grantor; Clark v. Seagraves, (Mass.) 71 N. E. 813.

(e) See, also McPherson v. Hayward, 81 Me. 329, 17 Atl. 164; but

an action for the foreclosure of the grantor's equity of redemption;^f the grantor may maintain an action to redeem and to compel a reconveyance upon his payment of the debt secured. If the grantee goes into possession, he is in reality a mortgagee in possession, and as such is liable to account for the rents and profits.³

§ 1197. *Mortgages to Secure Future Advances.*^a—Whatever disinclination may at any time have been felt by courts to sustain this kind of security, it is now well settled that mortgages given in good faith to secure future advances, either in addition to or without a present indebtedness, are valid and binding between the parties. When no claims of subsequent encumbrancers or purchasers have intervened, there is no longer any doubt that the mortgagee can enforce the security for all the sums which he has advanced to the mortgagor, under the mortgage and within its scope, both when such advances were optional on his part, and when he was bound to make them by some collateral agreement with the mortgagor. If the advances were actually made within the scope of the mortgage, the fact that they were originally optional or obligatory would be wholly immaterial between the parties themselves.^{1 b} The fact that the mortgage is

³ It has been held, however, that his liability to account under these circumstances is not so stringent and severe as that of the ordinary mortgagee in possession: See *Barnard v. Jennison*, 27 Mich. 230.*

¹ *Gordon v. Graham*, 2 Eq. Cas. Abr. 598, pl. 16; 7 Vin. Abr. 52, pl. 3; *Shaw v. Neale*, 20 Beav. 157; 6 H. L. Cas. 581, 608; *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Daun v. City of London Brewing Co.*, L. R. 8 Eq. 155; *Menzies v. Lightfoot*, L. R. 11 Eq. 459; *Young v. Young*, L. R. 3 Eq. 801; *Calisher v. Forbes*, L. R. 7 Ch. 109; *Shirras v. Caig*, 7 Cranch, 34, 3 L. ed. 260; *United States v. Hooe*, 3 Cranch, 73, 2 L. ed. 370; *Scheulenburg v. Martin*, 1 McCrary,

see *Mosely v. Mosely*, 86 Ala. 289, 5 South. 732.

(f) The foreclosure must be by the ordinary proceedings and sale. A decree of strict foreclosure will not be made: so held in *McCaughey v. McDuffie*, (Cal.) 74 Pac. 751.

(*) *De Cazara v. Orefia*, 80 Cal. 132, 22 Pac. 74.

(a) This section is cited in *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288.

(b) *Jones v. Guaranty Co.*, 101 U. S. 625, 25 L. ed. 1030; *Madigan v. Mead*, 31 Minn. 94, 16 N. W. 539; *Simons v. First Nat. Bank*, 93 N. Y. 269; *Keyes v. Bump*, 59 Vt. 391, 9 Atl. 598; *Evans v. Laughton*, 69 Wis. 138, 33 N. W. 573.

given to secure future advances need not appear on the face of the instrument itself. If it purports to secure the payment of a specified amount, the mortgage need not express the intention or agreement of the parties that this amount of indebtedness is to be made up wholly or in part by future advances; the agreement to that effect may be entirely verbal.^{2c} More definiteness and certainty, however, are necessary to render the mortgage operative against subsequent purchasers and encumbrancers.

348, 2 Fed. 747; Lawrence v. Tucker, 23 How. 14, 16 L. ed. 474; Kansas Valley Bank v. Rowell, 2 Dill. 371, Fed. Cas. No. 7,611; Miller v. Whittier, 36 Me. 577; McDaniels v. Colvin, 16 Vt. 300; 42 Am. Dec. 512; Seymour v. Darrow, 31 Vt. 122; Goddard v. Sawyer, 9 Allen, 78; Joslyn v. Wyman, 5 Allen, 62; Boswell v. Goodwin, 31 Conn. 74; 81 Am. Dec. 169; Pettibone v. Griswold, 4 Conn. 158; 10 Am. Dec. 106; Hubbard v. Savage, 8 Conn. 215; Ackerman v. Hunsicker, 85 N. Y. 43; 39 Am. Rep. 621; Babcock v. Bridge, 29 Barb. 427; Murray v. Barney, 34 Barb. 336; Lansing v. Woodworth, 1 Sand. Ch. 43; Barry v. Merchants' Exch. Co., 1 Sand. Ch. 280; Goodhue v. Berrien, 2 Sand. Ch. 630; Holt v. Creamer, 34 N. J. Eq. 181; Farnum v. Burnett, 21 N. J. Eq. 87; Taylor v. Cornelius, 60 Pa. St. 187; Moroney's Appeal, 24 Pa. St. 372; Bank of Commerce's Appeal, 44 Pa. St. 423; Brooks v. Lester, 36 Md. 65; Wilson v. Russell, 13 Md. 494; 71 Am. Dec. 645; Alexandria Sav. Inst. v. Thomas, 29 Gratt. 483; McCarty v. Chalfant, 14 W. Va. 531; Moore v. Ragland, 74 N. C. 343; Allen v. Lathrop, 46 Ga. 133; Forsyth v. Preer, 62 Ala. 443; Mceker v. Clinton etc. R. R., 2 La. Ann. 971; Klein v. Glass, 53 Tex. 37; Brewster v. Clamfit, 33 Ark. 72; Kramer v. Farmers' etc. Bank, 15 Ohio, 253; Michigan Ins. Co. v. Brown, 11 Mich. 265; Ladue v. Detroit etc. R. R., 13 Mich. 380; 87 Am. Dec. 759; Brackett v. Sears, 15 Mich. 244; Foster v. Reynolds, 38 Mo. 553; Hendrix v. Gore, 8 Or. 406; Tully v. Harloe, 35 Cal. 302; 95 Am. Dec. 102. In New Hampshire such mortgages appear to be prohibited by statute, although valid so far as given to secure a present indebtedness: See Johnson v. Richardson, 38 N. H. 353; New Hampshire Bank v. Willard, 10 N. H. 210; Leeds v. Cameron, 3 Sum. 488, Fed. Cas. No. 8,206. For a full discussion of the questions arising from these mortgages, see 1 Jones on Mortgages, secs. 364-378.

² Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49; Bell v. Fleming's Ex'rs, 12 N. J. Eq. 13; Craig v. Tappin, 2 Sand. Ch. 78; Hall v. Crouse, 13 Hun, 557; Bank of Utica v. Finch, 3 Barb. Ch. 293; Foster v. Reynolds, 38 Mo. 553; Forsyth v. Preer, 62 Ala. 443; Hendrix v. Gore, 8 Or. 406. While the rule of the text is operative between the parties, more definiteness and cer-

(c) See Kirby v. Raynes, 138 Ala. 194, 100 Am. St. Rep. 39, 35 South. 118; Johnson v. Bratton, 112 Mich. 319, 70 N. W. 1021; Reeves v. Evans,

(N. J. Eq.) 34 Atl. 477; Reed v. Rochford, 62 N. J. Eq. 186, 50 Atl. 70; Blackmar v. Sharp, 23 R. I. 412, 50 Atl. 852.

§ 1198. **The Same.** As against Subsequent Encumbrancers or Purchasers.—As such a mortgage is a valid security between the parties, it is plainly an equally valid and effective security, and gives the holder thereof a prior lien, against subsequent purchasers and encumbrancers, for all advances made *before* the execution of the subsequent conveyances or mortgages by the mortgagor, or the docketing of the subsequent judgments against him. The only real question to be considered relates to the validity of the mortgage as a security for advances made *after* the execution or recording of a subsequent mortgage by, or the docketing of a subsequent judgment against, the mortgagor; and in answering this question, there is, to some extent, a direct conflict of opinion among the American decisions. It may be regarded as established that where a mortgage has been given to secure future advances, and advances are made in pursuance thereof *after* the execution or recording of a subsequent mortgage or the docketing of a subsequent judgment, but without any notice to the mortgagee of such subsequent encumbrance, upon the general principles of equity, independently of the recording acts, the subsequent encumbrancer can claim no prefer-

tainty in the mortgage are needed, so that it may operate by recording as a constructive notice to subsequent purchasers and encumbrancers of the rights of the mortgagee. Thus a subsequent verbal agreement that subsequent advances should be covered by the mortgage is inoperative: *Johnson v. Anderson*, 30 Ark. 745; and where the mortgage specified the time within which the future advances should be made, advances made after that time were held not to be secured by it: *Miller v. Whittier*, 36 Me. 577. A mortgage, to be operative against subsequent purchasers or encumbrancers, should certainly specify the total or maximum amount of the indebtedness it is intended to secure: *Youngs v. Wilson*, 24 Barb. 510; and it may well be doubted whether any mortgage which simply purports on its face to be given for a single specified sum, described as an absolute debt, can be a valid security for future advances as against subsequent claimants who are only affected by the constructive notice created by its record: *North v. Belden*, 13 Conn. 376; 35 Am. Dec. 83. This case lays down a rule which seems to be sound, that to render a mortgage for future advances valid as against creditors, etc., of the mortgagor, the real nature of the transaction, so far as can be disclosed, must

ence for his own security; in other words, the first mortgage remains prior in effect, as it is prior in time.^{1 a}

appear on the record with reasonable certainty, or at least the record must point out a track to ascertain it: See 1 Jones on Mortgages, secs. 374, 375. d

¹ In the very recent case of *Ackerman v. Hunsicker*, 85 N. Y. 43, 47, 39 Am. Rep. 621, Andrews, J., clearly shows the correctness of this conclusion. *upon principle*, as follows: "It is equally clear that to prefer an intervening encumbrance over the claim of the plaintiff would violate the understanding of the parties to the mortgage at the time it was executed; for the plain intention was, that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser upon the faith of the mortgage. It would have been a clear breach of good faith on the part of the mortgagor if he had, without notice to the mortgagee, voluntarily encumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for and procured further indorsements." Furthermore, it is a well-settled doctrine of equity that an *executory agreement* to charge a specified parcel of land with a lien does create an equitable lien on such land, which will be enforced not only against the parties, but also against all persons who acquire subsequent interest in the land *with notice* of the agreement; and the effects of the constructive notice by recording are generally as broad as those of actual notice. The general doctrine of the text is fully sustained by authority. In *Gordon v. Graham*, 2 Eq. Abr. Cas. 598, pl. 16, 7 Vin. Abr. 52, pl. 3, Lord Chancellor Cowper is reported to have held that in such a mortgage, the first mortgagee had a prior lien, not only for the advances made before the execution of a second mortgage, but also for the further advances which he made *after receiving notice of such second mortgage*. The correctness of this latter ruling was doubted, although the question was not definitely decided, in *Shaw v. Neale*, 20 Beav. 157, 6 H. L. Cas. 581, 608. In *Hopkinson v. Rolt*, 9 H. L. Cas. 514, 25 Beav. 461, the house of lords, by a majority decision (Lords Campbell and Chelmsford), overruled *Gordon v. Graham*, and held that the first mortgagee is not entitled to priority of lien for the advances which he made after receiving notice of the second mortgage. Lord Cranworth dissented, and maintained the correctness of Lord Chancellor Cowper's entire ruling. The whole court, however, distinctly recognized and affirmed the doctrine as stated in the text, that the first mortgagee retains a prior lien for all advances made after the second mortgage, but without notice thereof.^b The leading case in this country is *Shirras v. Caig*, 7 Cranch, 34, 3 L. ed. 260, which was decided, like

(d) *Balch v. Chaffee*, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155; *Bullock v. Battenhausen*, 108 Ill. 28. It is held, however, in *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, that this is not necessary to its validity, if the amount of liability to be incurred under it is expressly limited. See,

also, *Simons v. First Nat. Bank*, 93 N. Y. 269.

(a) This section is cited in *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288.

(b) To the same effect are the cases, *London, etc., Banking Co. v. Ratcliffe*, 6 App. Cas. (H. L.) 722, and *Bradford Banking Co. v. Briggs*,

§ 1199. **The Same. As Affected by the Recording Acts.**—The general doctrine being thus established that the mortgage constitutes a prior lien for all advances made in pursuance thereof before notice of a subsequent encumbrance or conveyance, the effect of the recording acts remains to be considered. It is at this point that the diversity of opinion among the American courts has chiefly arisen. The following conclusions seem to be in harmony with established principles, and to be sustained by the weight of authority; and they may be regarded, I think, as furnishing the prevailing rule: When a mortgage to secure future advances reasonably states the purposes for which it is given, its record is a constructive notice to subsequent purchasers and encumbrancers; they are thereby put upon an inquiry to ascertain what advances or liabilities have been made or incurred. The record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, is not a constructive notice of its existence to such prior mortgagee. The prior mortgage, therefore, duly recorded, has a preference over subsequent recorded mortgages or conveyances, or subsequent docketed judgments, not only for advances previously made, but also

these English cases, upon the general principles of equity, without reference to the recording statutes. The mortgagees had made advances after a conveyance of the land to the defendants, but without notice of such conveyance. The supreme court held that the mortgage created a valid lien upon the land against the defendants as a security for such advances. Chief Justice Marshall said that the mortgage was security for "the payment of debts still remaining due to them, which were either due at the date of the mortgage or were afterwards contracted upon its faith, either by advances actually made or incurred *prior to the receipt of actual notice* of the subsequent title of the defendants." See also the cases cited *ante*, under § 1197.

12 App. Cas. (H. L.) 29, reversing 31 Ch. Div. 19, and restoring 29 Ch. Div. 149. In *West v. Williams*, [1899] 1 Ch. 132, 68 Law J. Ch. 127, 79 Law T. (N. S.) 575, 47 Wkly. Rep. 308, it was held that the doctrine of *Hopkinson v. Rolt* applies where the mortgagee, after notice

of the subsequent incumbrance, made advances which were obligatory under the terms of the mortgage.

(a) This section is cited in *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; *Schmidt v. Zahndt*, 148 Ind. 447, 47 N. E. 335.

for advances made after their recording or docketing without notice thereof. As the record of the second encumbrance does not operate as a constructive notice, it requires an actual notice to cut off the lien of the prior mortgage; and the subsequent encumbrancer may, by giving actual notice, at any time prevent further advances from being made to his own prejudice.^{1b} There is a group of decisions

¹ The courts which adopted this rule apply it alike, whether the advances were optional or obligatory: *Ackerman v. Hunsicker*, 85 N. Y. 43; 59 Am. Rep. 621 (overruling the contrary *dicta* in *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; *Lansing v. Woodworth*, 1 Sand. Ch. 43; *Barry v. Merch. Exch. Co.*, 1 Sand. Ch. 280; and *Goodhue v. Berrien*, 2 Sand. Ch. 630); *Truscott v. King*, 6 Barb. 346; 6 N. Y. 147; *Robinson v. Williams*, 22 N. Y. 380; *Crane v. Deming*, 7 Conn. 387; *Rowan v. Sharps' Rifle Mfg. Co.*, 29 Conn. 282; *Ward v. Cooke*, 17 N. J. Eq. 93; *Farnum v. Burnett*, 21 N. J. Eq. 87; *Wilson v. Russell*, 13 Md. 494; 71 Am. Dec. 645; *McDaniels v. Colvin*, 16 Vt. 300; 42 Am. Dec. 512; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Lovelace v. Webb*, 62 Ala. 271; *Witczinski v. Everman*, 51 Miss. 841; *Nelson's Heirs v. Boyce*, 7 J. J. Marsh. 401; 23 Am. Dec. 411; *Burdett v. Clay*, 8 B. Mon. 287; *Collins v. Carlisle*, 13 Ill. 254; *Shirras v. Caig*, 7 Cranch, 34; 3 L. ed. 260; *United States v. Hooe*, 3 Cranch, 73; 2 L. ed. 370. It is generally held to be necessary, however, in the states where this rule prevails, that the purpose to secure future advances should be sufficiently stated on the face of the first mortgage, so that it may put subsequent encumbrancers upon an inquiry. If the true purpose is not stated at all, or if stated in a too indefinite manner, the advances will not be secured against a subsequent encumbrancer or purchaser: *Babcock v. Bridge*, 29 Barb. 427; *Youngs v. Wilson*, 24 Barb. 510; *North v. Belden*, 13 Conn. 376; 35 Am. Dec. 83; *Pettibone v. Griswold*, 4 Conn. 153; 10 Am. Rep. 106. The decision in *Craig v. Tappin*, 2 Sand. Ch. 78, can only be sustained on the ground that the mortgagee had received *actual* notice of the second encumbrance; otherwise it is directly overruled by *Ackerman v. Hunsicker*, *supra*.

(b) Quoted in *Schmidt v. Zahndt*, 148 Ind. 447, 47 N. E. 335. See, also, *Peacock, Hunt & West Co. v. Thagard*, 128 Fed. 1005; *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288; *Williams v. Gilbert*, 37 N. J. Eq. 84; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Central Trust Co. v. Continental I. W.*, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539; *Schmidt v. Hedden*, (N. J. Eq.) 38 Atl. 843; *Simons v. First Nat. Bank*, 93 N. Y. 269.

(c) *Balch v. Chaffee*, 73 Conn. 318, 47 Atl. 327, 84 Am. St. Rep. 155. See, however, *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288. Where a mortgage is made to secure advances made within a certain time, an intervening recorded mortgage takes priority over advances made after the time limited: *Norwood v. Norwood*, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875.

which adopt a different view, an opposite conclusion. They seem to regard the lien for securing future advances as only arising, or at all events as only perfected so as to be available, at and from the time when the advance is actually made. An advance, therefore, although in pursuance of a prior mortgage duly recorded, if made after the record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, is affected with constructive notice of such subsequent encumbrance or conveyance, and its lien is consequently postponed to that of the second record. By this rule, a mortgage to secure future advances secures a preference only for those advances actually made before the record of a subsequent encumbrance or conveyance; it loses its precedence for all advances made after such record.² The lien of the prior mortgage will, of course, prevail against all subsequent purchasers or encumbrancers whose rights do not attach until after the advances are made, and against all who are not *bona fide* purchasers for value without notice.³ A distinction has been made, in

² The fundamental error of this view, in my opinion, consists in its mistaken conception of the nature of an equitable lien, in regarding the lien as arising at and from *the act of making the advance*, instead of from the previous *executory agreement* by which the land was bound as security for the future advances: See *post*, chapter on liens. This rule has been adopted in the following cases: Alexandria Sav. Inst. v. Thomas, 29 Gratt. 483; Bank of Montgomery County's Appeal, 36 Pa. St. 170; Ter-Hoven v. Kerns, 2 Pa. St. 96; Ladue v. Detroit etc. R. R., 13 Mich. 380; 87 Am. Dec. 759 (the opinion of Christiancy, J., gives the ablest presentation of this rule); Spader v. Lawler, 17 Ohio, 371; 49 Am. Dec. 463; Meeker v. Clinton etc. R. R., 2 La. Ann. 971 (this decision is based entirely on the peculiar provisions of the code); Brinkerhoff v. Marvin, 5 Johns. Ch. 320; Lansing v. Woodworth, 1 Sand. Ch. 43; Barry v. Merch. Exch. Co., 1 Sand. Ch. 280; Goodhue v. Berrien, 2 Sand. Ch. 630; Craig v. Tappin, 2 Sand. Ch. 78 (these cases, so far as they support the rule, have been expressly overruled by the latest New York decision); Griffin v. N. Y. Oil Co., 11 N. J. Eq. 49; Bell v. Fleming's Ex'rs, 12 N. J. Eq. 13 (these two cases seem to be entirely inconsistent with the later decision in Ward v. Cooke, cited in the last preceding note). The question is also discussed, but not decided, in Boswell v. Goodwin, 31 Conn. 74; 81 Am. Dec. 169.

³ McCarty v. Chalfant, 14 W. Va. 531; Schulze v. Bolting, 8 Biss. 174; Fed. Cas. No. 12,489 (good against an assignee in bankruptcy); Farnum v. Bur-

some of the cases, between *optional* and *obligatory* advances. Where the advance is optional with the mortgagee, it has been said that the lien thereof does not attach until it is actually made; and consequently such an advance made after notice of a second encumbrance loses its preference. Here, again, the decisions are not uniform; some require an *actual* notice in order to cut off the lien even of an optional advance; with others the recording gives a constructive notice which is sufficient.⁴ Finally, there are decisions by most able courts which give the prior mortgage to secure future advances an absolute preference; which maintain the mortgagee's supremacy, and preserve the lien of his mortgage against intervening subsequent encumbrances, even for advances made after receiving actual notice of such encumbrances.⁵ This conclusion is based upon the doctrines that the executory agreement of the mortgagee creates a full and perfect lien in equity, effectual against all persons who are charged with notice thereof, and that the record of the mortgage furnishes such a notice affecting all subsequent encumbrances.

nett, 21 N. J. Eq. 87; Lovelace v. Webb, 62 Ala. 271; Kramer v. Farmers' etc. Bank, 15 Ohio, 253; Barry v. Merchants' Exch. Co., 1 Sand. Ch. 280.

⁴ Heintze v. Bentley, 34 N. J. Eq. 562 (first mortgagee *having knowledge* of a second encumbrance); and see Ward v. Cooke, 17 N. J. Eq. 93; Ripley v. Harris, 3 Biss. 199; Fed. Cas. No. 11,853 (actual notice); Boswell v. Goodwin, 31 Conn. 74; 81 Am. Dec. 169 (actual notice); Frye v. Bank of Illinois, 11 Ill. 367 (actual notice); Bank of Montgomery Co.'s Appeal, 36 Pa. St. 170; McClure v. Roman, 52 Pa. St. 458; Parker v. Jacoby, 3 Grant Cas. 300 (in these three Pennsylvania cases, constructive notice by recording is held to be sufficient). Notwithstanding the ability of the courts which maintain this view, it seems to me very difficult to perceive on what equitable principle concerning priorities the rights of the second encumbrancer can at all depend upon the fact of the advances being either optional or obligatory. The equities of the second encumbrancer must arise from *his own position*, his own relations with the subject-matter and with the prior parties; it does not seem to be in accordance with settled doctrines of equity that the parties to the prior mortgage should be able to alter the equities of the second encumbrancer by any independent agreement or arrangement between themselves to which he was not a party, and of which he might be completely ignorant.

⁵ Some, though not all, of these decisions emphasize the fact that the advances made after notice of the second encumbrance were obligatory. In

§ 1200. **Mortgages to Secure Several Different Notes.**—In many of the states the mortgage debt is ordinarily evidenced by a promissory note in place of a bond. A special form of security has thus become common in certain parts of this country which is probably unknown in England; the mortgage debt is represented by a series of several distinct promissory notes, often negotiable in form, all bearing the same date, and generally made payable in a successive order at different times,—as, for example, in one, two, three, and four years from date,—and the mortgage expressly secures the payment of these notes according to their respective tenors.¹ While all these notes and the

Witczinski v. Everman, 51 Miss. 841, it was held, after a very able and full discussion, that where such a mortgage expresses on its face the nature and purposes of the security, and the extent to which the advances may be made, so that the record of it would put parties upon an inquiry and enable them by the use of ordinary diligence to ascertain the material facts, its lien will prevail against subsequent purchasers or encumbrancers, for advances made in pursuance of its terms by the mortgagee *after* he had received actual notice of such purchase or encumbrance, as well as for those made before any notice. No distinction was drawn between advances optional and those obligatory. In *Brinkmeyer v. Helbling*, 57 Ind. 435, where a mortgage was given to indemnify the mortgagee against his future indorsements which he had agreed to make up to a certain amount, it was held that his indorsements when made related back, and were secured by the lien of the mortgage against subsequent encumbrances; and since he was bound to make the indorsements, his knowledge of the subsequent encumbrances on the property at the time when he made the indorsements did not affect his rights under the mortgage, and did not postpone the lien thereof; and the case of *Brinkmeyer v. Browneller*, 55 Ind. 487, is substantially to the same effect. In *Rowan v. Sharps' Rifle Mfg. Co.*, 29 Conn. 282, the mortgagee was bound by contract to make advances up to a certain amount; held, that the mortgage created a valid and preferential lien for all advances made before actual notice of a second mortgage; and that after such actual notice was received, the mortgagee still had a right to go on and make all the advances necessary to carry out his contract, and that such advances also took precedence of the second encumbrance. These decisions, it will be seen, reaffirm the ruling of Lord Chancellor Cowper in the early case of *Gorden v. Graham*; and without entering into any discussion, I would venture to express the opinion that they are based upon the true principle, and formulate the correct doctrine, involved in and derived from the generally accepted construction of the American recording acts.

¹ In the Eastern states, where a bond, instead of a note, is the ordinary evidence of the debt, several separate bonds are sometimes given, payable at different times, each representing a distinct installment of the mortgage debt.

mortgage remain in the hands of the mortgagee, or when they are all assigned with the mortgage to and held by the same person, plainly no questions can arise other than those presented by the ordinary form of mortgage. It is only when the mortgagee assigns the notes separately to different persons, or when he assigns a portion of them and retains the others himself, that the special questions arise which are now to be considered; and these questions relate chiefly to the rights of the respective holders, and to the order of priority among them.

§ 1201. Rights of Assignees — Order of Priority among Them.— Where all the notes stand on the same footing,—that is, they are all payable at the same time,—the equities of all the assignees are equal, and there is no preference or priority among them in enforcing the security of the mortgage. All the assignees are entitled to a *pro rata* share of the proceeds of the mortgaged premises, in case there is not sufficient to pay all the notes in full.^{1 a} The notes, however, are commonly made payable at different times, in regular succession, and this condition of fact presents the real difficulty,—a difficulty apparently so great that the courts of various states have reached the most opposite conclusions, and have established several totally unlike rules. Where the notes, payable at different dates, are assigned by the mortgagee to different persons, either at the same or different times, and either with or without an accompanying assignment of the mortgage, the following may be regarded as the *prevailing* general rule determining the right of the respective assignees: Since the assign-

¹ Swartz's *Ex'rs v. Leist*, 13 Ohio St. 419. This is the rule prevailing in a great majority of the states; in the *very few* states where the priority among the assignees depends *wholly* upon the order of the assignments, it would not, of course, be followed.

(a) Likewise, where a mortgage secures two notes, identical in date, amount, and maturity, but made payable to different persons, the equities

of the holders are equal: *Chaplin v. Sullivan*, 128 Ind. 50, 27 N. E. 425. See, also, *Swayze v. Schuyler*, 50 N. J. Eq. 75, 45 Atl. 347.

ment of each note is a *pro tanto* assignment of the mortgage, the holders of the successive notes are regarded as being exactly in the situation of holders of successive mortgages upon the same land; their equities as among themselves, and their rights to enforce the security of the mortgage, are not equal; they are entitled to priority in the mortgage security of their respective notes according to the order of time in which such notes become due and payable. The order of maturing among the notes fixes the order of preference and priority among the respective assignees.^{2 b} An-

² This rule, which is adopted in the greatest number of states and by a large majority of the decisions, seems to be based upon a correct application of equitable principles and analogies. The rights of the holders are fixed by what expressly appears upon the face of the writings; the mortgage is a common bond uniting all the notes, and the various assignees have through it a clear notice of each other's rights. The order of the respective *assignments* is thus wholly immaterial upon the rights of priority among the assignees. This rule is sustained by the following cases: *Winters v. Franklin Bank*, 33 Ohio St. 250; *Bank of United States v. Covert*, 13 Ohio, 240; *People's Sav. Bank v. Finney*, 63 Ind. 460; *Doss v. Ditmars*, 70 Ind. 451; *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Osborne*, 7 Ind. 140; *Murdock v. Ford*, 17 Ind. 52; *Davis v. Langsdale*, 41 Ind. 399; *Crouse v. Holman*, 19 Ind. 30; *State Bank v. Tweedy*, 8 Blackf. 447; 46 Am. Dec. 486; *Herrington v. McCollum*, 73 Ill. 476; *Funk v. McReynold's Adm'rs*, 33 Ill. 481; *Kæster v. Burke*, 81 Ill. 436; *Vansant v. Allmon*, 23 Ill. 30; *Flower v. Elwood*, 66 Ill. 438; *Gardner v. Diederichs*, 41 Ill. 158; *Walker v. Schreiber*, 47 Iowa, 529; *Grepengether v. Fejervary*, 9 Iowa, 163; 74 Am. Dec. 336; *Rankin v. Major*, 9 Iowa, 297; *Hinds v. Mooers*, 11 Iowa, 211; *Sangster v. Love*, 11 Iowa, 580; *Massie v. Sharpe*, 13 Iowa, 542; *Isett v. Lucas*, 17 Iowa, 503; 85 Am. Dec. 572; *Wood v. Trask*, 7 Wis. 566; 76 Am. Dec. 230; *Marine Bank v. International Bank*, 9 Wis. 57; *Lyman v. Smith*, 21 Wis. 674; *Mitchell v. Ladew*, 36 Mo. 526; 88 Am. Dec. 156; *Thompson v. Field*, 38 Mo. 320; *Ellis v. Lamme*, 42 Mo. 153; *Richardson v. McKim*, 20 Kan. 346; *Gwathmeys v. Ragland*, 1 Rand. 466; *Wilson v. Hayward*, 6 Fla. 171; *Hunt v. Stiles*, 10 N. H. 466; but see *Gilman v. Moody*, 43 N. H. 239; and see also *Phelan v.*

(b) The text is quoted in *Alden v. White*, (Ind. App.) 66 N. E. 509; and cited in *First Nat. Bank v. Andrews*, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885. See, also, in support of the rule, *New York S. & T. Co. v. Lombard Inv. Co.*, 65 Fed. 271; *Schultz v. Plankington Bank*, 141 Ill. 116, 30 N. E. 346, 33

Am. St. Rep. 290; *Ayers v. Rivers*, 64 Iowa 543, 21 N. W. 23; *Leavitt v. Reynolds*, 79 Iowa 348, 44 N. W. 567, 7 L. R. A. 365. The first note has priority although not assigned until after the others: *Horn v. Bennett*, 135 Ind. 158, 34 N. E. 956, 24 L. R. A. 800.

other rule had been adopted by the courts of several states. Upon the same condition of facts, they hold there is no preference or priority whatever among the various assignees; the terms of their respective assignments, or of the maturing of their notes, are alike immaterial; all the assignees are entitled, as among themselves, to share *pro rata* in the security of the mortgage and in the proceeds of the mortgaged premises, if there is not sufficient to pay all in full.^{3c}

Olney, 6 Cal. 478; Grattan v. Wiggins, 23 Cal. 16. For a criticism on this doctrine, see Granger v. Crouch, 86 N. Y. 494, 499, per Finch, J. If the assignee of a note first maturing delays in enforcing his security, even though the second and other subsequent notes should have become due and payable, his priority is not thereby lost: Lyman v. Smith, 21 Wis. 674; People's Sav. Bank v. Finney, 63 Ind. 460 (holder of the first note made a binding agreement with the mortgagor, extending the time of its payment beyond the maturity of the other notes, and his priority was not lost). When a judgment at law has been recovered on a note by its holder, the judgment takes the place of the note in the order of priority under the mortgage: Funk v. McReynold's Adm'rs, 33 Ill. 481.

³ According to this rule, it would be impossible for the holder of a note or notes first maturing to foreclose the mortgage entirely, and by a sale of the premises cut off the rights of the other holders. The rule is sustained by the following cases: Cooper v. Ulmann, Walk. Ch. 251; Wilcox v. Allen, 36 Mich. 160; Donley v. Hays, 17 Serg. & R. 400; Hancock's Appeal, 34 Pa. St. 155; Dixon v. Clayville, 44 Md. 573; Chew v. Buchanan, 30 Md. 367; Andrews v. Hobgood, 1 Lea, 693; Smith v. Cunningham, 2 Tenn. Ch. 565; Ewing v. Arthur, 1 Humph. 537; Parker v. Mercer, 6 How. (Miss.) 320; 38 Am. Dec. 438; Henderson v. Herrod, 10 Smedes & M. 631; Bank of England v. Tarleton, 23 Miss. 173; Pugh v. Holt, 27 Miss. 461; Trustees of Jefferson College v. Prentiss, 29 Miss. 46; Adams v. Lear, 3 La. Ann. 144; Delespine v. Campbell, 52 Tex. 4; Paris Exch. Bank v. Beard, 49 Tex. 358; Robertson v. Guerin, 50 Tex. 317.

(c) See, also, Lovell v. Cragin, 136 U. S. 147, 10 Sup. Ct. 1024, 34 L. ed. 372; Penzel v. Brookmire, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23; Jennings v. Moore, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601; Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907; Hall v. McCormick, 31 Minn. 280, 17 N. W. 620; State Bank v. Mathews, 45 Nebr. 659, 63 N. W. 930, 50 Am. St. Rep. 565; McLean's Appeal, 103 Pa. St. 255; Fourth Nat. Bank's Appeal,

123 Pa. St. 484, 10 Am. St. Rep. 538, 16 Atl. 779; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903 (this case contains an extensive collection of authorities illustrating each of the three main rules stated in the text); Bartlett v. Wade, 66 Vt. 629, 30 Atl. 4; First Nat. Bank v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885. For the same rule applied to purchase-money notes secured by grantor's lien, either im-

In a very few of the states, other still more special rules are adopted in preference to either of these two principal theories.⁴ Finally, the operation of these general rules may be controlled and changed by express provisions contained in the mortgage itself.⁵ Such being the doctrines concerning the rights of assignees arising from the terms

⁴ According to the first of these rules, when notes maturing at different dates are assigned at different times, the assignees have priority according to *the order of the assignments*, irrespective of the order of maturing. This peculiar rule is based upon the notion that as between the mortgagee who assigns one note and retains the others, the assignee is entitled to the preference; and the first assignee having thus a priority as against the mortgagee, any subsequent assignee could only succeed to this position of the mortgagee, and so the assignees would all take in the order of their assignments:^d *Cullum v. Erwin*, 4 Ala. 452; *Nelson v. Dunn*, 15 Ala. 501. The second of these special rules seems to be confined to certain of the states in which the legal theory of the mortgage still prevails, that it is a conveyance of the legal title, so that it may be transferred without assigning the debt. When the notes or bonds have been assigned to different persons, A, B, C, and D, and the mortgage is transferred to another, M, and M forecloses and thus acquires the legal title to the land, he holds the land in trust for all the assignees of the notes or bonds in proportion to their various amounts:^e *Johnson v. Candage*, 31 Me. 28; *Moore v. Ware*, 38 Me. 496; *Bryant v. Damon*, 6 Gray, 564; and see *Gilman v. Moody*, 43 N. H. 239.

⁵ For example, the mortgage may provide that the notes shall have priority of lien in the *inverse* order of their maturing,—i. e., that the one last to become payable shall have the prior lien, etc.: *Ellis v. Lamme*, 42 Mo. 153. And when the mortgage provides that upon default in payment of any one note, all the notes shall at once become payable, it is generally held that upon the happening of such event the holders of all the notes become entitled to share *pro rata* in the security, the case being then virtually the same as where all the notes are originally payable at once: *Pierce v. Shaw*, 51 Wis. 316; 8 N. W. 209; *Bushfield v. Meyer*, 10 Ohio St. 334; *Bank of United States v. Covert*, 13 Ohio, 240. In Missouri, however, it is held that the priority resulting from order of maturity is not changed by such a provision: *Hurek v. Erskine*, 45 Mo. 484; *Mitchell v. Ladew*, 36 Mo. 526; 88 Am. Dec. 156; *Thompson v. Field*, 38 Mo. 320.

plied or reserved in the deed, see *Levy v. Rudolph*, 22 Ky. Law Rep. 258, 56 S. W. 988; *Aaron v. Warner*, 62 Miss. 370; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903; *Salmon v. Downs*, 55 Tex. 243; *Wooters v. Hollingsworth*, 58 Tex. 371.

(d) See, also, *Knight v. Ray*, 75 Ala. 383; *Preston v. Ellington*, 74 Ala. 133 (notes secured by grantor's lien); *Parsons v. Martin*, 86 Ala. 352, 5 South. 467 (same).

(e) *Jordan v. Cheney*, 74 Me. 359.

of the mortgage and notes themselves, it is generally held by courts adopting either of the two principal rules before stated that the mortgagee in assigning a note may, by express agreement with the assignee thereof, change the order of priority or equality which would otherwise exist, and may establish a different order, giving precedence of lien to a note maturing at a later time, and that such agreement would be binding upon any second or subsequent assignees of other notes.^{6†}

§ 1202. Effect of Assigning the Note.—Wherever the equitable theory of the mortgage is admitted, the assignment of one of the notes by itself, without any accompanying transfer of the mortgage, is an assignment of an interest *pro tanto* in the mortgage.^a Each assignee is, through the mortgage, charged with notice of the equitable interests of all the other assignees.¹ In the states which adopt the first general rule as given in the preceding paragraph, the assignee of the note first maturing is

⁶ For example, if there were three notes payable in the order No. 1, No. 2, and No. 3, and the mortgagee first assigned No. 3 to A, he might agree that it should have priority of lien in A's hands over the other two; and a subsequent assignee of No. 1 would be bound by this agreement. Conversely, on assigning No. 1 to A, the parties might agree that it should not have a prior lien, but should only share *pro rata* with the others: Walker v. Dement, 42 Ill. 272; Noyes v. White, 9 Kan. 640; Ellis v. Lamme, 42 Mo. 153; Bank of England v. Tarleton, 23 Miss. 173; Trustees of Jeff. Coll. v. Prentiss, 29 Miss. 46; Chew v. Buchanan, 30 Md. 367; Grattan v. Wiggins, 23 Cal. 16; Lane v. Davis, 14 Allen, 225.

¹ If the mortgagee should, therefore, assign a part of the notes to A, and the remaining notes, together with the mortgage itself, to B, B would not

(f) Romberg v. McCormick, 194 Ill. 205, 62 N. E. 537; Anglo-American Land M. & A. Co. v. Bush, 84 Iowa 272, 50 N. W. 1063; Solberg v. Wright, 33 Minn. 224, 22 N. W. 381. The reasons for holding such a preference binding upon subsequent assignees of other notes are well and fully stated in Nashville Trust Co. v. Smythe, 94 Tenn. 513, 45 Am. St. Rep. 748, 29 S. W. 903.

(a) Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919, 85 Am. St. Rep. 444 (assignee is entitled to equitable *pro rata* share of proceeds, but is not entitled to foreclose); Cram v. Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714; New England Loan & Tr. Co. v. Robinson, 56 Nebr. 50, 71 Am. St. Rep. 657, 76 N. W. 415; State Bank v. Mathews, 45 Nebr. 659, 50 Am. St. Rep. 565, 63 N. W. 930.

entitled to foreclose the mortgage and procure the mortgaged premises to be sold, when his note becomes due, and thus to cut off the liens of the other notes. The holders of the other notes, in order to protect their own interests, are entitled to redeem from him, before the final sale, in the order of their various notes.²

§ 1203. **Priority between the Assignee and the Mortgagee.**—Thus far I have spoken of the rights of assignees among themselves, where all or some of the notes have been assigned to various holders; a different principle may operate between an assignee and the mortgagee. When the mortgagee assigns one or more of the notes, and retains the remainder of the series, it is generally held that the assignee is entitled to a priority of lien as against the mortgagee, with respect to the note or notes so transferred; and this rule operates without regard to the order in which the notes held by the two parties mature.^{1 a}

acquire any precedence from the fact of his holding the mortgage:^b *Walker v. Schreiber*, 47 Iowa, 529; *Sargent v. Howe*, 21 Ill. 148; *Hough v. Osborne*, 7 Ind. 140; *Anderson v. Baumgartner*, 27 Mo. 80; *Cullum v. Erwin*, 4 Ala. 452; *Nelson v. Dunn*, 15 Ala. 501; *Henderson v. Herrod*, 10 Smedes & M. 631; *Gwathmeys v. Ragland*, 1 Rand. 466; *Phelan v. Olney*, 6 Cal. 478; *Stevenson v. Black*, 1 N. J. Eq. 338; *Keyes v. Wood*, 21 Vt. 331; *Belding v. Manly*, 21 Vt. 550.

² If the land was sold in such a case, without making the holders of the other notes parties to the suit, their rights of redemption would still remain; they could redeem from the purchaser. In fact, according to this view, they stand in exactly the same position as subsequent mortgagees:^c *Vansant v. Allmon*, 23 Ill. 30; *Flower v. Elwood*, 66 Ill. 438; *Hinds v. Mooers*, 11 Iowa, 211; *Stanley v. Beatty*, 4 Ind. 134; *Murdock v. Ford*, 17 Ind. 52; *Doss v. Ditmars*, 70 Ind. 451; *Grattan v. Wiggins*, 23 Cal. 16. Where the first of a series of notes is paid by the mortgagor at maturity, the remaining notes of the series are entitled to preference over it, although the mortgagor has attempted to give it a new life by transferring it to another holder: *Bailey v. Malvin*, 53 Iowa, 371, 5 N. W. 515.

¹ For example, if there was a series of three notes, and the mortgagee assigned No. 3, then the assignee, having a priority of lien, would be entitled

(b) *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907.

(c) See, also, *Bank of Napa v. Godfrey*, 77 Cal. 612, 20 Pac. 142;

and see *Bridges v. Ballard*, 62 Miss. 237.

(a) Quoted in *Alden v. White*, (Ind. App.) 66 N. E. 509; *Douglass*

SECTION IV.

INTERESTS, RIGHTS, AND LIABILITIES OF THE MORTGAGOR AND OF THE MORTGAGEE.

ANALYSIS.

- § 1204. General interests of the mortgagor and the mortgagee.
- §§ 1205-1208. I. Conveyance by the mortgagor.
 - § 1205. Conveyance "subject to" the mortgage; effect of.
 - § 1206. Grantee "assumes" the mortgage; effect of.
 - § 1207. *Rationale* of the grantee's liability.
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- §§ 1209-1214. II. Assignment of the mortgage.
 - § 1209. Assignment at law and in equity.
 - § 1210. Assignment of the debt is, in equity, an assignment of the mortgage; what operates as such assignment.
 - § 1211. Equitable assignment by subrogation.
 - § 1212. In whose favor such equitable assignment exists.
 - § 1213. In whose favor such equitable assignment does not exist.
 - § 1214. Right to compel an actual assignment.
- §§ 1215-1218. III. Rights and liabilities of mortgagee in possession.

to have his note paid in full, although it matured last, before the proceeds were applied upon the notes remaining in the mortgagee's hands, whenever the proceeds were insufficient to pay all in full. The mortgagee having transferred the note and received the consideration therefor, it would be inequitable for him to deprive the assignee of any part of its value, by insisting upon a priority or even an equality of right in sharing the insufficient proceeds:^b *McClintic v. Wise's Adm'rs*, 25 Gratt. 448; 18 Am. Rep. 694; *Stevenson v. Black*, 1 N. J. Eq. 338; *Salzman v. Creditors*, 2 Rob. (La.) 241; *Ventress v. Creditors*, 20 La. Ann. 359; *Waterman v. Hunt*, 2 R. I. 298; *Bryant v. Damon*, 6 Gray, 564; *Warden v. Adams*, 15 Mass. 233; *Cullum v. Erwin*, 4 Ala. 452; *Forwood v. Dehoney*, 5 Bush, 174; *Clowes v. Dickenson*, 5 Johns. Ch. 235; *Van Rensselaer v. Stafford*, Hopk. Ch. 569; *Pattison v. Hull*, 9 Cow. 747; *Mechanics' Bank v. Bank of Niagara*, 9 Wend. 410. But the following cases hold that they both share ratably:^c *Donley v. Hays*, 17 Serg. & R. 400; *Dixon v. Clayville*, 44 Md. 573; *McClanahan v. Chambers*, 1 Mon. 43; and see *Belding v. Manly*, 21 Vt. 550.

v. Blount, 22 Tex. Civ. App. 493, 55 S. W. 526. The same rule applies where the assignee of all the notes assigns one: *Jenkins v. Hawkins*, 34 W. Va. 799, 12 S. E. 1090.

(^b) Quoted in *Alden v. White*, (Ind. App.) 66 N. E. 509. See, also, *Par-*

sons v. Martin, 86 Ala. 352, 5 South. 467 (grantor's lien); *Preston v. Ellington*, 74 Ala. 133 (same); *Knight v. Ray*, 75 Ala. 383.

(^c) *Salmon v. Downs*, 55 Tex. 243 (grantor's lien); *Wooters v. Hollingsworth*, 58 Tex. 374 (same).

- § 1215. To whom the doctrine applies in different states.
- § 1216. With what he is chargeable; rents and profits, willful default.
- § 1217. His allowances and credits, disbursements, repairs, improvements, compensation.
- § 1218. Liability to account.
- §§ 1219–1226. IV. Redemption from the mortgage.
- § 1219. By the mortgagor; suit to redeem.
- § 1220. By other persons.
- §§ 1221–1226. Rights of contribution and of exoneration upon redemption.
- § 1221. General doctrine; classes of cases; equities equal or unequal.
- § 1222. 1. Where their equities are equal; titles simultaneous.
- § 1223. 2. Where their equities are unequal, although the titles are simultaneous; tenants for life or for years and remaindermen; dowress and reversioner.
- § 1224. 3. Inequality of equities where titles are not simultaneous; between mortgagor and his grantee of a parcel; between successive grantees; inverse order of alienation.
- § 1225. The same; what circumstances disturb these equities and defeat this rule.
- § 1226. 4. A release by the mortgagee of one or more parcels.
- § 1227. V. Foreclosure; foreclosure proper or “strict foreclosure.”
- § 1228. Foreclosure by judicial sale.

§ 1204. General Interests of Mortgagor and Mortgagee.—The doctrines which prevail in this country concerning the respective interests of the mortgagor and the mortgagee, and their ordinary rights which arise therefrom, have been explained in the preceding section II. of the present chapter. In equity, the mortgagor's interest continues to be the substantial ownership of the land, subject only to the lien of the mortgage; and in those states where the purely equitable theory has been adopted this ownership is the legal estate; in the others it is equitable,—the equity of redemption. A mortgagor may therefore deal with the land in any lawful manner, subject only to the lien which affects it through all of his subsequent dealings and in all of its subsequent relations. Among the necessary incidents of the mortgagor's ownership are the following: Upon his death intestate, the land, if owned in fee, descends to his heirs; he may devise it by will, and it is subject to dower and to curtesy in all the states where these life estates are preserved. It is generally liable to be

levied on and sold on execution issued upon a judgment against the mortgagor.^{1a} In all the states the mortgagor is entitled to possession against third persons; and in all the states which have adopted the purely equitable theory, he is entitled to possession against the mortgagee and those claiming under him, until the time when a foreclosure sale has been finally consummated. While in possession, according to either theory he may use the premises in any reasonable manner, and is not accountable to the mortgagee for the rents, profits, and income during such possession.^{2b} The interest of the mortgagee, in equity, is simply a lien, a thing in action, a mere adjunct or accessory of the debt.

¹ To this liability there is one most important exception. It is the prevailing rule — in some states based upon statute — that where the mortgagee, or other holder of the mortgage, elects to sue at law on the mortgage debt, and recovers a personal judgment against the mortgagor, he cannot, by his execution, levy on and sell the very land itself which is covered by the mortgage, but must satisfy his judgment out of other property (if any) of the mortgagor. The reasons of this rule are obviously just. If the mortgaged land was sold on such a judgment, the purchaser would take it *still encumbered* by the mortgage; it would not, therefore, sell for its fair value, and thus the mortgagor's property would be unjustly sacrificed. Furthermore, since the mortgagee had a *specific* lien on the particular tract by his mortgage, he ought not, in equity and justice, to obtain and enforce a *general lien* by judgment upon the very same tract: See *Palmer v. Foote*, 7 Paige, 437; *Atkins v. Sawyer*, 1 Pick. 351; 11 Am. Dec. 188; *Washburn v. Goodwin*, 17 Pick. 137; *Powell v. Williams*, 14 Ala. 476; 48 Am. Dec. 105; *Barker v. Bell*, 37 Ala. 354, 358; *Baldwin v. Jenkins*, 23 Miss. 206; *Thornton v. Pigg*, 24 Mo. 249; *per contra*, *Freeby v. Tupper*, 15 Ohio, 467; and see *Trimm v. Marsh*, 54 N. Y. 599; 13 Am. Rep. 623; and Cal. Code Civ. Proc., sec. 726.

² In very special cases the mortgagor may be restrained from committing waste and thereby endangering the security.^c

(a) The sale does not extinguish the lien of the mortgage: *Whitmore v. Tatum*, 54 Ark. 457, 16 S. W. 198, 26 Am. St. Rep. 56.

(b) *Georgetown Water Co. v. Fidelity Trust & S. V. Co.*, 25 Ky. Law Rep. 1739, 78 S. W. 113. Before foreclosure, the mortgagor is entitled to the crops: *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150, 17 L. R. A. 782; *Simpson v. Ferguson*, 112 Cal.

180, 40 Pac. 104, 44 Pac. 484, 53 Am. St. Rep. 201.

(c) See *Webber v. Ramsey*, 100 Mich. 58, 58 N. W. 625, 43 Am. St. Rep. 429; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206, 19 Am. St. Rep. 387, 7 L. R. A. 630; *Russell v. Merchants' Bank*, 47 Minn. 286, 50 N. W. 228, 28 Am. St. Rep. 368; and *Pomeroy Equitable Remedies*, Chapter on Injunction.

It is entirely personal assets, and on his death passes to his executors or administrators, may be bequeathed by will, and is not subject to dower or curtesy. Like other things in action, it is liable to be reached by the creditors of the mortgagee, and may be pledged by him, or given as collateral security for an indebtedness. In fact, the relation of the mortgagee to the mortgagor is purely a conventional one, and not fiduciary. The mortgage is a mere security for a debt, and imposes no duty upon the mortgagee to protect the interests of the mortgagor, unless there is some special covenant creating such a duty.³

³ *Cornell v. Woodruff*, 77 N. Y. 203, 206, per Rapallo, J. This case holds that there is no such relation of trust between the mortgagee and the mortgagor as prevents the former from acquiring an adverse claim to or lien upon the mortgaged premises, and enforcing the same with like effect as any stranger could.^d

My limits do not permit any fuller discussion of the doctrines stated in the above *résumé*. Authorities bearing on them for nearly every state will be found in the preceding section II., and for a complete treatment the reader is referred to Mr. Jones's work on mortgages. In the remainder of this section I purpose to examine, in a general manner, certain special but most important doctrines, the nature and application of which are peculiarly equitable, involving broad equitable principles, which frequently come before the American courts in dealing with mortgages. These are the following: Conveyance by the mortgagor, and especially when the grantee assumes the mortgage; assignment of the mortgage, and especially when and in whose favor an equitable assignment takes place; the rights and liabilities of the mortgagee in possession; redemption by the mortgagor and by other persons, and the rights of subrogation and of contribution thence arising; the various modes of foreclosure. In dealing with these topics, I am necessarily confined to a statement of the more general principles, doctrines, and rules, and must refer to Mr. Jones and other writers for an exhaustive treatment.

(d) Whether a mortgagee or his assignee out of possession can become a purchaser at a tax sale of the mortgaged premises, with the same effect as against the mortgagor and other mortgagees as if he were a stranger to the estate, is a question on which the authorities are in conflict. To the effect that he cannot, see *Stinson v. Connecticut M. L. Ins. Co.*, 174 Ill.

125, 51 N. E. 193, 66 Am. St. Rep. 262; *Hall v. Wescott*, 15 R. I. 373, 5 Atl. 629, and cases cited. That he can, see *McLaughlin v. Acorn*, 58 Kan. 514, 50 Pac. 441. To the effect that the relation is not fiduciary, see *Adler v. Van Kirk L. & C. Co.*, 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133.

§ 1205. I. Conveyance by the Mortgagor Subject to the Mortgage.^a—The mortgagor can convey the entire mortgaged premises to a single grantee; or he can convey them in parcels to different grantees simultaneously or successively; or he can convey a portion and retain the residue. Where the mortgagor conveys by a deed absolutely silent with respect to an outstanding mortgage, the grantee, of course, takes the land encumbered by the mortgage, if he has actual notice of it, or constructive notice by record or otherwise.^{1b} Where a mortgagor conveys by a deed which states simply that the conveyance is “subject to” a certain specified mortgage, or words to that effect, the grantee takes the land burdened with the lien. As between himself and the grantor-mortgagor, the land is the primary fund out of which the mortgage debt should be paid; he cannot claim that the mortgagor should pay off the mortgage and thus exonerate the land.^{2c} He does not, however, become

¹ See *Boxheimer v. Gunn*, 24 Mich. 372. Where the mortgage is unrecorded, the subsequent grantee may, by means of a prior record, under the operation of the recording acts, obtain a title free from the lien of the mortgage as a *bona fide* purchaser for value and without notice.

² *Johnson v. Zink*, 51 N. Y. 333; *Mathews v. Aikin*, 1 N. Y. 595; *Harris v. Jex*, 66 Barb. 232; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Russell v. Allen*, 10 Paige, 249; *Vanderkemp v. Shelton*, 11 Paige, 28; *Brewer v. Staples*, 3 Sand. Ch. 579; *Cleveland v. Southard*, 25 Wis. 479; *Sweetzer v. Jones*, 35 Vt. 317; 82 Am. Dec. 639; *Stevens v. Church*, 41 Conn. 369; *Shuler v. Hardin*,

(a) This section is cited in *Wade v. Bent*, 24 Ky. Law Rep. 1294, 71 S. W. 444.

(b) This portion of the text is quoted in *Farmers' Savings & B. & L. Ass'n v. Kent*, 117 Ala. 624, 23 South. 757; *Swope v. Jordan*, 107 Tenn. 166, 64 S. W. 52. See, also, *Kelly v. Staed*, 136 Mo. 430, 58 Am. St. Rep. 648, 37 S. W. 1110. It is held in *Wadsworth v. Lyon*, 93 N. Y. 201, 45 Am. Rep. 190, that when the land is conveyed by a deed silent with respect to the mortgage, and the mortgage debt is not part of the purchase

price, the grantor remains the principal debtor, and the land is simply security; that the primary liability of the mortgagor to pay the debt cannot be shifted to the land, save by a conveyance thereof subject to its payment, or by deducting the amount from the consideration for the conveyance, or by some agreement between the parties changing such liability.

(c) *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Wilbur v. Warren*, 104 N. Y. 192, 10 N. E. 263.

personally liable for the mortgage debt, but the mortgagor remains personally liable for any deficiency arising upon a foreclosure sale of the land.^{3e} A grantee who thus takes a conveyance subject to a mortgage is presumed to have included the mortgage debt in the purchase price, and is not, therefore, permitted to dispute the validity of the mortgage; in this respect he is in the same position as one who expressly assumes the mortgage.^{4 f}

25 Ind. 386. The grantee cannot, as against the mortgagor, destroy the lien of the mortgage by a mere tender: *Harris v. Jex*, *supra*; nor as between himself and the mortgagor is he a surety with any of the rights belonging to a surety: *Brewer v. Staples*, *supra*; *Stevens v. Church*, *supra*; *Maher v. Lanfrom*, 86 Ill. 513; as to the rights of the mortgagor, see *Johnson v. Zink*, 51 N. Y. 333; ^d also *ante*, §§ 797, 798, and cases cited in notes.

³ *Binsse v. Paige*, 1 Abb. App. 138; *Belmont v. Coman*, 22 N. Y. 438; 78 Am. Dec. 213; *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Cleveland v. Southard*, 25 Wis. 479; *Johnson v. Monell*, 13 Iowa, 300; and see *ante*, § 797, cases cited in note.

⁴ *Maher v. Langfrom*, 86 Ill. 513; *Freeman v. Auld*, 44 N. Y. 50; 37 Barb. 587; *Hardin v. Hyde*, 40 Barb. 435; *Fuller v. Hunt*, 48 Iowa, 163; *Green v. Turner*, 38 Iowa, 112; *Greither v. Alexander*, 15 Iowa, 470; and see cases cited *ante*, in note under § 937. In the absence of covenants in the deed having a different effect, it is presumed that the grantee actually paid the value of the land, less the mortgage debt, so that it is his equitable duty to pay off the mortgage: *Shuler v. Hardin*, 25 Ind. 386; and if he *does* pay it,

(d) To the extent of the value of the land his relation to his grantee is that of surety towards the principal debtor, and to that extent he is discharged by a valid agreement, without his knowledge, between the creditor and the grantee, for the extension of the time of payment: *Murray v. Marshall*, 94 N. Y. 611; *Spencer v. Spencer*, 95 N. Y. 353.

(e) *Elliott v. Sackett*, 108 U. S. 140, 2 Sup. Ct. 375, 27 L. ed. 680; *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. ed. 456; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449; *Holcomb v. Thompson*, 50 Kan. 598, 32 Pac. 1091; *Crane v. Hughes*, 5 Kan.

App. 100, 48 Pac. 865; *Clifford v. Minor*, 76 Minn. 12, 78 N. W. 861; *Lang v. Cadwell*, 13 Mont. 458, 34 Pac. 957; *Loudenslager v. Woodbury Heights Land Co.*, (N. J. Eq.) 45 Atl. 784; *Bennett v. Bates*, 94 N. Y. 354; *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 229, 8 Am. Dec. 492; *Miles v. Miles*, 6 Oreg. 267, 25 Am. Rep. 522; *Fisler v. Reach*, 202 Pa. St. 74, 51 Atl. 599; *Appeal of Moore*, 88 Pa. St. 450, 32 Am. Rep. 469; *Granger v. Roll*, 6 S. Dak. 611, 62 N. W. 970; *Arnold v. Randall*, (Wis.) 98 N. W. 239.

(f) *Central Trust Co. v. Columbus, H. V. & T. R. Co.*, 87 Fed. 815; *Pratt's Ex'r v. Nixon*, 91 Ala. 192, 8 South. 751; *West v. Miller*, 125 Ind. 70, 25 N. E. 143 (cannot set up

§ 1206. **The Same. Grantee Assumes the Mortgage.**—The mortgagor may not only convey the premises “subject to” the mortgage; he may also convey them in such a manner that the grantee assumes the payment of the mortgage debt,

he does not thereby acquire any claim, by way of set-off or otherwise, against his grantor: *Atherton v. Toney*, 43 Ind. 211. A contrary condition of facts, however, may exist, and may be shown by evidence, in which such presumption would be overcome: *Wolbert v. Lucas*, 10 Pa. St. 73; 49 Am. Dec. 578. It should be carefully observed that the rights and liabilities of the grantee who takes “subject to” a mortgage, and the equities between himself and the mortgagor who conveys to him, may be modified, controlled, and completely determined by the covenants of title on the part of the grantor contained in the deed,—covenants by which the grantor may render himself primarily liable, and may exonerate the land, as between himself and the grantee. If this fact is borne in mind, it will reconcile any apparent discrepancy among the decisions. The effect upon the grantor’s covenants of title of a clause stating that the conveyance is subject to a certain mortgage belongs to the law, and not to equity. Where a mortgagor conveys a portion of the premises and retains the residue, and where he conveys in parcels to different grantees, the equities between himself and his grantee in the one case, and among the various grantees in the other, involve questions of great importance, which will be more appropriately considered under subsequent heads.

duress, illegality of consideration, or coverture of one of the mortgagees); *Foy v. Armstrong*, 113 Iowa 629, 85 N. W. 753; *Selby v. Sanford*, 7 Kan. App. 781, 54 Pac. 17; *Willis v. Terry*, 15 Ky. Law Rep. 753, 24 S. W. 621; *Johnson v. Thompson*, 129 Mass. 398; *McNaughton v. Burke*, 63 Nebr. 704, 89 N. W. 274; *Arlington Mill & Elevator Co. v. Yates*, 57 Nebr. 286, 77 N. W. 677; *Pass v. Lynch*, 117 N. C. 453, 23 S. E. 357; *Mott v. Maris*, (Tex. Civ. App.) 29 S. W. 825; *Washington, etc., R. R. v. Cazenove*, 83 Va. 744, 3 S. E. 433. See, however, *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209. If it appears that the incumbrance is not a part of the consideration and has not been deducted from it, the grantee is not estopped, although the deed recites that it is subject to the mortgage: *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492. It

has been held that the mere withholding of a portion of the purchase price as security against the claim of the mortgagee does not estop the grantee: *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489. See, also, *Hallam v. Telleren*, 55 Nebr. 255, 75 N. W. 560. It is held that where the conveyance is silent as to the mortgage, the grantee is not estopped to set up usury: *Camden Fire Ins. Co. v. Reed*, (N. J. Eq.) 38 Atl. 667. It is held that one taking a second mortgage expressly subject to a first cannot question the validity of the first: *First Nat. Bank v. Reid*, 122 Iowa 280, 98 N. W. 107; but that second mortgagee may contest the validity of the first, where that was not assumed, though it was exempted from the covenants of the second mortgage, see *Livingstone v. Murphy*, (Mass.) 72 N. E. 1012. To the effect that one who purchases subject to a mortgage is estopped to set up an outstanding

and thus renders himself personally liable therefor. The element which lies at the bottom of such assumption, and which alone gives it efficacy according to the theory held by some courts, is the fact that the mortgage debt is included in the purchase price as a constituent part thereof, and the grantee actually pays or secures to his grantor only the balance of the gross price after deducting such debt. No particular form of words is necessary to create a binding assumption; it is sufficient that the language shows unequivocally an intent on the part of the grantee to assume the liability of paying the mortgage debt, but this intent must clearly appear.^{1 a} When the deed executed by

¹ Strong v. Converse, 8 Allen, 557; 85 Am. Dec. 732; Drury v. Tremont etc. Co., 13 Allen, 168, 171; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Trotter v. Hughes, 12 N. Y. 74; 62 Am. Dec. 137; Belmont v. Coman, 22 N. Y. 438; 78 Am. Dec. 213; Binsse v. Paige, 1 Abb. App. 138; Collins v. Rowe, 1 Abb. N. C. 97; Stebbins v. Hall, 29 Barb. 524; Miller v. Thompson, 34 Mich. 10; Fowler v. Fay, 62 Ill. 375; Dunn v. Rodgers, 43 Ill. 260; Comstock v. Hitt, 37 Ill. 542, 546; Hull v. Alexander, 26 Iowa, 569; Johnson v. Monell, 13 Iowa, 300; Bumgardner v. Allen, 6 Munf. 439. A mere provision in the deed that the conveyance "is subject to" a certain mortgage, even though the mortgage is expressly excepted from the operation of the covenants of title, does not constitute an assumption: Johnson v. Zink, 51 N. Y. 333; Strohauser v. Voltz, 42 Mich. 444; Slater v. Breese, 36 Mich. 77.^b A provision in the deed that

title against the mortgagee, see Wade v. Bent, 24 Ky. Law Rep. 1294, 71 S. W. 444; Washington Loan & Tr. Co. v. McKenzie, 64 Minn. 273, 66 N. W. 976; Landau v. Cottrill, 159 Mo. 308, 60 S. W. 64. See the following miscellaneous cases: National Mut. B. & L. Ass'n v. Retzman, (Nebr.) 96 N. W. 205 (when deduction is enough for legal interest only, grantee may set up usury); Board of Trustees of Westminster College v. Piersol, 161 Mo. 270, 61 S. W. 811 (purchaser cannot question ownership of note when his grantor does not); First Nat. Bank v. Honeyman, 6 Dak. 275, 42 N. W. 771 (purchaser subject to mortgage to secure future advances may question the amount of the advances).

(a) To the effect that the evidence must be clear, see Holcomb v. Thompson, 50 Kan. 598, 32 Pac. 1091; Hopper v. Calhoun, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363. It has been held that a grantee is bound by an agreement of assumption in a contract of sale, although the deed is silent as to it: Whicker v. Hushaw, 159 Ind. 1, 64 N. E. 460.

(b) See, however, Canfield v. Shear, 49 Mich. 313, 13 N. W. 605. In Jager v. Vollinger, 174 Mass. 521, 55 N. E. 458, the words "subject to a mortgage claim . . . the payment of which claim is part of the consideration," etc., were held sufficient to show an assumption. In Jehle v. Brooks, 112 Mich. 131, 70 N. W. 440, the words "except a mortgage . . .

the grantor contains a clause sufficiently showing such an intent, the acceptance thereof by the grantee consummates the assumption, and creates a personal liability on his part, which inures to the benefit of the mortgagee as though he had himself executed the deed.^{2c} When a grantee thus

the amount of a certain mortgage shall be paid as a part of the purchase price has been held to be an assumption, and to create a personal liability of the grantee: *Thayer v. Torrey*, 37 N. J. L. 339; *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Heid v. Vreeland*, 30 N. J. Eq. 591. But in *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659, the following clause, "subject, however, to a mortgage held by, etc., for seven thousand dollars, which is part of the above-named consideration," was decided not to be an assumption of the mortgage.

² *Converse v. Cook*, 8 Vt. 164; *Curtis v. Tyler*, 9 Paige, 432, 435; *Halsey v. Reed*, 9 Paige, 446, 451; *King v. Whitely*, 10 Paige, 465; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Ricard v. Sanderson*, 41 N. Y. 179; *Spaulding v. Hallenbeck*, 35 N. Y. 204; 39 Barh. 79; *Trotter v. Hughes*, 12 N. Y. 74, 78; 62 Am. Dec. 137; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Lennig's Estate*, 52 Pa. St. 135, 138; *Hoff's Appeal*, 24 Pa. St. 200; *Miller v. Thompson*, 34 Mich. 10; *Crawford v. Edwards*, 33 Mich. 354; *Bishop v. Douglass*, 25 Wis. 696; *Thompson v. Bertram*, 14 Iowa, 476; *Corbett v. Waterman*, 11 Iowa, 86. It is even held that

which second party assumes" were held sufficient.

(c) Quoted in *O'Conner v. O'Conner*, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33. This section is cited to this effect in *Davis v. Hulett*, 58 Vt. 90, 4 Atl. 139; *Columbus & S. H. R. Co.'s Appeals*, 48 C. C. A. 275, 109 Fed. 177, 208; *Skinner v. Harker*, 23 Colo. 333, 48 Pac. 648. See, also, *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *Burbank v. Roots*, 4 Colo. App. 197, 35 Pac. 275; *Gage v. Cameron*, (Ill.) 72 N. E. 204; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Windle v. Hughes*, 40 Oreg. 1, 65 Pac. 1058; *Blood v. Crew Levick Co.*, 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 741; *Connor v. Jones*, (S. Dak.) 72 N. W. 463. To the effect that the grantee becomes personally liable, see *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. ed. 613; *North Alabama Dev. Co. v. Orman*,

55 Fed. 18, 5 C. C. A. 22, 13 U. S. App. 215; *Tulare Co. Bank v. Mad-den*, 109 Cal. 312, 41 Pac. 1092; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Farmers & Merchants' Bank v. Copsey*, 134 Cal. 287, 66 Pac. 324; *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30; *Ingram v. Ingram*, 172 Ill. 287, 50 N. E. 198 (affirming 71 Ill. App. 497); *Beeson v. Green*, 103 Iowa 406, 72 N. W. 555; *Corning v. Burton*, 102 Mich. 86, 62 N. W. 1040; *Pinch v. McCulloch*, 72 Minn. 71, 74 N. W. 897; *Keedle v. Flack*, 27 Nebr. 836, 44 N. W. 34; *Rockwell v. Blair Sav. Bank*, 31 Nebr. 128, 47 N. W. 641; *Grand Island etc. Ass'n v. Moore*, 40 Nebr. 686, 59 N. W. 115; *Meehan v. First Nat. Bank*, 44 Nebr. 213, 62 N. W. 490; *Gibson v. Hambleton*, 52 Nebr. 601, 72 N. W. 1033; *Goos v. Goos*, 57 Nebr. 294, 77 N. W. 687; *Martin v. Humphrey*, 58 Nebr. 414, 78 N. W. 715; *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 Am. Dec. 69, and note; *Poe v. Dixon*, 60 Ohio St. 124,

assumes payment of the mortgage debt as a part of the purchase price, the land in his hands is not only made the primary fund for payment of the debt, but he himself becomes personally liable therefor to the mortgagee or other holder of the mortgage. The assumption produces its most important effect, by the operation of equitable principles, upon the relations subsisting between the mortgagor, the grantee, and the mortgagee. As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a

a verbal promise by the grantee to pay the mortgage creates such a personal liability, even though the conveyance appears on the face of the deed to be merely subject to the mortgage:^d *Strohauer v. Voltz*, 42 Mich. 444; *Drury v. Tremont etc. Co.*, 13 Allen, 168; *Bowen v. Kurtz*, 37 Iowa, 239; *Bolles v. Beach*, 22 N. J. L. 680; 53 Am. Dec. 263.

The following is substantially the ordinary form of the clause inserted in the deed: "The said premises are conveyed subject to a certain mortgage [describing it], which mortgage the said party of the second part, his heirs and assigns, hereby assume and agree to pay as a part of the consideration of the said conveyance."

54 N. E. 86, 71 Am. St. Rep. 713; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Farmers' Nat. Bank v. Gates*, 33 Oreg. 388, 54 Pac. 205, 72 Am. St. Rep. 724; *Redfearn v. Craig*, 57 S. C. 534, 35 S. E. 1024; *Fox v. Robbins*, (Tex. Civ. App.) 70 S. W. 597; *Fant v. Wright*, (Tex. Civ. App.) 61 S. W. 514; *Ward v. Green*, (Tex. Civ. App.) 28 S. W. 574; *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774; *Morgan v. South Milwaukee Lake View Co.*, 97 Wis. 275, 72 N. W. 872. It has been held that an assumption by a trustee does not make the *cestuis* personally liable: *Reynolds v. Dietz*, 39 Nebr. 180, 58 N. W. 89.

See the following cases in which the grantee was held to be not bound by the covenant of assumption: *Drury v. Hayden*, 111 U. S. 223, 4 Sup. Ct. 405, 28 L. ed. 408 (assumption clause inserted by mistake, and

grantee released by mortgagor upon discovery); *Bogart v. Phillips*, 112 Mich. 697, 71 N. W. 320 (clause inserted without grantee's knowledge, and he promptly disaffirmed); *Gold v. Ogden*, 61 Minn. 88, 63 N. W. 266 (deed taken in grantee's name without his consent).

(d) To the effect that the promise may be proved by parol, see *Hopper v. Calhoun*, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363; *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; *Moore v. Booker*, 4 N. Dak. 543, 62 N. W. 607; *Society of Friends v. Haines*, 47 Ohio St. 423, 25 N. E. 119; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 63 Am. St. Rep. 892 (the agreement must be established by a clear preponderance of evidence). But this rule is denied in *Shepherd v. May*, 115 U. S. 505, 6 Sup. Ct. 119, 29 L. ed. 456.

surety, with all the consequences flowing from the relation of suretyship.^e As between these two and the mortgagee, although he may treat them both as debtors and may enforce the liability against either, still, after receiving notice of the assumption, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all of his subsequent dealings with them.^{3 f} Payment,

³ *Calvo v. Davies*, 73 N. Y. 211, 215; 29 Am. Rep. 130; 8 Hun, 222; *Marshall v. Davies*, 78 N. Y. 414, 420, 421; *Ayers v. Dixon*, 78 N. Y. 318, 323; *Russell v. Pistor*, 7 N. Y. 171; 57 Am. Dec. 509; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 13 Am. Rep. 556; *Thorp v. Keokuk etc. Co.*, 48 N. Y. 253; *Burr v. Beers*, 24 N. Y. 178; 80 Am. Dec. 327; *Belmont v. Coman*, 22 N. Y. 438; 78 Am. Dec. 213; *Trotter v. Hughes*, 12 N. Y. 74; 62 Am. Dec. 137; *Comstock v. Drohan*, 8 Hun, 373; *Mills v. Watson*, 1 Sweeny, 374; *Rubens v. Prindle*, 44 Barb. 336; *Gilbert v. Averill*, 15 Barb. 20; *Andrews v. Wolcott*, 16 Barb. 21; *Jumel v. Jumel*, 7 Paige, 591; *Blyer v. Monholland*, 2 Sand. Ch. 478; *Wales v. Sherwood*, 52 How. Pr. 413; *Townsend Sav. Bank v. Munson*, 47 Conn. 390; *Waters v. Hubbard*, 44 Conn. 340; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Risk v. Hoffman*, 69 Ind. 137; *Lilly v. Palmer*, 51 Ill. 331; *Thompson v. Bertram*, 14 Iowa, 476; *Corbett v. Waterman*, 11 Iowa, 86.

Since such grantee thus becomes the principal debtor, primarily and absolutely liable for the debt, when he pays the mortgage it is completely extinguished, when he takes an assignment of it it is completely merged. He cannot by any form of assignment, legal or equitable, or by subrogation, keep the mortgage alive as against other liens on the land: *Winans v. Wilkie*, 41 Mich. 264; *Fowler v. Fay*, 62 Ill. 375; *McCabe v. Swap*, 14 Allen, 188; *Converse v. Cook*, 8 Vt. 164; and see *ante*, § 797, and cases in notes. On the other hand, when the mortgagor, having become a surety, pays off the mortgage, he is entitled to hold it by equitable assignment or subrogation, for the purpose of reimbursement from the grantee:^h *Ayers v. Dixon*, 78 N. Y. 318, 323, per

(e) Quoted in *Cook v. Berry*, 193 Pa. St. 377, 44 Atl. 771; cited to this effect in *Latimer v. Latimer*, 38 S. C. 379, 16 S. E. 995.

(f) This portion of the text is quoted in *Miller v. Kennedy*, 12 S. Dak. 478, 81 N. W. 906. See, also, *Pellier v. Gillespie*, 67 Cal. 582, 8 Pac. 185; *Thompson v. Dearborn*, 107 Ill. 87; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Schley v. Fryer*, 100 N. Y. 71, 2 N. E. 280; *Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. 823; *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713. It has been held that if the grantee dies

the mortgagee is under no obligation to present a claim against his estate: *Hull v. Hayward*, 13 S. Dak. 291, 79 Am. St. Rep. 890, 83 N. W. 270. It has been held that the bar of the statute of limitations in favor of the grantee does not bar a suit against the mortgagor who has been out of the state: *Robertson v. Stuhlmiller*, 93 Iowa 326, 61 N. W. 986.

(g) *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; *Goodyear v. Goodyear*, 72 Iowa 329, 33 N. W. 142.

(h) See, also, *Orrick v. Durham*, 79 Mo. 174; *Travers v. Dorr*, 60 Minn.

therefore, by a grantee who has assumed the entire mortgage debt completely extinguishes the mortgage; he cannot be subrogated to the rights of the mortgagee, and keep the mortgage alive for any purpose. While the mortgagee

Danforth, J.; *Risk v. Hoffman*, 69 Ind. 137; *Lappen v. Gill*, 129 Mass. 349; and cases in note under § 797. See, however, *Fairchild v. Lynch*, 14 Jones & S. 1.

The dealings of the mortgagee with these two parties are also governed by the doctrines of suretyship. He may release the mortgagor, and the grantee or the land will not be thereby discharged, since a release of a surety by the creditor in no way affects the liability of the principal debtor: *Tripp v. Vincent*, 3 Barb. Ch. 613. On the other hand, in his dealings with the grantee, at least after notice, the mortgagee must respect the rights of the mortgagor-surety. A valid extension of the time of payment, made by the mortgagee to the grantee, without the consent of the mortgagor, will therefore discharge the mortgagor from his liability:¹ *Calvo v. Davies*, 73 N. Y. 211, 215; 29

173, 62 N. W. 269. To the effect that the mortgagor who is compelled to pay may recover from the grantee, see *Weems v. George*, 13 How. (U. S.) 190, 14 L. ed. 108; *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30; *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; *Blood v. Crew Levick Co.*, 171 Pa. St. 328, 33 Atl. 344, 37 Wkly. Notes Cas. 181. It has been often held that the mortgagor may sue before he has paid: *Kreling v. Kreling*, 118 Cal. 413, 50 Pac. 546; *Burbank v. Roots*, 4 Colo. App. 197, 35 Pac. 275; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Walton v. Ruggles*, 180 Mass. 24, 61 N. E. 267; *Rice v. Sanders*, 152 Mass. 108, 24 N. E. 1079, 23 Am. St. Rep. 804, 8 L. R. A. 315; *Stichter v. Cox*, 52 Nebr. 532, 72 N. W. 848; *McAbee v. Cribbs*, 194 Pa. St. 94, 44 Atl. 1066; *Callender v. Edmison*, 8 S. Dak. 81, 65 N. W. 425. But see, *contra*, *Kearney v. Tanner*, 17 Serg. & R. 94, 17 Am. Dec. 648; *Blood v. Crew Levick Co.*, 171 Pa. St. 328, 33 Atl. 344, 37 Wkly. Notes Cas. 181. In *Abell v. Coons*, 7 Cal. 105, 68 Am.

Dec. 229, it is held that when the debt becomes due the grantor may file his bill in equity to compel foreclosure and payment.

(1) *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. ed. 118; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269; *Merriman v. Miles*, 54 Nebr. 566, 74 N. W. 861, 69 Am. St. Rep. 731; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Spencer v. Spencer*, 95 N. Y. 353; *Dillaway v. Peterson*, 11 S. Dak. 210, 76 N. W. 925; *Schroeder v. Kinney*, 15 Utah 462, 49 Pac. 894; and when the land is conveyed merely subject to the mortgage, such extension of time will discharge the mortgagor to the extent of the value of the land: *Murray v. Marshall*, 94 N. Y. 611; *Bunnell v. Carter*, 14 Utah 100, 46 Pac. 755. It is essential, however, that notice be brought home to the mortgagee: *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602. Mere delay in foreclosing does not discharge the mortgagor: *Warner v. Williams*, 93 Md. 517, 49 Atl. 559; *Hull v. Hayward*, 13 S.

may release the mortgagor without discharging the grantee, his release of the grantee, or his valid extension of the time of payment to the grantee, without the mortgagor's consent, would operate to discharge the mortgagor. In short, the doctrines concerning suretyship must control

Am. Rep. 130; 8 Hun, 222; and a release by the mortgagee of a part of the premises in the hands of the grantee from the lien of the mortgage will also discharge the mortgagor's liability; *a fortiori* a release of the entire premises: *J. Townsend Sav. Bank v. Munson*, 47 Conn. 390; but see *Knowles v. Carpenter*, 8 R. I. 548.

After the grantee has thus assumed payment of a mortgage and incurred an absolute personal liability to the mortgagee, can his grantor, without the knowledge and consent of the mortgagee, release him from his assumption, and discharge him from the liability created thereby? It is strange, as it seems to me, that the decisions should be conflicting in their answer to this question. In the following cases it is either expressly held, or an unequivocal opinion is stated by way of *dictum*, that the grantor *cannot* thus release the grantee from his assumption and liability to the mortgagee:^k *Garnsey v. Rogers*, 47 N. Y. 233, 242; 7 Am. Rep. 440, per Rapallo, J.; *Hartley v. Harrison*, 24 N. Y. 170; *Simson v. Brown*, 6 Hun, 251; *Douglass v. Wells*, 18 Hun, 88; 57 How. Pr. 378 (overruling *Stephens v. Cashacker*, 8 Hun, 116, and disapproving *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650); *Ranney v. McMullen*, 5 Abb. N. C. 246. On the other hand, a series of cases in New Jersey apparently give the mortgagor-grantor this power to release and discharge his grantee without consent of the mortgagee, *unless the grantor himself is insolvent*:^l

Dak. 291, 79 Am. St. Rep. 890, 83 N. W. 270. Mere indulgence or even a naked promise to extend the time does not release the mortgagor: *Steele v. Johnson*, 96 Mo. App. 147, 69 S. W. 1065. In *Denison University v. Manning*, 65 Ohio St. 138, 61 N. E. 706, it was held that an agreement extending time of payment does not release the mortgagor. In *Palmer v. White*, 65 N. J. L. 69, 46 Atl. 706, it was held that at law, in a suit on the bond, the mortgagor continues to be the principal debtor, and is therefore not discharged by an extension of time to the grantee.

(j) *Hyde v. Miller*, 168 N. Y. 590, 60 N. E. 1113 (affirming 60 N. Y. Supp. 974, 45 App. Div. 396).

(k) *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652; *Bay v. Williams*,

112 Ill. 91, 54 Am. Rep. 209; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 15 Am. St. Rep. 508, 6 L. R. A. 610; *N. Y. L. Ins. Co. v. Aitkin*, 125 N. Y. 660, 26 N. E. 732; *Clark v. Fisk*, 9 Utah 94, 33 Pac. 248; *Willard v. Worsham*, 76 Va. 392.

(l) *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Field v. Thistle*, 58 N. J. Eq. 339, 43 Atl. 1072 (affirmed, 60 N. J. Eq. 444, 46 Atl. 1099), (the release cannot be made after the grantor is insolvent nor after the mortgagee has adopted the arrangement by bringing suit to foreclose); and see *Gilbert v. Sanderson*, 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103 (a promise to a mortgagor to pay his mortgage may be released by the mortgagor before it is as-

the dealings between these three parties. When land is thus conveyed, with an assumption of a mortgage by the grantee contained in the deed, subsequent grantees holding under the conveyance are charged with notice; and the land continues to be the primary fund for payment, as though the fact were recited in their own deeds.^{4m} In the foregoing statement of the general doctrine, it has been supposed that the grantee assumes payment of the whole mortgage. If a grantee, in purchasing a part of the mortgaged premises, assumes payment of a part of the mortgage, he becomes personally and primarily liable only for such part.⁵ The general doctrine is well set-

Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; O'Neill v. Clark, 33 N. J. Eq. 444; Youngs v. Public School Trustees, 31 N. J. Eq. 290; Public School Trustees v. Anderson, 30 N. J. Eq. 366. When an *absolute right* has vested in any manner in C against two parties, A and B, it is difficult to understand upon what principle either of the two can be relieved from his liability by an arrangement entered into between themselves alone. It is even more difficult to perceive how the insolvency of one of them should affect the liability of the other, by rendering it either more or less permanent. If A is bound as a principal debtor and B as a surety, it would be an extraordinary view of equity which should regard the creditor's right against either as depending upon the insolvency of the other. In my opinion, these New Jersey decisions are not sustained by the established doctrines of equity concerning the relation of suretyship. Judson v. Dada, 79 N. Y. 373, is expressly distinguished from the foregoing series of New York cases, and does not deal with the mortgagee's rights.

⁴ Weber v. Zeimet, 30 Wis. 283; Freeman v. Auld, 44 N. Y. 50; 37 Barb. 587. If the land is conveyed through successive grantees, each in turn assuming payment of the same mortgage, they all become and remain personally liable to the mortgagee, and he may obtain a decree for a deficiency against all. As to the rights of the mortgagee and the provisions of the decree in such cases, see Risk v. Hoffman, 69 Ind. 137; Youngs v. Public School Trustees, 31 N. J. Eq. 290.

⁵ Snyder v. Robinson, 35 Ind. 311; 9 Am. Rep. 738; Torrey v. Bank of Orleans, 9 Paige, 649; 7 Hill, 260; Hilton v. Bissell, 1 Sand. Ch. 407. Although

sent to by the mortgagee); Morrison v. Barry, 10 Tex. Civ. App. 22, 30 S. W. 376 (same); Huffman v. Western Mortg. & Inv. Co., 13 Tex. Civ. App. 169, 36 S. W. 306 (same). As a result of these cases, it has been held that a grantee under a conveyance subject to a mortgage is not

estopped to set up a defense of fraud in the obtaining of the mortgage: Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150.

(m) Quoted in Nelson v. Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755.

tled that a grantee who thus assumes payment, in whole or in part, of a mortgage as a portion of the purchase price of the land conveyed to him cannot contest the validity of the mortgage on any ground and thus evade the liability which he has assumed.⁶⁰

such grantee is only personally liable for a part, yet in order to protect his own land, under the settled doctrine concerning redemption he may be compelled to redeem the entire mortgage. If, therefore, he makes a general payment, it will be applied first on that portion of the mortgage debt for which he is personally liable: *Snyder v. Robinson*, *supra*. And where he thus redeems the whole mortgage, he becomes subrogated to the rights of the mortgagee in that portion of it which he did not assume—or in other words, he becomes an equitable assignee of that portion—as security for his reimbursement from the rest of the mortgaged premises: *Town of Salem v. Edgerly*, 33 N. H. 46; *Champlin v. Williams*, 9 Pa. St. 341. When, however, the grantee of a part of the premises assumes payment of the whole mortgage upon the entire tract, no such right of subrogation exists; he has by his contract charged his own land with the entire mortgage debt, and by his payment the mortgage is completely extinguished: *Welch v. Beers*, 8 Allen, 151.ⁿ

⁶ *Ritter v. Phillips*, 53 N. Y. 586; *Freeman v. Auld*, 44 N. Y. 50; 37 Barb. 587; *Hardin v. Hyde*, 40 Barb. 435; *Cox v. Hoxie*, 115 Mass. 120; *Crawford v. Edwards*, 33 Mich. 354; *Pidgeon v. Trustees etc.*, 44 Ill. 501; and see *ante*, § 937, and cases cited in note.

(m) See, also, cases cited *post*, § 1225, 1. If he fails to protect the owner of the remaining portion against the mortgage, he becomes liable to such owner for any damages occasioned thereby: *Fleming v. Reed*, 20 Ind. App. 462, 49 N. E. 1087. The mortgagor is entitled to have such parcel first sold and to have execution for deficiency against the grantee: *Mead v. Peabody*, 183 Ill. 126, 55 N. E. 719 (affirming 83 Ill. App. 297). See, in general, *Miller v. Fasler*, 42 Minn. 366, 44 N. W. 256.

(o) *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 76 Pac. 654; *Hadley v. Clark*, (Idaho) 69 Pac. 319; *Lang v. Dietz*, 191 Ill. 161, 60 N. E. 841 (affirming 93 Ill. App. 148); *Miller v. Wayne International B. & L. Ass'n*, (Ind. App.) 70 N. E.

180; *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351, 86 N. W. 317; *Gowans v. Pierce*, 57 Kan. 180, 45 Pac. 586; *Dunn v. Shannon*, 21 Ky. Law Rep. 138, 51 S. W. 14; *Terry v. Durand Land Co.*, 112 Mich. 665, 71 N. W. 525; *Conner v. Howe*, 35 Minn. 518, 29 N. W. 314; *Scanlon v. Grimmer*, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146; *Goos v. Goos*, 57 Nebr. 294, 77 N. W. 687; *Skinner v. Reynick*, 10 Nebr. 323, 6 N. W. 369, 35 Am. Rep. 479; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; *Mitchell v. National Ry. B. & L. Ass'n*, (Tex. Civ. App.) 49 S. W. 624. But a recital of assumption in a deed does not estop the grantee from showing that the

§ 1207. **Rationale of the Grantee's Liability.**—The ground of the grantee's liability adopted by the courts of a large majority of the states is that of contract. It is an application of the general doctrine, so widely prevailing in this country that it may properly be called an American doctrine,—where A makes a promise directly to B, for the benefit of C, upon a consideration moving alone from B, C, being the party beneficially interested, may treat the promise as though made to himself, and may maintain an action at law upon it in his own name against A, the promisor. According to this generally accepted view, the liability of the grantee who thus assumes the payment of an outstanding mortgage does not depend upon any extension of the equitable doctrine concerning subrogation; it is strictly legal, arising out of a contract binding at law; the mortgagee, instead of enforcing the liability by a suit in equity for a foreclosure, may maintain an action at law against the grantee upon his promise, and recover a personal judgment for the whole mortgage debt.^{1a} Another

¹ Mr. Jones represents the doctrine formulated in the text as exceptional, and as confined to the courts of New York: See 1 Jones on Mortgages, secs. 755, 758, 762. Mr. Jones has, I think, fallen into an error. In my work upon Remedies by the Civil Action, I have examined this question and collected many authorities, and have shown that the general doctrine of contracts as stated above in the text prevails throughout a majority of the states. In fact, the contrary rule, which forbids the party for whose benefit the promise is made to sue in his own name, is exceptional: See Pomeroy on Remedies, sec. 139, and cases cited.

That the grantee is liable *on his contract*, and may be sued by the mortgagee at law, or may be compelled to pay the deficiency arising after a sale by a decree in an equity suit for a foreclosure, see Booth v. Conn. Mut. L. Ins. Co., 43 Mich. 299; Unger v. Smith, 44 Mich. 22; Strohauser v. Voltz, 42 Mich. 444; Carley v. Fox, 38 Mich. 387; Miller v. Thompson, 34 Mich. 10; Crawford v. Edwards, 33 Mich. 354; Lamb v. Tucker, 42 Iowa, 118; Schmucker v. Sibert, 18 Kan. 104; 26 Am. Rep. 765. It must be conceded, however, that in the recent cases of Pardee v. Treat, 82 N. Y. 385, 387, 388, and Vrooman v. Turner, 69 N. Y. 280, 283, 25 Am. Rep. 195, the New York court seems to favor the doc-

assumption formed no part of the consideration for the conveyance: Logan v. Miller, 106 Iowa 511, 76 N. W. 1005.

(a) Quoted in Starbird v. Cranstons, 24 Colo. 20, 48 Pac. 652. This section is cited in Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep.

and entirely different *rationale* is adopted by the courts of certain states: that the liability of the grantee to the mortgagee does not arise from contract, and does not exist at law; but it results from an application, or more correctly an extension, of the equitable doctrine of subrogation. Since the mortgagor becomes a surety, the creditor is entitled by subrogation to all the securities which he holds from the principal debtor, and is thus entitled in equity to enforce the promise made to him by the grantee.^{2 b} According to

trine maintained by the courts of Massachusetts and of New Jersey, that the liability of the grantee depends upon the equitable relation of subrogation.

² This theory is adopted by the courts of Massachusetts and New Jersey: *Mellen v. Whipple*, 1 Gray, 317; *Pettee v. Peppard*, 120 Mass. 522; *Exchange Bank v. Rice*, 107 Mass. 37, 41; 9 Am. Rep. 1; *Crowell v. Currier*, 27 N. J. Eq. 152. The same view was taken by some of the earlier cases in New York, and perhaps in other states: *Halsey v. Reed*, 9 Paige, 446; *King v. Whitely*, 10 Paige, 465; *Russell v. Pistor*, 7 N. Y. 171; 57 Am. Dec. 509; *Trotter v. Hughes*, 12 N. Y. 74; 62 Am. Dec. 137. According to this theory, the liability of the grantee to the mortgagee always depends upon the fact that his imme-

474; *McKay v. Ward*, 20 Utah 149, 57 Pac. 1024, 46 L. R. A. 623; *Marble Sav. Bank v. Mesarvey*, 101 Iowa 286, 70 N. W. 198. See, also, *North Alabama Dev. Co. v. Orman*, 55 Fed. 18, 5 C. C. A. 22, 13 U. S. App. 215; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975 (affirming 73 Ill. App. 234); *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865 (affirming 84 Ill. App. 317); *Ayres v. Randall*, 108 Ind. 595, 9 N. E. 464; *Beeson v. Green*, 103 Iowa 406, 72 N. W. 555; *Bristol Sav. Bank v. Stiger*, 86 Iowa 344, 53 N. W. 265; *Cumberland Nat. Bank v. St. Clair*, 93 Me. 35, 44 Atl. 123; *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Goos v. Goos*, 57 Nebr. 294, 77 N. W. 687; *Keedle v. Flack*, 27 Nebr. 836, 44 N. W. 34; *Wager v. Link*, 150 N. Y. 549, 44 N. E. 1103 (affirming 134 N. Y. 122, 31 N. E. 213); *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Windle*

v. Hughes, 40 Oreg. 1, 65 Pac. 1058; *Thompson v. Cheesman*, 15 Utah 43, 48 Pac. 477; and see *Gilbert v. Sanderson*, 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103; *Society of Friends v. Haines*, 47 Ohio St. 423, 25 N. E. 119; *McCown v. Schrimpf*, 21 Tex. 22, 73 Am. Dec. 221; *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774. It has been held that when the one assuming is evicted by paramount authority he ceases to be personally liable. The consideration for his promise fails: *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617.

(b) This section is cited to this effect in *Greene v. McDonald*, 75 Vt. 93, 53 Atl. 332. See, also, *Winters v. Hub Min. Co.*, 57 Fed. 287 (Idaho); *Green v. Turner*, 80 Fed. 41 (affirmed in 86 Fed. 837); *Daniels v. Johnson*, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123; *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818;

the general theory first above stated, the grantee's assumption and promise are so completely for the benefit of the mortgagee that the grantor can maintain no action thereon merely because the grantee has failed to perform his undertaking; it is only where the grantor has himself paid the mortgage that he becomes subrogated to the rights of the mortgagee, and is entitled to enforce it against the grantee.³

diate grantor is also personally liable, since there would be no place for the operation of any subrogation, in the absence of such personal liability of the grantor:^c *Norwood v. De Hart*, 30 N. J. Eq. 412; *Arnaud v. Grigg*, 29 N. J. Eq. 482. The grantee's liability at law on his promise, however, does not depend upon any personal liability of his grantor:^d *Thorp v. Keokuk etc. Co.*, 48 N. Y. 253; but see *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195.

³ *Ayers v. Dixon*, 78 N. Y. 318, 322, 323; but see *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341. The mortgagor-grantor's remedy is simply the right of exoneration by a surety against his principal debtor. It is difficult to perceive how the grantor can have any other right of action against his grantee consistently with the settled doctrines of equity concerning suretyship. That he is entitled to this remedy is clear: *Lappen v. Gill*, 129 Mass. 349; *Risk v. Hoffman*, 69 Ind. 137. When the agreement of assumption by the grantee

Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; *Tulare Co. Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092; *Creesy v. Willis*, 159 Mass. 249, 34 N. E. 265; *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Woodcock v. Bostic*, 118 N. C. 822, 24 S. E. 362; *Davis v. Hulett*, 58 Vt. 90, 4 Atl. 139; *Willard v. Worsham*, 76 Va. 392; *Osborne v. Cabell*, 77 Va. 462; *Francisco v. Shelton*, 85 Va. 779, 8 S. E. 789.

(c) *Knapp v. Connecticut Mut. Life Ins. Co.*, 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861; *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*, 47 Minn. 103, 49 N. W. 526; *Eakin v. Shultz*, 61 N. J. Eq. 156, 47 Atl. 274. It has been held that under this theory the mortgagee has no greater rights

against the grantee than the mortgagor has. Hence, the grantee has been allowed to set up want of consideration: *Giesy v. Truman*, 17 App. D. C. 449.

(d) *Cobb v. Fishel*, 15 Colo. App. 384, 62 Pac. 625; *Marble Sav. Bank v. Mesarvey*, 101 Iowa 286, 70 N. W. 198; *Hare v. Murphy*, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851; *Enos v. Sanger*, 96 Wis. 151, 70 N. W. 1069, 65 Am. St. Rep. 38, 37 L. R. A. 862. But see *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431 (resting on ground that there is no consideration); *Carrier v. United Paper Co.*, 73 Hun 287, 26 N. Y. Supp. 414; *Wager v. Link*, 150 N. Y. 549, 44 N. E. 1103 (affirming 134 N. Y. 122, 31 N. E. 213); *Young Men's Christian Ass'n v. Croft*, 34 Ore. 106, 55 Pac. 439, 75 Am. St. Rep. 568.

§ 1208. Assumption by a Mortgagee.— When a second mortgage contains a provision by which the mortgagee assumes the payment of a prior mortgage on the same land, such mortgagee thereby incurs no personal liability to the prior mortgagee. The whole foundation of the grantee's liability in such a case is wanting. Even if the second mortgage is in the *form* of an absolute deed, the result is the same. In either case there is no debt owing by the mortgagee to the mortgagor, which he can pay in whole or in part by assuming and paying a prior mortgage.¹

§ 1209. II. Assignment of the Mortgage.— In the few states which still retain, in the ordinary transactions of business and modes of administering justice, the strict legal theory according to which the mortgagee obtains and holds the legal estate in the land, an assignment of the mortgage fully efficient and operative must necessarily amount to a conveyance of the legal estate in the mortgaged premises. Such an assignment must, therefore, be an instrument under seal, or at least a written instrument sufficient to convey the legal title.^{1a} We are only concerned with that mode of assignment which is valid and efficient in

is of such a special character that by its terms the grantor still remains the principal debtor, and not a surety, the grantee becomes liable to his grantor only, and not to the mortgagee: *Pardee v. Treat*, 82 N. Y. 385. As to the extent of the grantee's liability, see *Fenton v. Lord*, 128 Mass. 466; *Emley v. Mount*, 32 N. J. Eq. 470; *Strohauer v. Voltz*, 42 Mich. 444; *Waters v. Hubbard*, 44 Conn. 340; *Marshall v. Davies*, 78 N. Y. 414.

§ 1208, ¹ *Garnsey v. Rogers*, 47 N. Y. 233; 7 Am. Rep. 440. The opinion of *Rapallo, J.*, contains a clear and convincing explanation of the necessary distinction between assumptions by a grantee and by a mortgagee.

§ 1209, ¹ See 1 *Jones on Mortgages*, secs. 786-790, where the rules concerning this form of assignment are fully stated. It should be observed that in the cases involving these rules the question is, whether, in accordance with the strict legal theory, the assignment transferred the legal estate *in the land* to the assignee,— a question purely legal, and wholly foreign to the equitable system of mortgage which, practically at least, prevails in the great majority of the states, even in many of those which also retain the legal view.

(a) The assignee under an assignment so made is vested with any power of sale contained in the mort-

gage: *Lanier v. McIntosh*, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676.

equity, which operates to vest the assignee with all the mortgagee's interests, rights, remedies, and liabilities which are recognized and enforced in equity, and are capable of being transferred.² A formal written assignment by which the mortgagee in express terms transfers the mortgage and the debt secured thereby, and the bond, note, or other evidence of the debt, is always proper, and possesses many advantages, and should always be adopted, when possible, as a matter of expediency,³ but it is not essential.

§ 1210. Assignment of the Debt Carries with It the Mortgage — What Operates as an Assignment.—The fundamental principle upon which this doctrine of assignment rests is, that the debt is the principal thing, and the mortgage is only an accessory or incident of the debt, and can have no separate independent existence.¹ The doctrine is therefore universal, that any valid operative assignment of the debt, whether evidenced by a bond, note, or otherwise, is also an efficient assignment of the mortgage, and vests the assignee with all the equitable rights, interests, and reme-

² It would, however, be very misleading to call this an "equitable" assignment, as distinguished from that first above mentioned, as though its operation were confined to courts of equity, and it conferred rights recognized only in equity. In England and in Massachusetts, and a few other states, such an assignment is undoubtedly "equitable"; but in most of the states the rights which it confers are protected by all the courts.

³ Among these advantages is the power of having the assignment recorded, with the protection which the recording acts give to the assignee: See *ante*, §§ 733, 734.

¹ This principle, as the foundation of assignment, was forcibly stated by Swayne, J., in *Carpenter v. Longan*, 16 Wall. 271, 275; 21 L. ed. 313, a case where the mortgage was given to secure a note. "The transfer of the note carries with it the security [the mortgage], without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. All the authorities agree that the debt is the principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. The mortgage can have no separate existence. When the note is paid, the mortgage expires; it cannot survive for a moment the debt which the note represents."

dies of the mortgagee.^{2 a} In the absence of a contrary statutory requirement, such assignment need not even be in writing; it may be merely verbal with delivery. It also follows, as a necessary consequence of the same principle,

² This proposition is *universal* in equity. In all the states adopting the *second* system, as described in the previous section II., such assignment is complete and absolute. In some of the states adopting the *first* system, such assignment is regarded as simply equitable, since the assignee does not thereby acquire the legal estate in the mortgaged premises; but in several other states of the same class, I think this form of assignment is treated as practically complete and absolute: *Langdon v. Keith*, 9 Vt. 299; *Pratt v. Bank of Bennington*, 10 Vt. 293; 33 Am. Dec. 201; *Keyes v. Wood*, 21 Vt. 331; *Blake v. Williams*, 36 N. H. 39; *Page v. Pierce*, 26 N. H. 317; *Downer v. Button*, 26 N. H. 338; *Rigney v. Lovejoy*, 13 N. H. 247; *Smith v. Moore*, 11 N. H. 55; *Southerin v. Mendum*, 5 N. H. 420; *Whitemore v. Gibbs*, 24 N. H. 484; *Thorndike v. Norris*, 24 N. H. 454; *Wolcott v. Winchester*, 15 Gray, 461; *Green v. Hart*, 1 Johns. 580; *Runyan v. Mersereau*, 11 Johns. 534; 6 Am. Dec. 393; *Evertson v. Booth*, 19 Johns. 486, 491; *Jackson v. Blodget*, 5 Cow. 202; *Pattison v. Hull*, 9 Cow. 747; *Langdon v. Buel*, 9 Wend. 80; *Gillett v. Campbell*, 1 Denio, 520; *Parmelee v. Dann*, 23 Barb. 461; *Partridge v. Partridge*, 38 Pa. St. 78; *Hyman v. Devereux*, 63 N. C. 624; *Walker v. Kee*, 14 S. C. 142; *Cleveland v. Cohrs*, 10 S. C. 224; *Muller v. Wadlington*, 5 S. C. 342; *Prout v. Hoge*, 57 Ala. 28; *Center v. P. & M. Bank*, 22 Ala. 743; *Graham v. Newman*, 21 Ala. 497; *Cullum v. Erwin*, 4 Ala. 452; *Emanuel v. Hunt*, 2 Ala. 190; *Doe v. McLoskey*, 1 Ala. 708; *O'Hara v. Haas*, 46 Miss. 374; *Holmes v. McGinty*, 44 Miss. 94; *Henderson v. Herrod*, 10 Smedes & M. 631; *Lewis v. Starke*, 10 Smedes & M. 120; *Dick v. Mawry*, 9 Smedes & M. 448; *Perot v. Levasseur*, 21 La. Ann. 529; *Scott v. Turner*, 15 La. Ann. 346; *Perkins v. Sterne*, 23 Tex. 561; 76 Am. Dec. 72; *Paine v. French*, 4 Ohio, 318; *Burdett v. Clay*, 8 B. Mon. 287; *Miles v. Gray*, 4 B. Mon. 417; *French v. Turner*, 15 Ind. 59; *Burton v. Baxter*, 7 Blackf. 297; *Slaughter v. Foust*, 4 Blackf. 379; *Blair v. Bass*, 4 Blackf. 539; *Briggs v. Hannowald*, 35 Mich. 474; *Nelson v. Ferris*, 30 Mich. 497; *Martin v. McReynolds*, 6 Mich. 70; *Grassly v. Reinback*, 4 Ill. App. 341; *Mapps v. Sharpe*, 32 Ill. 13; *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219; *Vansant v. Allmon*, 23 Ill. 30; *Lucas v. Harris*, 20 Ill. 165; *Ryan v. Dunlap*, 17 Ill. 40; 63 Am. Dec. 334; *Andrews v. Hart*, 17 Wis. 297; *Rice v. Cribb*, 12 Wis. 179; *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709; *Croft v. Bunster*, 9 Wis. 503; *Vandercook v. Baker*, 48 Iowa, 199; *Preston v. Morris*, 42 Iowa, 549; *Swan v. Yapple*, 35 Iowa, 248; *Bank of Indiana v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390; *Crow v. Vance*, 4 Iowa, 434; *Lindsey v. Bates*, 42 Miss. 397; *Potter v. Stevens*, 40 Mo. 229; *Chappell v. Allen*, 38 Mo. 213; *Anderson v.*

(a) *Converse v. Michigan Dairy Co.*, 45 Fed. 18; *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626; *Van Pelt v. Hurt*, 97 Ga. 660, 25 S. E. 489;

Sedgwick v. Johnson, 107 Ill. 385; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373, 14 N. E. 586, 3 Am. St. Rep. 655; *Mutual Ben. Life*

that an assignment of the mortgage alone, without the debt, is wholly nugatory in equity, and passes no equitable rights to the assignee. Even in the states where the legal estate in the premises may be conveyed by the mortgagee, such an assignment would only vest the assignee with the naked legal title held by him in trust for the one who owned the debt.^{3d} The rights of priority acquired by the assignee, as

Baumgartner, 27 Mo. 80; Kurtz v. Sponable, 6 Kan. 395; Bennett v. Solomon, 6 Cal. 134; Ord v. McKee, 5 Cal. 515.

That an assignment of a part of the debt secured carries with it a proportionate part of the mortgage has already been shown: *Ante*, § 1202; and see *Muller v. Wadlington*, 5 S. C. 342. A verbal assignment with delivery is sufficient, in the absence of a statutory requirement of writing:^b *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Pease v. Warren*, 29 Mich. 9; 18 Am. Rep. 58; but when it was intended to have a written assignment, a mere manual delivery will not pass the title: *Strause v. Josephthal*, 77 N. Y. 622. If the debt is evidenced by a note, a formal assignment of the mortgage, and delivery of the note *without indorsement*, constitutes a complete and absolute transfer: *Pease v. Warren*, 29 Mich. 9; 18 Am. Rep. 58; *Nelson v. Ferris*, 30 Mich. 497.^c A transfer of a negotiable note without indorsement passes a perfect equitable title.

³ *Carpenter v. Longan*, 16 Wall. 271; *Hutchins v. Carleton*, 19 N. H. 487;

Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19; *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266; *Johnson v. Johnson*, 81 Mo. 331; *Greeley State Bank v. Line*, 50 Nebr. 434, 69 N. W. 966; *Consterdine v. Moore*, (Nebr.) 96 N. W. 1021; *Daniels v. Densmore*, 32 Nebr. 40, 48 N. W. 906; *Salvage v. Haydock*, 68 N. H. 484, 44 Atl. 696; *Daly v. New York & G. L. Ry. Co.*, 55 N. J. Eq. 595, 38 Atl. 202 (mere delivery of bond and mortgage sufficient); *Grether v. Smith*, (S. Dak.) 96 N. W. 93; *Houston, etc., R. R. Co. v. Bremond*, 66 Tex. 159, 18 S. W. 448; *Franke v. Neisler*, 97 Wis. 364, 72 N. W. 887. Under a late statute in Indiana, (Acts 1899, p. 191; *Burns' Rev. St.* 1901, § 1107a, *et seq.*) the mere assignment of a note does not carry the mortgage: *Perry v. Fisher*, 30 Ind. App. 261, 65 N. E. 935. An assignment of a debt carries with it an

equitable lien: *Union Trust Co. v. Walker*, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. ed. 490; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596 (right to claim payment out of fund in hands of receiver).

(b) *Curtis v. Moore*, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506.

(c) See *O'Connor v. McHugh*, 89 Ala. 531, 7 South. 749 (transfer by delivery of note and mortgage conveys the equitable, but not the legal, estate): *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331 (mortgagee can convey the legal title only by deed under seal); *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045.

(d) *Jordan v. Sayre*, 29 Fla. 100, 10 South. 823; *Williams v. Teachey*, 85 N. C. 402; *Dameron v. Eskridge*, 104 N. C. 624, 10 S. E. 700.

governed by the original doctrines of equity, and as modified by the recording acts, and how far he takes subject to or freed from existing equities in favor of the mortgagor and others, have already been considered in a previous chapter.⁴

Bell v. Morse, 6 N. H. 205; Bowers v. Johnson, 49 N. Y. 432; Merritt v. Bartholick, 36 N. Y. 44; 47 Barb. 253; Cooper v. Newland, 17 Abb. Pr. 342; Aymar v. Bill, 5 Johns. Ch. 570; Cleveland v. Cohrs, 10 S. C. 224; Carter v. Bennett, 4 Fla. 283; Doe v. McLoskey, 1 Ala. 708; Johnson v. Cornett, 29 Ind. 59; Bailey v. Gould, Walk. Ch. 478; Hitchcock v. Merrick, 18 Wis. 357; Swan v. Yaple, 35 Iowa, 248; Sangster v. Love, 11 Iowa, 580; Pope v. Jacobus, 10 Iowa, 262; Thayer v. Campbell, 9 Mo. 277, 280; Peters v. Jamestown B. Co., 5 Cal. 334; 63 Am. Dec. 134. In states adopting the *second* system, such an assignment would be wholly nugatory, conveying no interest to the assignee. In states of the *first* class, it would be possible at law, but the bare legal interest acquired by the assignee would be controlled by equity for the benefit of the party holding the debt, who would be the person *beneficially* interested, and the *equitable* owner of the mortgage. It should be observed, however, that when the mortgage itself, as is ordinarily the case, contains a covenant or promise on the mortgagor's part to pay the debt, or a provision from which such a promise will be implied, an assignment of the mortgage is necessarily, also, an assignment of the debt.

⁴See *ante*, vol. 2, §§ 703-715. That the assignee takes subject to existing equities (*ante*, § 704), see Vredenhurgh v. Burnet, 31 N. J. Eq. 229; Burbank v. Warwick, 52 Iowa, 493; 3 N. W. 519; Sims v. Hammond, 33 Iowa, 368; Mason v. Ainsworth, 58 Ill. 163. When a mortgage is given to secure a *negotiable* note, and the note and mortgage are assigned before maturity, the question whether the assignee takes the mortgage free from all equities, as in the case of a *bona fide* transferee of such a note alone, or whether he takes it subject to all equities, is examined *ante*, § 704, and cases are cited reaching exactly opposite conclusions. The following cases, also, maintain the rule that such assignee takes the mortgage free from all equities: Carpenter v. Longan, 16 Wall. 271; 21 L. ed. 313; Kenicott v. Supervisors, 16 Wall. 452; 21 L. ed. 319; Beals v. Neddo, 1 McCrary, 206; Gabbert v. Schwartz, 69 Ind. 450; Pierce v. Faunce, 47 Me. 507; Sprague v. Graham, 29 Me. 160; Taylor v. Page, 6 Allen, 86; Gould v. Marsh, 1 Hun, 566; and see Jones v. Smith, 22 Mich. 360. On the other hand, the following additional cases hold such assignment to be controlled by the general rule, and therefore subject to all existing equities: Grassly v. Reinback, 4 Ill. App. 341; Baily v. Smith, 14 Ohio St. 396; 84 Am. Dec. 385; Johnson v. Carpenter, 7 Minn. 176; Bouligny v. Fortier, 17 La. Ann. 121. The reasons for the ruling that such assignee takes free from all equities are stated with as much force as possible by Swayne, J., in Carpenter v. Longan, *supra*. Reduced to their lowest terms, they amount to this: that the debt is the principal thing, and the mortgage is a mere adjunct of the debt, and has no existence separate from the debt. Admitting the full force of this reasoning, the conclusion is, in my opinion,

§ 1211. **Equitable Assignment by Subrogation.**— Under some circumstances, the payment of the amount due on a mortgage, when made by certain classes of persons, is held in equity to operate as an assignment of the mortgage. By means of the payment, the mortgage is not satisfied and the lien of it destroyed, but equity regards the person making the payment as thereby becoming the owner of the mortgage, at least for some definite purposes, and the mortgage as being kept alive, and the lien thereof as preserved, for his benefit and security.^a This equitable result follows, although no actual assignment, written or verbal, accom-

the result of a false analogy. The answer to it is very short, but, as it seems to me, very complete. The note and the mortgage do not together constitute a promissory note. The conclusion reached by this line of cases not only destroys the uniformity and consistency of the doctrines concerning mortgages, but misapprehends and misapplies the peculiar doctrines concerning negotiable instruments. The most distinctive feature of negotiability—the rule that the *bona fide* transferee takes a bill or note free from defenses—had its origin in the customs of merchants. It was first adopted by the courts, and has ever since been maintained, solely with a view to promote the interests of merchants, and to secure the success and freedom of mercantile and commercial dealings. A promissory note accompanied by a mortgage is not in any sense a mercantile or commercial security; all the reasons of the peculiar rule of the law merchant fail in their application to it. The courts which extend this rule to a note and mortgage are misled by a false analogy; in order to reach their conclusion, they are obliged to treat the mortgage as a nullity,—not merely as an *incident* of the note, but as having actually no existence. I am strongly of the opinion that the cases of which the Illinois decisions are an example rest upon a true foundation of principle. It is held in the very recent case of *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274, that where a note and mortgage are assigned for value before maturity, and the assignment was not recorded, and no notice of it was given to the mortgagor, payment by the mortgagor to the original mortgagee does not in any way affect the rights of the assignee to enforce the security,—the absence of notice being wholly immaterial. This decision is certainly inconsistent with a doctrine supposed to be settled and familiar: See *ante*, vol. 2, § 702. The only possible ground upon which it can be sustained is the rule stated above, which imparts to such mortgages the distinctive characteristics of negotiable paper. This case, I think, well illustrates the correctness of my criticisms; it shows to what extent that rule destroys the consistency and uniformity of the settled doctrines concerning mortgages. See also *Jones v. Smith*, 22 Mich. 360; *Van Keuren v. Corkins*, 4 Hun, 129.

(a) Quoted in *Lashua v. Myhre*, 117 Wis. 18, 93 N. W. 811.

panied the payment, and the securities themselves were not delivered over to the person making payment, and even though a receipt was given speaking of the mortgage debt as being fully paid, and sometimes even though the mortgage itself was actually discharged and satisfied of record. This equitable doctrine, which is a particular application of the broad principle of subrogation, is enforced whenever the person making the payment stands in such relations to the premises or to the other parties that his interests, recognized either by law or by equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, and the lien of the mortgage as being kept alive, either wholly or in part, for his security and benefit.^{1 b}

¹ It should be carefully observed that this peculiarly equitable doctrine can have application only to persons who, properly speaking, make payment of the mortgage. If a stranger, having no interest whatever in the premises, purchases the mortgage from the holder thereof, and takes an assignment to himself, the doctrine clearly has no application. If, however, persons acquiring subsequent interests in the premises, as purchasers, incumbrancers, and the like, but not being the debtors, pay off the mortgage for the purpose of securing their own interest, their act is properly called a "payment," and they are plainly in a very different position from that of the stranger who purchases the mortgage. The doctrine formulated in the text is an instance of *subrogation*, and depends upon the same general grounds and considerations. By many writers and judges it is discussed under the name of "subrogation" alone; the person paying is described as being subrogated to the rights of the mortgagee in the mortgage security. I prefer to use the name of "equitable assignment," — a designation which accurately describes the nature of the transaction and its effects upon the rights of the parties. The classes of persons whose rights are to be considered in connection with this doctrine are the stranger who voluntarily pays the mortgage, the stranger who advances money for its payment at the request of the mortgagor or other person upon whom

(b) This section is quoted *in extenso* in *Columbus, S. & H. R. Co. Appeals*, 48 C. C. A. 275, 109 Fed. 177, 210; *Whiteselle v. Texas Loan Agency*, (Tex. Civ. App.) 27 S. W. 309; and cited in *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Boevink v. Christiaanse*, (Nebr.) 95 N. W. 652; *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19; *Bank of Ipswich v. Brock*, 13 S. Dak. 409, 83 N. W. 436; *First*

Nat. Bank v. Ackerman, 70 Tex. 315, 8 S. W. 45; *Wood v. Wood*, 134 Ala. 557, 33 South. 347; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; *Estate of Freud*, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407; *Kinthead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1053 (right of subrogation arises from the circumstances of the case, and not out of any notion of contract).

§ 1212. In whose Favor Such Equitable Assignment Exists.—Equity does not admit the doctrine of equitable assignment in favor of every person who pays off a mortgage. Such relations must exist towards the mortgaged premises or with the other parties, that the payment is not a purely voluntary act, but is an equitably necessary or proper means of securing the interests of the one making it from possible loss or injury. The payment must be made by or on behalf of a person who had some interest in the premises, or some claim against other parties, which he is entitled, in equity, to have protected and secured. A mere stranger, therefore, who pays off a mortgage as a purely voluntary act can never be an equitable assignee.^{1a} In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for

the liability to pay rests, the mortgagor, his heirs, devisees, and administrators or executors, his grantee who assumes payment of the mortgage, his grantee merely subject to the mortgage, the widow of the mortgagor or of any subsequent owner of the premises, subsequent encumbrancers, subsequent lessees,—in short, all persons who acquire subsequent interests in the mortgaged premises or in any part thereof. This doctrine in connection with the general principle of subrogation is elaborately discussed in the American editor's notes to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 228, 255, et seq., and to *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq., 4th Am. ed., 120, 134-187; and see section concerning merger, *ante*, §§ 789-800, vol. 2.

¹ Such a stranger, having no interest in the premises and no relations with the parties, cannot even compel the mortgagee to accept payment of the amount due on the mortgage. If the mortgagee voluntarily accepts the money, he cannot be compelled to assign the mortgage to the stranger. If the mortgagee consents both to accept the money and to give an assignment, then the transaction becomes an ordinary purchase of the mortgage by the stranger, which can always be effected with the mortgagee's consent, but never without. In no case, therefore, can the stranger voluntarily paying occupy the position of an equitable assignee,—he can never claim to be subrogated to the rights of the mortgagee.

(a) *Rice v. Winters*, 45 Nehr. 517, 63 N. W. 830.

his own equitable protection.^{2b} The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance

² In *Muir v. Berkshire*, 52 Ind. 149, 151, Biddle, C. J., said: "Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim, or it arises from transactions of principals and sureties, and sometimes between co-sureties or co-guarantors. It is not allowed to voluntary purchasers or strangers, unless there is some peculiar equitable relation in the transaction, and never to mere meddlers. But while this is the rule generally, we think that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor." In *Ellsworth v. Lockwood*, 42 N. Y. 89, 97, Sutherland, J., said: "The subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is on and by redemption; and redemption is *payment* of the mortgage debt, after forfeiture by the terms of the mortgage contract; so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond and mortgage *assigns* them to a party claiming a right to redeem, the latter is subrogated, by the assignment, to the mortgage debt and mortgage security, and to the instruments evidencing such debt and security, and there is no room or occasion for subrogation by operation of law." The class of persons coming within the description of the text who are equitable assignees, and thus subrogated to the mortgagee by the act of payment, include the grantee from the mortgagor or any subsequent grantee who has taken the land simply subject to the mortgage; the heir or devisee of the mortgagor; the widow of the mortgagor or of any subsequent owner; a subsequent encumbrancer by mortgage, judgment, or otherwise; a subsequent lessee, and the like. The mortgagor himself who has conveyed the premises to a grantee in such manner that the latter has assumed payment of the mortgage debt becomes an equitable assignee on payment, and is subrogated to the mortgagee, *so far as is necessary to enforce his equity of reimbursement or exoneration from such grantee*; but *quære*, is he an equitable assignee to any greater extent or against any other parties? See *ante*, § 1206, and notes; also vol. 2, § 797. The doctrine is also extended to a person who had no subsequent interest in the premises, and was therefore under no obligation or personal necessity of paying the debt, but who at the instance of the debtor pays off the mortgage for his benefit, or advances the money for its payment, under an agreement that he shall have security

(b) Quoted in *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19. This section is cited in *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Bowen v. Gilbert*, 122 Iowa 448, 98 N. W. 273; *Bennett v. First Nat. Bank*, (Iowa) 102 N. W.

129; *Scott v. Mortgage Co.*, 127 Ala. 161, 28 South. 709; *McQueen v. Whetstone*, (Ala.) 30 South. 548; *Wood v. Wood*, 134 Ala. 557, 33 South. 347; *Estate of Freud*, 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407. See, also, *McCormick v. Knox*, 105 U. S. 126, 26 L. ed. 940; *Ohmer v. Boyer*,

of a debtor party and for his benefit; such a person is in no true sense a mere stranger and volunteer.^d

§ 1213. In whose Favor Such Equitable Assignment does not Exist.— On the other hand, if payment of the mortgage debt is made to the mortgagee or other holder of the mort-

for his payment or advances.^e Such a person is not a mere stranger and volunteer. The following cases furnish illustrations of the doctrine as applied to various persons belonging to the class as above enumerated: *Cobb v. Dyer*, 69 Me. 494 (where the mortgage had been actually satisfied and discharged of record on payment by a junior mortgagee); *Walker v. King*, 45 Vt. 525; 44 Vt. 601; *Wheeler v. Willard*, 44 Vt. 640; *Twombly v. Cassidy*, 82 N. Y. 155; *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625 (the mortgage discharged of record); *Brainard v. Cooper*, 10 N. Y. 356; *Russell v. Pistor*, 7 N. Y. 171; 57 Am. Dec. 509; *Snelling v. McIntyre*, 6 Abb. N. C. 469; *Dings v. Parshall*, 7 Hun, 522; *McGiven v. Wheelock*, 7 Barb. 22; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583; *Klock v. Cronkhite*, 1 Hill, 107; *Tice v. Annin*, 2 Johns. Ch. 125; *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783; *Roddy's Appeal*, 72 Pa. St. 98; *Fiacre v. Chapman*, 32 N. J. Eq. 463; *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Carter v. Taylor*, 3 Head, 30; *Simpson v. Gardiner*, 97 Ill. 237 (by one of two owners in common); *Young v. Morgan*, 89 Ill. 199; *Matteson v. Thomas*, 41 Ill. 110; *Wood v. Smith*, 51 Iowa, 156; 50 N. W. 581; *White v. Hampton*, 13 Iowa, 259; *Levy v. Martin*, 48 Wis. 198; 4 N. W. 35; *Greenwell v. Heritage*, 71 Mo. 459; *Lockwood v. Marsh*, 3 Nev. 138; *Carpentier v. Brenham*, 40 Cal. 221; and see 1 Jones on Mortgages, secs. 874-885; and *ante*, vol. 2, §§ 797, 798.

89 Ala. 273, 7 South. 663; *Swain v. Stockton S. & L. Soc.*, 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118; *Ebert v. Gerding*, 116 Ill. 216, 5 N. E. 591; *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Illinois Nat. Bank v. Trustees of Schools*, (Ill.) 71 N. E. 1070 (subrogation of junior mortgagee paying off senior mortgage); *Johnson v. Barrett*, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83; *Bryson v. Close*, 60 Iowa 357, 14 N. W. 350; *Bowen v. Gilbert*, 122 Iowa 448, 98 N. W. 273; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Heisler v. Aultman*, 56 Minn. 454, 57 N. W. 1053, 45 Am. St. Rep. 486; *Allen v. Dermott*, 80 Mo. 56; *Kelly v. Duff*, 61 N. H. 435; *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1;

Duffy v. McGuinness, 13 R. I. 595; *Sutton v. Sutton*, 26 S. C. 33, 1 S. E. 19; *Cape Fear Lumber Co. v. Evans*, (S. C.) 48 S. E. 108; *First Nat. Bank v. Ackerman*, 70 Tex. 315, 8 S. W. 45; *Wilton v. Mayberry*, 75 Wis. 191, 43 N. W. 901, 17 Am. St. Rep. 193, 6 L. R. A. 61; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886 (subrogation of grantee who in good faith paid off mortgage, but whose deed was subsequently set aside on ground of non-delivery).

(c) Quoted in *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437.

(d) Quoted and applied in *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437. Cited to this effect in *Bank of Ipswich v. Brock*, 13 S. Dak. 409, 83 N. W. 436;

gage, by a party who is himself personally and primarily liable for the debt, who is in any manner and by any means the actual primary debtor, whose duty it is to pay the debt absolutely, and before all others, such payment operates *ipso facto* as an end of the mortgage, and the lien is completely destroyed. The party so paying is not subrogated to the rights of the mortgagee; there is no equitable assignment to him of the mortgage security; even if he should receive a formal assignment, the mortgage could not be thus kept alive, but would be wholly merged and ended.¹

¹ In this description are included the mortgagor himself, so long as he remains the principal debtor, and has not changed his relations by a conveyance, and also the grantee from the mortgagor who has assumed payment of the mortgage debt, and thus rendered himself the principal and primary

Union M., B. & Trust Co. v. Peters, 72 Miss. 1058, 18 South. 497, 30 L. R. A. 829; Merchants & Mechanics' Bank v. Tillman, 106 Ga. 55, 31 S. E. 794; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31. See Home Sav. Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146. Thus, "where one loans money to another upon the agreement that it is to be used to pay off an existing mortgage on property, and that a new mortgage is to be executed to the lender therefor, the lender is entitled to be subrogated to the rights of the prior mortgagee in case the borrower fails to execute a new mortgage, or in case the new mortgage, when executed, proves to be invalid or defective": Lashua v. Myhre, 117 Wis. 18, 93 N. W. 811; Wilton v. Mayberry, 75 Wis. 191, 43 N. W. 901, 6 L. R. A. 61, 17 Am. St. Rep. 193; Brevink v. Christiaanse, (Nebr.) 95 N. W. 652; Scott v. Mortgage Co., 127 Ala. 161, 28 South. 709 (vendor's lien); Western Mortg. & Inv. Co. v. Ganzer, 63 Fed. 647, 11 C. C. A. 371, 23 U. S. App. 608 (vendor's lien); Merchants & Mechanics' Bank v.

Tillman, 106 Ga. 55, 31 S. E. 794; Whitselle v. Texas Loan Agency, (Tex. Civ. App.) 27 S. W. 309; Heuser v. Sharman, 89 Iowa 355, 48 Am. St. Rep. 390, 56 N. W. 525; Haverford Loan & B. Ass'n v. Fire Ass'n, 180 Pa. St. 522, 57 Am. St. Rep. 654, 37 Atl. 179; Baker v. Baker, 2 S. Dak. 261, 39 Am. St. Rep. 776, 49 N. W. 1064; Sproal v. Larsen, (Mich.) 101 N. W. 213. In Seeley v. Bacon, (N. J. Eq.) 34 Atl. 139, it is said: "It is entirely settled that one who advances money to pay a claim for the security of which there exists a lien, in default of an agreement, cannot be subrogated to the rights of the lienor. Conventional subrogation can only result from an express agreement either with the debtor or the creditor." Compare Bohn, etc., Door Co. v. Case, 42 Nebr. 281, 60 N. W. 576; Rice v. Winters, 45 Nebr. 517, 63 N. W. 830. On the other hand, it is held in Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, that the agreement may be implied.

(a) Quoted in Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; Columbus, S. H. & R. Co. Ap-

§ 1214. The Right to Compel an Actual Assignment.—Whether the equitable assignee may compel an actual assignment is a question which has received conflicting answers from different courts. Some cases hold that every person who, on payment, becomes an equitable assignee is entitled to compel the execution of a formal assignment of the mortgage by the mortgagee or other holder, for the purpose of perfecting his own equitable right of subrogation.¹ By other cases the position is maintained that such person must, in general, rely upon his equitable assignment and right of subrogation, and cannot compel the execution of a formal assignment; that only a technical surety is entitled to perfect his right of subrogation by calling for an assignment in writing.^{2 a}

debtor therefor. When a grantee has thus become the principal debtor, the mortgagor, as *his* surety, upon payment, is an equitable assignee of the mortgage, and is subrogated to the mortgagee, so far as is necessary to enforce his right of exoneration by the grantee; but it by no means follows that he is an equitable assignee of the mortgage, and entitled to enforce its lien *against all subsequent encumbrancers and other parties* interested. In like manner, if A and B are co-owners of land, and jointly give a mortgage thereon, and A pays off the entire debt, he is an equitable assignee of the mortgage to the extent of compelling a contribution from B; but this may not entitle him to keep the mortgage alive as against all other parties subsequently and independently interested in the premises. As illustrations of the text, see *Moody v. Moody*, 68 Me. 155 (mortgage paid by the mortgagor-debtor, and although procured by him to be assigned to a third person, it was held to be extinguished); *Willson v. Burton*, 52 Vt. 394 (payment by a grantee who had assumed the mortgage); *Dickason v. Williams*, 129 Mass. 182; 37 Am. Rep. 316 (ditto); and see 1 *Jones on Mortgages*, secs. 864, 865; also *ante*, vol. 2. section on merger, §§ 793, 796–798.^b

¹ *Twombly v. Cassidy*, 82 N. Y. 155; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Johnson v. Zink*, 52 Barb. 396; *Tompkins v. Seely*, 29 Barb. 212; *Pardee v. Van Anken*, 3 Barb. 534; *McLean v. Tompkins*, 18 Abb. Pr. 24; *Mount v. Suydam*, 4 Sand. Ch. 399; *Baker v. Terrell*, 8 Minn. 195; and see *Lyon's Appeal*, 61 Pa. St. 15; *Bishop v. Ogden*, 9 Phila. 524.

² *Lamb v. Montague*, 112 Mass. 352; *Lamson v. Drake*, 105 Mass. 564; *But-*

peals, 48 C. C. A. 275, 109 Fed. 177, 210; *Cook v. Berry*, 193 Pa. St. 377, 44 Atl. 771. This section is cited in *McQueen v. Whetstone*, 127 Ala. 417, 30 South. 548. See, also, *Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87; *Stastny v. Pease*, (Iowa) 100

N. W. 483; *Campbell v. Foster Home Ass'n*, 163 Pa. St. 609, 30 Atl. 222.

(b) See, further, *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474.

(a) *Holland v. Citizens' Sav. Bank*,

§ 1215. III. Rights and Liabilities of the Mortgagee in Possession.^a — It has been shown in the preceding section II. that in a portion of the states adopting the first or legal system the mortgagee is entitled to possession at once upon the execution of the mortgage; that in the remaining states of the same class he is entitled to possession only upon the mortgagor's default; and that in either case, upon thus acquiring the possession, he can retain it until the mortgage is redeemed. In all the states adopting the second system, the mortgagee is not entitled to possession, either before or after a breach of the condition. If, however, he actually acquires possession, with the consent of the mortgagor, or in any other lawful manner, although the nature of his interest is not thereby altered, he is entitled to retain such possession until the mortgage is redeemed or paid.¹ The rights and consequent liabilities of the mortgagee who is actually and lawfully in possession, as against the mortgagor and those claiming under or through him, are thus virtually the same in all the states, as well in those adopting the second as in those adopting the first system, as heretofore described. In order, however, that these special rights and liabilities may arise from his possession, it must be a possession taken and held by him as mortgagee.^{2b}

§ 1216. With What He is Chargeable — Rents.—The general duty of the mortgagee in possession towards the premises is that of the ordinary prudent owner. He must account,

ler v. Taylor, 5 Gray, 455. It seems, however, that he is entitled to have the mortgage delivered up to himself uncanceled: Hamilton v. Dobbs, 19 N. J. Eq. 227.

¹ See *ante*, § 1189.

² Parkinson v. Hanbury, L. R. 2 H. L. 1; 2 De Gex, J. & S. 450; Sanford v. Pierce, 126 Mass. 146; Lamson v. Drake, 105 Mass. 564; Davenport v. Turpin, 41 Cal. 100.

16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553.

(a) The text, §§ 1215-1217, is cited in Whitney v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598.

(b) Quoted in Compton v. Jesup,

68 Fed. 263, 15 C. C. A. 397, 31 U. S. App. 486. See Daniel v. Coker, 70 Ala. 260; Rogers v. Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Banning v. Sabin, 45 Minn. 431, 48 N. W. 8.

in general, for their rents and profits, or for their occupation value. When the land is in the occupation of tenants, he is chargeable with the gross actual rents and profits received, and with no more, unless he has been guilty of a willful default.^{1a} When the land is occupied by the mortgagee himself, he is chargeable with the fair annual value as an occupation rent.^{2b} *Willful default:* He is also chargeable with losses occasioned by his willful default.³

¹ Some of the American cases make him chargeable, under these circumstances, with the amount of rent which he might with reasonable diligence have received; but this extensive liability, which is that of fiduciary persons, is not sustained by the weight of authority: *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Hughes v. Williams*, 12 Ves. 493; *Chaplin v. Young*, 33 Beav. 330; *Blum v. Mitchell*, 59 Ala. 535; *Barron v. Paulling*, 38 Ala. 292; *Adkins v. Lewis*, 5 Or. 292; *Cook v. Ottawa University*, 14 Kan. 548; *Freytag v. Hoeland*, 23 N. J. Eq. 36, 41; *Shaeffer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211; *Van Buren v. Olmstead*, 5 Paige, 9; *Quin v. Brittain*, 3 Edw. Ch. 314; *Milliken v. Bailey*, 61 Me. 316; *Harper v. Ely*, 70 Ill. 581; *Moore v. Titman*, 44 Ill. 367; *Strang v. Allen*, 44 Ill. 428; *Pierce v. Robinson*, 13 Cal. 116; *Hidden v. Jordan*, 28 Cal. 301; 32 Cal. 397.

² *Smart v. Hunt*, 1 Vern. 418, note; *Trulock v. Robey*, 15 Sim. 265; 2 Phill. Ch. 395; *Wilson v. Metcalfe*, 1 Russ. 530; *Dawson v. Drake*, 30 N. J. Eq. 601; *Moore v. Degraw*, 5 N. J. Eq. 346; *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; 6 N. W. 41; *Montgomery v. Chadwick*, 7 Iowa, 114; *Van Buren v. Olmstead*, 5 Paige, 9; *Sanders v. Wilson*, 34 Vt. 318.

³ This includes losses by his willful or negligent failure to collect rent, or to obtain a better rent, or suffering the premises to remain in the possession of

(a) Quoted in *Steen v. Mark*, 32 S. C. 286, 11 S. E. 93; and cited to this effect in *Emil Kiewert Co. v. Juneau*, 78 Fed. 708, 24 C. C. A. 294. See also *Gresham v. Ware*, 79 Ala. 192; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Pinneo v. Goodspeed*, 120 Ill. 524, 533, 12 N. E. 196; *Young v. Omohundro*, 69 Md. 424, 16 Atl. 120; *Merriam v. Goss*, 139 Mass. 83, 28 N. E. 449; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382; *Baker v. Cunningham*, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490. For the more extensive liability, see *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209.

(b) See *Huguley Mfg. Co. v.*

Galeton Cotton Mills, 94 Fed. 269, 36 C. C. A. 236 (although obliged to account, he is entitled to credits for that portion of the gross rental value which is referable to betterments made); *Robertson v. Read*, 52 Ark. 381, 14 S. W. 387, 20 Am. St. Rep. 188 (same); *Hatch v. Falconer*, (Nebr.) 93 N. W. 172; *Felino v. Newcomb Lumber Co.*, 64 Nebr. 335, 89 N. W. 755, 97 Am. St. Rep. 646. But it has been held that a mortgagee, put in possession of a going concern which by the terms of the mortgage he is required to keep in operation, cannot be charged with the rental value: *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 225.

§ 1217. Allowances and Credits, Repairs, Disbursements.—The mortgagee is allowed, and credited in his account, with the cost of all ordinary, reasonably necessary repairs made to the premises, and with all reasonable disbursements and expenses necessary for their proper management and protection.^{1 a} *Improvements*: The mortgagee will be allowed for permanent improvements, increasing the value of the estate, if made *with the consent* or acquiescence of the mort-

an insolvent tenant, and the like: *Parkinson v. Hanbury*; *Hughes v. Williams*, and other cases cited in the last note but one; *Montague v. Boston etc. R. R.*, 124 Mass. 242; *Miller v. Lincoln*, 6 Gray, 556. Also committing or suffering acts of waste or spoliation: *Sandon v. Hooper*, 6 Beav. 246; *Hood v. Easton*, 2 Giff. 692; *Hornby v. Matcham*, 16 Sim. 325; *Lord Middleton v. Eliot*, 15 Sim. 531, 536; *Woodman v. Higgins*, 14 Jur. 846; *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; 6 N. W. 41; *Scott v. Webster*, 50 Wis. 53; 6 N. W. 363; *Onderdonk v. Gray*, 19 N. J. Eq. 65. He is also charged with the loss resulting from unsuccessful speculation with the property: *Hughes v. Williams*, 12 Ves. 493; *Marriott v. Anchor etc. Co.*, 3 De Gex, F. & J. 177; *Palmer v. Hendrie*, 27 Beav. 349. As to the opening or working mines by the mortgagee, see *Millett v. Davey*, 31 Beav. 470; *Rowe v. Wood*, 2 Jacob & W. 553; *Norton v. Cooper*, 25 L. J. Ch. 121; *Irwin v. Davidson*, 3 Ired. Eq. 311.

¹ What repairs and expenses are reasonable must depend largely upon the circumstances of each case. The payment of taxes is a proper disbursement: *Sandon v. Hooper*, 6 Beav. 246; *Neeson v. Clarkson*, 4 Hare, 97; *Hardy v. Reeves*, 4 Ves. 466, 480; *Blum v. Mitchell*, 59 Ala. 535 (taxes); *Adkins v. Lewis*, 5 Or. 292; *Cook v. Ottawa Univ.*, 14 Kan. 548; *Hidden v. Jordan*, 28 Cal. 301; 32 Cal. 397; *Quin v. Brittain*, Hoff. Ch. 353; *Moore v. Cable*, 1 Johns. Ch. 385, 387; *Clark v. Smith*, 1 N. J. Eq. 121, 139. The mortgagee in possession is only bound to make *necessary* repairs: *Godfrey v. Watson*, 3 Atk. 517; *Russel v. Smithies*, 1 Anstr. 96. He must not commit waste, but is not in a fiduciary position: See *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342; *Shaef-fer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211.^c

§ 1216, (c) *Liability for Waste*.—*Pollard v. American Freehold Land Mortgage Co.*, (Ala.) 35 South. 767; *McMichael v. Webster*, 57 N. J. Eq. 295, 41 Atl. 714, 73 Am. St. Rep. 630; *Whiting v. Adams*, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598. The text is cited in *Penney v. Miller*, 134 Ala. 593, 33 South. 668.

§ 1217, (a) This section is cited in *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866.

§ 1217, (b) *Raynor v. Drew*, 72 Cal.

307, 13 Pac. 866; *Sidenberg v. Ely*, 90 N. Y. 263, 43 Am. Rep. 163 (taxes); *Pollard v. American Freehold Land Mortgage Co.*, (Ala.) 35 South. 767 (mortgagee is entitled to interest on amounts so paid for taxes); *Baker v. Cunningham*, 162 Mo. 134, 62 S. W. 445, 85 Am. St. Rep. 490.

§ 1217, (c) If he claim adversely to the mortgagor, as absolute owner, he is entitled to no allowances: *Booth v. Steam Packet Co.*, 63 Md. 39; and see *Gresham v. Ware*, 79 Ala. 192.

gagor; but he cannot be allowed for such expenditures when made *without* the mortgagor's consent. He is bound to keep the property without unreasonable deterioration, and is therefore credited with necessary repairs; but he has no right to enhance the value of the estate, and thus render it more difficult for the mortgagor to redeem.^{2d} *Compensation*: The mortgagee cannot charge any commissions or

²Lord Trimleston v. Hamill, 1 Ball & B. 377, 385; Powell v. Trotter, 1 Drew. & S. 388; Sandon v. Hooper, 6 Beav. 246, 248; Adkins v. Lewis, 5 Or. 292; Cook v. Ottawa Univ., 14 Kan. 548; Hidden v. Jordan, 28 Cal. 301; 32 Cal. 397; Ruby v. Portland, 15 Me. 306; Russell v. Blake, 2 Pick. 505; Quin v. Brittain, Hoff. Ch. 353; Moore v. Cable, 1 Johns. Ch. 385; Bell v. The Mayor, 10 Paige, 49; Benedict v. Gilman, 4 Paige, 58; Mickles v. Dillaye, 17 N. Y. 80; Clark v. Smith, 1 N. J. Eq. 121, 138; Harper's Appeal, 64 Pa. St. 315; Givens v. McCalmont, 4 Watts, 460; Dougherty v. McColgan, 6 Gill & J. 275; Neale v. Hagthorp, 3 Bland, 551, 590; Lowndes v. Chisholm, 2 McCord Eq. 455, 16 Am. Dec. 667; McCarron v. Cassidy, 18 Ark. 34. But when the mortgagee is not credited with the cost of improvements, he is not charged with the increase of rent or occupation value resulting from such improvements: Moore v. Cable; Bell v. The Mayor; Clark v. Smith; and Hidden v. Jordan, *supra*.

The general rule of the text has been relaxed, in its application to certain special conditions of fact, by many American cases, which hold that the mortgagee is allowed for such improvements when made by him under a *bona fide* but mistaken supposition that he was the absolute owner, and that the equity of redemption had been barred: *c* Miner v. Beekman, 50 N. Y. 337; Mickles v. Dillaye, 17 N. Y. 80; Benedict v. Gilman, 4 Paige, 58; Putnam v. Ritchie, 6 Paige, 390; Fogal v. Pirro, 10 Bosw. 100; Troost v. Davis, 31 Ind. 34; Roberts v. Fleming, 53 Ill. 196, 198; Montgomery v. Chadwick, 7 Iowa, 114; and also when made by a person who, although in reality a mortgagee, has reason to believe from the form of his conveyance or other circum-

(d) See, also, Whetstone v. McQueen, 137 Ala. 301, 34 South. 229; Whiting v. Adams, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598; Robertson v. Read, 52 Ark. 381, 14 S. W. 387, 20 Am. St. Rep. 188; Beckman v. Wilson, 61 Cal. 335; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Bradley v. Merrill, 34 Atl. 160, 88 Me. 319; Barnard v. Patterson, (Mich.) 100 N. W. 893 (no allowance for unnecessary repairs). In Shepard v. Jones, 21 Ch. Div. 469, it was held that the mortgagee may be allowed for reasonable

improvements, although the mortgagor had no notice of the expenditure. See, also, Henderson v. Astwood, [1894] App. Cas. 150.

(e) This note is cited to this effect in Bradley v. Merrill, 88 Me. 319, 34 Atl. 160. Where a purchaser at a judicial sale buys in good faith, believing that he is getting a perfect title, he is entitled to a credit for improvements: Higginbottom v. Benson, 24 Nebr. 461, 8 Am. St. Rep. 211, 39 N. W. 418; Cram v. Cotrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. Rep. 714 (*dictum*).

other compensation for his services, since they are rendered primarily for his own benefit.^{3a}

§ 1218. **Liability to Account.**—The mortgagee in possession is bound to account, upon the basis of charges and allowances above described, not only to the mortgagor, but to subsequent mortgagees, if he has notice of their encumbrances.^{1a} This accounting belongs exclusively to the equitable jurisdiction, and can be enforced only in a suit to redeem, brought by the mortgagor or subsequent encumbrancer.^{2b} Whenever the net amount of annual rents or

stances of his purchase that he is the absolute owner:† *McSorley v. Larissa*, 100 Mass. 270; *Bright v. Boyd*, 1 Story, 478; *Vanderhaise v. Hugues*, 13 N. J. Eq. 410; *Harper's Appeal*, 64 Pa. St. 315; *Barnard v. Jennison*, 27 Mich. 230; *Green v. Wescott*, 13 Wis. 606; *Green v. Dixon*, 9 Wis. 532; *Bacon v. Cottrell*, 13 Minn. 194.

³ *Chambers v. Goldwin*, 9 Ves. 254, 271; *Langstaffe v. Fenwick*, 10 Ves. 405; *Nicholson v. Tutin*, 3 Kay & J. 159; *French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 Atk. 517; *Bonithon v. Hockmore*, 1 Vern. 316; *Elmer v. Loper*, 25 N. J. Eq. 475; *Clark v. Smith*, 1 N. J. Eq. 121, 137; *Moore v. Cable*, 1 Johns. Ch. 385, 388; *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342. In Massachusetts he is allowed a commission on the rents, as a compensation: *Gerrish v. Black*, 104 Mass. 400; *Adams v. Brown*, 7 Cush. 220; *Tucker v. Buffum*, 16 Pick. 46; and see *Waterman v. Curtis*, 26 Conn. 241.

¹ *Berney v. Sewell*, 1 Jacob & W. 647, 650; *Archdeacon v. Bowes*, 13 Price, 353; *Harrison v. Wyse*, 24 Conn. 1; 63 Am. Dec. 151; *Shields v. Kimbrough*, 64 Ala. 504.

² *Farrant v. Lovel*, 3 Atk. 723; *Chapman v. Smith*, 9 Vt. 153; *Seaver v. Durant*, 39 Vt. 103; *Bell v. The Mayor*, 10 Paige, 49; *Givens v. McCalmont*, 4 Watts, 460, 464; *Gordon v. Hobart*, 2 Story, 243; *Fed. Cas. No. 5,608*; *Dexter v. Arnold*, 2 Sum. 108; *Fed. Cas. No. 3,858*; *Watford v. Oates*, 57 Ala. 290. Even in the states adopting the second or equitable system, the mortgagor cannot recover the land by an action of ejectment, but must sue in equity for a re-

(f) This note is cited to this effect in *Bradley v. Merrill*, 88 Me. 319, 34 Atl. 160.

(g) The text is cited to this effect in *Moss v. Odell*, 141 Cal. 335, 74 Pac. 999. See, also, *Whiting v. Adams*, 66 Vt. 679, 30 Atl. 32, 44 Am. St. Rep. 875, 25 L. R. A. 598; *Barnard v. Patterson*, (Mich.) 100 N. W. 893, and cases cited.

(a) This section is cited in *Compton v. Jesup*, 68 Fed. 263, 31 U. S. App. 486, 15 C. C. A. 397; in *Penney*

v. Miller, 134 Ala. 593, 33 South. 668 (to the effect that he owes no duty to subsequent incumbrancers of whom he has no notice). See, also, *Long v. Richards*, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281; *Hatch v. Falconer*, (Nebr.) 93 N. W. 172.

(b) See *Farris v. Houston*, 78 Ala. 250; *Dailey v. Abbott*, 40 Ark. 275. In *Morgan v. Morgan*, 48 N. J. Eq. 399, 22 Atl. 545, it is held that if the mortgagee fails to account when

occupation; value received by the mortgagee exceeds the interest then due, the accounting is taken with annual rests.³ If the mortgagee remains in possession after the mortgage debt has been fully paid, he becomes a trustee for the mortgagor, and is chargeable with interest on the net excess of rents received by him; but the mortgagor can only enforce his rights to the land by an equitable action for an account and to redeem.⁴

§ 1219. IV. Redemption — By the Mortgagor.* — As has already been shown, the right of redemption is the very essential element of the equitable conception of a mortgage. If an instrument is once a mortgage, nothing, in general, can destroy the equitable right of redemption except a valid and complete foreclosure, or the bar arising expressly or by analogy from the statute of limitations, or conduct of the mortgagor amounting to an estoppel. Strictly speaking,

demption, in which an accounting can be had: *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; and see *ante*, § 1189.^c

³ This rule applies both to a mortgagee who receives rents from tenants, and to one who actually occupies the land: *Gould v. Tancred*, 2 Atk. 533; *Shephard v. Elliot*, 4 Madd. 254; *Morris v. Islip*, 20 Beav. 654; *Wilson v. Metcalfe*, 1 Russ. 530; *Blum v. Mitchell*, 59 Ala. 535; *Watford v. Oates*, 57 Ala. 290; *Elmer v. Loper*, 25 N. J. Eq. 475; *Gladding v. Warner*, 36 Vt. 54; *Reed v. Reed*, 10 Pick. 398; *Gordon v. Lewis*, 2 Sum. 143, 147; *Fed. Cas. No. 5,613*; *Shaeffer v. Chambers*, 6 N. J. Eq. 548; 47 Am. Dec. 211; *Green v. Wescott*, 13 Wis. 606. The fundamental object of the rule governing the mode of accounting is to prevent the compounding of interest, to prevent the adding of interest to principal, and the computing interest on this sum: See cases last cited, and also *Connecticut v. Jackson*, 1 Johns. Ch. 13, 17; 7 Am. Dec. 471; *Stone v. Seymour*, 15 Wend. 19, 24; *Jencks v. Alexander*, 11 Paige, 619, 625; *Bennett v. Cook*, 2 Hun, 526; *Van Vronker v. Eastman*, 7 Met. 157; for illustrations of English mode of accounting, see *Thorneycroft v. Crockett*, 2 H. L. Cas. 239, 256; *Binnington v. Harwood*, Turn. & R. 477; *Heighington v. Grant*, 5 Mylne & C. 258; *Thompson v. Hudson*, L. R. 10 Eq. 497. By the English rule, annual rests are not directed when the interest was in arrear at the time the mortgagee took possession: *Finch v. Brown*, 3 Beav. 70; *Wilson v. Cluer*, 3 Beav. 136; *Nelson v. Booth*, 3 De Gex & J. 119.

⁴ *Quarrell v. Beckford*, 1 Madd. 269; *Lloyd v. Jones*, 12 Sim. 491; *Bennington v. Harwood*, Turn. & R. 477, 485; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *Green v. Turner*, 38 Iowa, 112; *Pierce v. Robinson*, 13 Cal. 116.

such a suit is brought, his mortgage will be declared satisfied.

(c) See, also, *Posten v. Miller*, 60 Wis. 494, 19 N. W. 540.

(a) This section is cited in *McQueen v. Whetstone*, 127 Ala. 417, 30 South. 548.

redemption is the "buying back" and recovering the legal estate by the mortgagor after it has passed to the mortgagee. Under the original common-law theory, the redemption by the mortgagor took place, not only after the mortgagee had acquired the legal estate by the mortgage, but after he had taken possession of the mortgaged premises. The same conditions of the redemption still substantially exist in all the states which have adopted the *first* system as described in the preceding section II.¹ In those states which have adopted the *second* system, the mortgagor may have the same suit and the same relief whenever the mortgagee has actually taken possession; but such cases are quite rare, for the mortgagor is generally left in possession. It is, however, a settled doctrine in all these states that the mortgagor in possession may maintain a similar equitable suit whenever, from a dispute as to the amount due or any other cause, the mortgagee refuses to accept payment and to discharge the mortgage. The mortgagor can always come into a court of equity and obtain a decree removing the lien of the mortgage. Although this suit is uniformly termed a "suit to *redeem*," and the relief is called "redemption," yet it is really one to free the mortgagor's land from the encumbrance, to compel the mortgagee to accept the amount actually due, if any, and to discharge the mortgage of record.^{2b} The essential requisites of maintaining the suit

¹ At any time before his right is cut off by foreclosure or barred by the statute of limitations, the mortgagor may maintain a suit for a redemption, in which an accounting is had, the amount of the debt still due is ascertained, and upon payment of this amount the mortgagee is decreed to reconvey. In several of the states adopting this general system, the original doctrine is so far relaxed that no reconveyance from the mortgagee is necessary, but the legal estate vests in the mortgagor *ipso facto* of his payment: See *ante*, § 1187.

I would remark that in all the discussions of the text I am speaking only of the *equity* of redemption, which exists solely as a part of the equitable conception of mortgage. The *statutory* right of redeeming *after* foreclosure or execution sale, given by the legislation of certain states, forms no part of *equity* jurisprudence.

² The true nature of the relief, according to the system prevailing in the

(b) Quoted in *Bowen v. Gerhold*, (Ind. App.) 70 N. E. 546.

are, that the mortgage debt should be due and payable, that the mortgagor should offer to pay whatever amount is due, and should pay the same when ascertained and fixed by the decree, and that the relief should be sought in equity.³

states of this second class, was recognized in *Daubenspeck v. Platt*, 22 Cal. 330, 335, per Norton, J.: "It is urged that an action to redeem does not lie in this state before foreclosure. There is no peculiarity in the laws of this state in reference to mortgages which takes from a mortgagor the right to redeem which exists in other states. Our statute enables a mortgagor to hold possession as owner until his title is divested by a foreclosure, but does not take from him the right to disencumber the land by a voluntary payment after a default to pay at the time provided in the mortgage. Although a redemption may not now be necessary after default in order to repurchase the legal title, it is still an important right in order to the full beneficial enjoyment of the property. Mortgages have long been treated as only liens, whether before or after default, and a bill to redeem has practically only been a *proceeding to remove the encumbrance*." See also *Cowing v. Rogers*, 34 Cal. 648, 654; *Koch v. Briggs*, 14 Cal. 256, 262; 73 Am. Dec. 651; *Cunningham v. Hawkins*, 24 Cal. 403, 410; 85 Am. Dec. 73.

32 Lead. Cas. Eq., 4th Am. ed., 1967, 2006, notes to *Thornbrough v. Baker*; 2 Jones on Mortgages, sec. 1052; *Tasker v. Small*, 3 Mylne & C. 63; *Gleaves v. Paine*, 1 De Gex, J. & S. 87; *Pearce v. Morris*, L. R. 5 Ch. 227; *Harding v. Pingey*, 10 Jur., N. S., 872; *Hughes v. Cook*, 34 Beav. 407; *Brown v. Cole*, 14 Sim. 427; *Burrowes v. Molloy*, 2 Jones & L. 521; *Randall v. Bradley*, 65 Me. 43; *Hall v. Gardner*, 71 Me. 233; *Welch v. Stearns*, 69 Me. 192; *Rowell v. Jewett*, 69 Me. 293; *Nevius v. Egbert*, 31 N. J. Eq. 460; *Parks v. Allen*, 42 Mich. 482; 4 N. W. 227; *Walker v. Carleton*, 97 Ill. 582; *Wylie v. Welch*, 51 Wis. 351; 8 N. W. 207; *Grigg v. Banks*, 59 Ala. 311 (where the mortgagee has paid off a prior encumbrance); *Beach v. Cooke*, 28 N. Y. 508; 86 Am. Dec. 260; *Koch v. Briggs*, 14 Cal. 256, 262; 73 Am. Dec. 651; *Cunningham v. Hawkins*, 24 Cal. 403, 410; 85 Am. Dec. 73; *Daubenspeck v. Platt*, 22 Cal. 330, 335; *Cowing v. Rogers*, 34 Cal. 648, 654; *Lorenzana v. Camarillo*, 45 Cal. 125 (a mortgagor's right to redeem is not lost because he is no longer the owner of the premises). If a mortgagee pays off prior encumbrances he is subrogated to the rights of the holders thereof, and when the mortgagor redeems, he must pay them also: *Grigg v. Banks*, 59 Ala. 311; *Arnold v. Foot*, 7 B. Mon. 66; *Harper v. Ely*, 70 Ill. 581; *Robinson v. Ryan*, 25 N. Y. 320; *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Weld v. Sabin*, 20 N. H. 533; 51 Am. Dec. 240; *Page v. Foster*, 7 N. H. 392; *Jenness v. Robinson*, 10 N. H. 215. The right of redeeming can only be cut off by a valid, complete, strict foreclosure, or by a valid, complete foreclosure by sale: *Thompson v. Comm'rs*, 79 N. Y. 54; *Bennett v. Austin*, 81 N. Y. 308; *Pell v. Ulmar*, 18 N. Y. 139; *Olmsted v. Elder*, 5 N. Y. 144; *Sherwood v. Reade*, 7 Hill, 431; *Ward v. Seymour*, 51 Vt. 320; *Gilson v. Whitney*, 51 Vt. 552; *Winton's Appeal*, 87 Pa. St. 77; *Parks v. Allen*, 42 Mich. 482; 4 N. W. 227; *Wylie v. Welch*, 51 Wis. 351; 8 N. W. 207; *Hull v. McCall*, 13 Iowa, 467. Persons otherwise entitled, who were not made parties to the suit, may therefore redeem after and notwith-

§ 1220. **The Same. By Other Persons.**^a — Any person who holds a legal estate in the mortgaged premises, or in any part thereof, derived through, under, or in privity with the mortgagor, and any person holding either a legal or equitable lien on the premises, or any part thereof, under or in privity with the mortgagor's estate, may also in like manner redeem from the prior mortgage. No such redemption, however, is possible unless the mortgage debt is due and payable,^b nor unless the mortgage is wholly redeemed by payment of the entire amount of the mortgage debt. The debt being a unit, no party interested in the whole premises, or in any portion of them, can compel the mortgagee to accept a part of the debt, and to relieve the property *pro tanto* from the lien.^c Furthermore, if the person redeeming has only a partial interest in the premises, and there are other partial owners also interested in having

standing a foreclosure and sale:^e *Ibid.*; *Miner v. Beekman*, 50 N. Y. 337; *Noyes v. Hall*, 97 U. S. 34; 24 L. ed. 909; *Endel v. Leibrock*, 33 Ohio St. 254; *Avery v. Ryerson*, 34 Mich. 362; *Hasselmann v. McKernan*, 50 Ind. 441; *Shaw v. Heisey*, 48 Iowa, 468; *Gower v. Winchester*, 33 Iowa, 303; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 428; *Pratt v. Frear*, 13 Wis. 462; *Green v. Dixon*, 9 Wis. 532; *Chandler v. Dyer*, 37 Vt. 345; *Wiley v. Ewing*, 47 Ala. 418. The purchaser at the foreclosure sale may maintain an action against a subsequent mortgagee who was not made a party, to compel him to redeem within a certain time or be foreclosed: *Shaw v. Heisey*, *supra*.

§ 1219, (c) *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407; *American Buttonhole, etc., Co. v. Loan Assn.*, 61 Iowa 464, 16 N. W. 527; *Bunce v. West*, 62 Iowa 81, 17 N. W. 179; *Spurgin v. Adamson*, 62 Iowa 661, 18 N. W. 293; *Tucker v. Jackson*, 60 N. H. 214; *Hunt v. Makemson*, 56 Tex. 9; *Rodman v. Quick*, (Ill.) 71 N. E. 1087. See, however, *Worthington v. Wilmot*, 59 Miss. 608. That a person of whose interest the mortgagee had no notice, as the holder, by unrecorded assignment, of a junior incumbrance, may have no such right to redeem, see *Reel v. Wilson*, 64 Iowa 13, 19 N. W. 814.

§ 1220, (a) This section is cited in

Buser v. Shepard, 107 Ind. 417, 8 N. E. 280; *Sellwood v. Gray*, 11 Oreg. 534, 5 Pac. 196; *McQueen v. Whetstone*, (Ala.) 30 South. 548; *Howser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 South. 206; *First Nat. Bank v. Elliott*, 125 Ala. 646, 27 South. 7, 82 Am. St. Rep. 268, 47 L. R. A. 742 (in dissenting opinion); *Kelly v. Longshore*, 78 Ala. 203; *Dougherty v. Kubat*, (Nebr.) 93 N. W. 317.

§ 1220, (b) *Bernard v. Topplitz*, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465 (suit by mortgagor).

§ 1220, (c) *McGough v. Sweetser*, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470. It has been held that the

the lien of the mortgage removed from their estates,—such as co-owners, life tenants, reversioners, remaindermen, and the like,—he can not compel them in the first instance to advance their proportionate shares for the purpose of paying off the debt; he must himself redeem the whole mortgage, and his only equity against them consists in his right to enforce the mortgage upon *their* estates as a security for obtaining a *subsequent* contribution.¹

¹ In its most general terms, the doctrine may be briefly stated that all persons interested in the premises, and who would be prejudiced by a foreclosure, have a right to redeem. Persons who claim under a title paramount or adverse to the mortgagor's would not be affected by a foreclosure, and cannot redeem. It is plain, also, that there can be no *complete* redemption until the whole mortgage debt is due and payable. If one prior installment is due, and the mortgagee is entitled to foreclose for its non-payment, he cannot be compelled to accept the installments not yet due; the only possible redemption would be a payment of the amount then due, leaving the mortgage in full force with respect to the subsequent installments. In illustration of the text, see 2 Lead. Cas. Eq., 4th Am. ed., 1967–1969, 2006; 2 Jones on Mortgages, secs. 1055–1069 (who may redeem); 1070–1081 (requisites of redemption). The following list will show the various classes of persons who may redeem as well in this country as in England: *Grantees or assignees* of the mortgagor, even when *volunteers*: Howard v. Harris, 1 Vern. 190; Winterbottom v. Tayloe, 2 Drew. 279; *devisees*: Lewis v. Nangle, 2 Ves. Sr. 431; Catley v. Sampson, 33 Beav. 551; *heirs*: Pym v. Bowremare, 3 Swanst. 241, note; Lloyd v. Wait, 1 Phill. Ch. 61; *a joint tenant*, who must redeem the whole: Waugh v. Land, Coop. 129; Wynne v. Styan, 2 Phill. Ch. 303, 306; *a tenant in common*: Wynne v. Styan, *supra*; *a tenant for life*: Wicks v. Scrivens, 1 Johns. & H. 215; *a tenant in tail*: Playford v. Playford, 4 Hare, 546; *remaindermen or reversioners*: Rafferty v. King, 1 Keen, 601, 617; *a dowress*: Swannock v. Lyford, Amb. 6; Jackson v. Parker, Amb. 687; *the superior lord*, or the *crown*, in case of escheat or forfeiture: Viscount Downe v. Morris, 3 Hare, 394; Burgess v. Wheate, 1 Eden, 177, 210, 256; Beale v. Symonds, 16 Beav. 406; Att'y-Gen. v. Crofts, 4 Brown Parl. C. 136; *a creditor* who is plaintiff in a creditor's suit, after a decree: Christian v. Field, 2 Hare, 177; *judgment creditors*: Stonehewer v. Thompson, 2 Atk. 440; Neate v. Duke of Marlborough, 3 Mylne & C. 407; Jefferys v. Dickson, L. R. 1 Ch. 183; Mildred v. Austin, L. R. 8 Eq. 220; In re Cowbridge R'y, L. R. 5 Eq. 413; Guest v. Cowbridge R'y, L. R. 6 Eq. 619; Thornton v. Finch, 4 Giff. 505; *subsequent mortgagees*: Fell v. Brown, 2 Brown Ch. 276; Palk v. Lord Clinton, 12 Ves. 48; Rhodes v. Buckland, 16 Beav. 212; Smith v. Green, 1 Coll.

mortgagor cannot, in his suit to redeem, set off a personal demand against the mortgage: Brown v. Coriell, 50 N. J. Eq. 753, 26 Atl. 915,

35 Am. St. Rep. 789, 21 L. R. A. 321.

(d) *Remaindermen*.—Prout v. Cook, [1896] 2 Ch. 808.

§ 1221. Rights of Contribution and of Exoneration upon Redemption.^a—In general, whenever redemption by one of the above-mentioned persons operates as an equitable assignment of the mortgage to himself, he can keep the lien

C. C. 555; *lunatic's committee*: Ex parte Grimstone, Amb. 706; *legatees* whose legacies are charged on the mortgaged premises: Faulkner v. Daniel, 3 Hare, 199; Batchelor v. Middleton, 6 Hare, 75; *any person having even a partial interest*: Pearce v. Morris, L. R. 5 Ch. 227. American cases: Persons having an estate in the land as *heirs, devisees, grantees, tenants for life, dowress, co-owners, etc.*:^c Smith v. Manning, 9 Mass. 422; Lamson v. Drake, 105 Mass. 564; Davis v. Wetherell, 13 Allen, 60; 90 Am. Dec. 177; Beach v. Cooke, 28 N. Y. 508; 86 Am. Dec. 260; Mills v. Van Voorhies, 20 N. Y. 412; Bell v. The Mayor, 10 Paige, 49; Denton v. Nanny, 8 Barb. 618; Mills v. Van Voorhis, 23 Barb. 125; Cunningham v. Knight, 1 Barb. 399; Opdyke v. Bartles, 11 N. J. Eq. 133; McArthur v. Franklin, 16 Ohio St. 193; Beach v. Shaw, 57 Ill. 17. Persons having subsequent encumbrances: *Judgment creditors*:^f Bigelow v. Willson, 1 Pick. 485; Niagara Bank v. Roosevelt, 9 Cow. 409; Dabney v. Green, 4 Hen. & M. 101; 4 Am. Dec. 503. *Subsequent mortgagees*:^g Frost v. Yonkers Sav. Bank, 70 N. Y. 553; 26 Am. Rep. 627; Twombly v. Cassidy, 82 N. Y. 155; Haines v. Beach, 3 Johns. Ch. 459; Rogers v. Herron, 92 Ill. 583; Hodgen v. Guttery, 58 Ill. 431; Beach v. Shaw, 57 Ill. 17; Sager v. Tupper, 35 Mich. 134; Avery v. Ryerson, 34 Mich. 362; Hasselman v. McKernan, 50 Ind. 441; Renard v. Brown, 7 Neb. 499; Manning v. Markel, 19 Iowa, 103; Scott v. Henry, 13 Ark. 112; Wiley v. Ewing, 47 Ala. 418; Hill v. White, 1 N. J. Eq. 435; but see Bigelow v. Cassedy, 26 N. J. Eq. 557. Any person having an interest in the premises subsequent to the mortgage: Averill v. Taylor, 8 N. Y. 44; Boquet v. Coburn, 27 Barb. 230; Platt v. Squire, 12 Met. 494; Farnum v. Metcalf, 8 Cush. 46.^h The whole debt must be paid: 2 Jones on Mortgages, sec. 1072; Palk v. Lord Clinton, 12 Ves. 48; Marquis of Cholmondeley v. Lord Clinton, 2 Jacob & W. 1, 189; Johnson v.

(^e) *Persons having an estate in the land.*—Butts v. Broughton, 72 Ala. 294; Ohmer v. Boyer, 89 Ala. 273, 7 South. 663; Howser v. Cruikshank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76; Kenyon v. Segar, 14 R. I. 490.

(^f) *Judgment creditors.*—See Cramer v. Watson, 73 Ala. 127; Fitch v. Wetherbee, 110 Ill. 475; Kelly v. Longshore, 78 Ala. 203 (purchaser at execution sale of equity of redemption).

(^g) *Subsequent mortgagees.*—Johnson v. Hosford, 110 Ind. 572, 10 N. E. 407; Hunt v. Makemson, 56 Tex. 9; but see Tillman v. Stewart, 104

Ga. 687, 69 Am. St. Rep. 192, 30 S. E. 949.

(^h) *Any person having an interest in the premises subsequent to the mortgage.*—Buser v. Shepard, 107 Ind. 417, 8 N. E. 280; Sellwood v. Gray, 11 Oreg. 534, 5 Pac. 196; but he must show that he derived his title through the mortgagor: Hazen v. Nicholls, 126 Cal. 327, 58 Pac. 816.

(a) This section is cited in Peck v. Peck, 110 N. Y. 64, 17 N. E. 383; Beck v. Tarrant, 61 Tex. 402; Wood v. Wood, 134 Ala. 557, 33 South. 347.

of it alive as security against others who are also interested in the premises, and who are bound to contribute their proportionate shares of the sum advanced by him, or are bound, it may be, to wholly exonerate him from and reimburse him for the entire payment. The doctrine has already been stated, that where a party interested in the premises, who is not personally and primarily liable as the principal debtor for the whole mortgage debt, pays the mortgage to the holder thereof, he is entitled to regard the transaction as an equitable assignment of the mortgage to himself, and to keep it alive as security of his own rights against others who are owners of or interested in the land.^{1 b} Any such person who redeems, no matter how small a portion of the premises he may own, or how partial may be his interest, must redeem the entire mortgage by paying the whole mortgage debt. The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redemtor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment in order to secure such contribution, are the efficient means by which equity completely and most beautifully works out perfect justice and equality of burden, under these circumstances. The right of contribution arises only *after* a redemption, and necessarily depends upon the equities subsisting between all those persons who have an interest in the premises subject to the mortgage, and who therefore

Candage, 31 Me. 28; Lamb v. Montague, 112 Mass. 352; Lanning v. Smith, 1 Pars. Cas. 13; Knowles v. Rablin, 20 Iowa, 101; Gliddon v. Andrews, 14 Ala. 733; and see cases cited above, in this note.

¹ See *ante*, §§ 1211, 1212. This doctrine has its simplest and most frequent application in cases of redemption by a person who is owner of or interested in a part of the mortgaged premises,—as by a co-owner, an owner of a separate parcel of the land, etc.; or by a person who has only a *partial* interest in the premises,—as by a life tenant, a dowress, a reversioner, a tenant for years, etc.

(b) §§ 1221 *et seq.* cited to this effect in Lang v. Cadwell, 13 Mont. 458, 34 Pac. 957 (subrogation of tenant in common paying mortgage).

have a *common*, but not necessarily an *equal*, interest in being relieved from the burden of the mortgage.²

§ 1222. 1. Where their Equities are Equal.^a — It is a general doctrine of equity that where a common charge rests upon a fund which belongs to several owners, who stand upon a footing of equality with respect to their individual titles and relations with the holder of the charge, the burden should rest ratably upon each separate portion of the fund; and if the owner of one portion, for the purpose of protecting his own interest, pays off the common charge, he is entitled to call upon the other owners to contribute their proportionate shares of the amount thus paid. This doctrine is a simple application of the maxim, Equality is equity.^{1b} Whenever, therefore, a mortgage rests upon land which is owned by several persons in such a manner that their equities as between themselves are equal, and one of them redeems from the mortgage, he is entitled to a *pro rata* contribution from the other owners, and may keep the lien of the mortgage alive, by equitable assignment, as security for such contributions.² In order, however, that this

§ 1221, ² The nature and extent of the liability to contribute are primarily independent of the mortgagee, and depend upon or are controlled by the equities subsisting, between the various parties interested in having the mortgage redeemed, which equities primarily arise from their several relations with the mortgagor, or from their dealings with each other. The mortgagee *may*, however, by releasing some one of these parties, modify or restrict his own right of enforcing the mortgage against the others, and may thus disturb the equities otherwise subsisting among them, and as a necessary consequence may alter their normal liability of contribution. Any adequate statement of the doctrine concerning contribution requires, therefore, some examination of the rules determining the equities between the various persons who are owners of or interested in the mortgaged premises, and of the effects upon these equities produced by a release from the mortgagee to any one or more of them. I shall briefly discuss the three following cases: 1. Where the equities among the owners are equal; 2. Where their equities are unequal; 3. The effect in either case of a release by the mortgagee given to one of such parties.

§ 1222, ¹ See *ante*, vol. 1, §§ 405, 406, 407, 411.

§ 1222, ² Among the instances where the equities are equal, and which fall within this rule, are the following: Two or more persons, co-owners of land,

(a) This section is cited in Beck v. Tarrant, 61 Tex. 402.

(b) Senft v. Vanek, 209 Ill. 361, 70 N. E. 720 (equities between two

liability to a ratable contribution may exist under such a condition of ownership, it is essential that the equities of all the owners should be equal.³

§ 1223. 2. Where their Equities are Unequal — Tenants for Life or for Years.^a — In the preceding case the titles of the several owners are simultaneous in their time of acquisi-

jointly give a mortgage thereon; land covered by a mortgage, on the death of the mortgagor, descends to his several heirs, or is devised by him to several devisees, who take it as co-owners; a mortgagor conveys the premises by one deed to several grantees, who become co-owners of undivided shares; a mortgagor, by separate, similar, and simultaneous deeds, conveys all the mortgaged premises, in separate and distinct parcels, to several separate grantees, neither of whom assumes payment of the whole mortgage, nor any part thereof, so as to disturb the equality of the equities between them, and the like:^c *Bailey v. Myrick*, 50 Me. 171; *Aiken v. Gale*, 37 N. H. 501, 505; *Town of Salem v. Edgerly*, 33 N. H. 46; *Towle v. Hoit*, 14 N. H. 61; *Taylor v. Bassett*, 3 N. H. 294; *Wheeler v. Willard*, 44 Vt. 640; *Gibson v. Crehore*, 5 Pick. 146; *Saunders v. Frost*, 5 Pick. 259; 16 Am. Dec. 394; *Allen v. Clark*, 17 Pick. 47; *Parkman v. Welch*, 19 Pick. 231; *Chase v. Woodbury*, 6 Cush. 143; *Taylor v. Porter*, 7 Mass. 355; *Young v. Williams*, 17 Conn. 393; *Lyon v. Robbins*, 45 Conn. 513; *Stevens v. Cooper*, 1 Johns. Ch. 425; 7 Am. Dec. 499; *Cheesebrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; *Lawrence v. Cornell*, 4 Johns. Ch. 542; *Sawyer v. Lyon*, 10 Johns. 32; *Johnson v. White*, 11 Barb. 194; *Stroud v. Casey*, 27 Pa. St. 471; *Simpson v. Gardiner*, 97 Ill. 237; *Briscoe v. Power*, 47 Ill. 447; *Kingsbury v. Buckner*, 70 Ill. 514; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267; *McLaughlin v. Estate of Curts*, 27 Wis. 644; *Bates v. Ruddick*, 2 Iowa, 423; 65 Am. Dec. 774; *Beall v. Barclay*, 10 B. Mon. 261.

³ The equality may be disturbed in various ways. If the mortgagor should convey the land by three simultaneous deeds to A, B, and C, and A should in his deed assume payment of the whole mortgage as a part of the consideration, A's parcel would not only be primarily chargeable with the entire mortgage, but he would himself become the principal debtor. If A should pay off the mortgage, he would have no right of contribution against the others; on the contrary, if either B or C should redeem, he would be entitled to a complete exoneration as against A: See *Zabriskie v. Salter*, 80 N. Y. 555. The equality might also be lost if the grantee of one parcel neglected to put his deed on record, and those of the other grantees being recorded, one of them conveyed his portion to a second grantee for value and without

persons purchasing separate parcels at same judicial sale are equal).

(c) *Hall v. Morgan*, 79 Mo. 47; *Peck v. Peck*, 110 N. Y. 64, 74, 17 N. E. 383; *Beck v. Tarrant*, 61 Tex. 402 (vendor's lien).

(a) This section is cited in *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Tindall v. Peterson*, (Nebr.) 99 N. W. 659.

tion, and are the same in kind, the only difference being in the value of their respective interests. In the case now to be considered, the titles are also simultaneous,¹ and the inequality consists in the fact that the estate held in the mortgaged premises by one party is only partial, while that held by the other is absolute or in fee. The particular inequality referred to exists when the land subject to the mortgage is held by A as a tenant for life or for years, and by B as a remainderman or reversioner in fee.² The general doctrine of contribution applies to such owners, but is modified in its operation by the new element of inequality in the nature of their respective estates. As has already been shown, the holder of a partial interest is always compelled to redeem the whole mortgage.^{3b} By a settled rule

notice: *Chase v. Woodbury*, 6 Cush. 143; and see *Layman v. Willard*, 7 Ill. App. 183.

¹ The inequality of equities resulting from the fact that the titles of the several owners are not simultaneous is examined in the next subsequent paragraphs; and it will be seen that *such* inequality prevents any common ratable contribution.

² This general condition of ownership includes the following particular cases: When the land subject to the mortgage is conveyed or devised by the mortgagor to A for life, and on his death to B in fee; also, when a part of the land subject to the mortgage is conveyed to or held by A for life, while the reversion of such part, together with all the residue of the land, are conveyed to or held by B in fee; as, for example, when, on the death of the mortgagor or of any subsequent owner, the whole land subject to the mortgage passes to his heirs or devisees, and his widow is entitled to dower in one third thereof, or when the mortgagor is a married woman, and on her death her husband becomes tenant for life of the whole land by the curtesy, while the reversion in fee descends to her heirs; and finally, when the land, or a part thereof, is held by A as a tenant for years, and the reversion in fee by B.

³ See *ante*, § 1220; *Lyon v. Robbins*, 45 Conn. 513; *Spencer v. Waterman*, 36 Conn. 342; *Lamson v. Drake*, 105 Mass. 564, 567; *McCabe v. Bellows*, 7 Gray, 148; 66 Am. Dec. 467; *Brown v. Lapham*, 3 Cush. 551; *Bell v. The Mayor*, 10 Paige, 49.

(b) But it is held that when the mortgage and the equity of redemption unite in the same person, a dowress may redeem her dower by paying only her portion of the debt;

because if she paid the whole debt, she would be immediately entitled, by subrogation, to have all above her proportional part refunded: *Kenyon v. Segar*, 14 R. I. 490.

of the law, the life tenant, A, is bound to pay the annual interest on the mortgage accruing during his own lifetime, —or if a tenant for years, during his term. This is his own debt, and for what he thus pays in keeping down the interest he is not entitled to any contribution from B, the owner in fee.^{4c} When, therefore, A redeems the mortgage, a certain part of the money paid to the mortgagee would be the equivalent of the annual interest on the mortgage which A was obliged to pay at all events, and this part, being his own debt, need not be refunded to him by B; but all of the mortgage debt over and above such part equitably belongs to B to pay; it is the share which should fall upon him by virtue of his reversionary interest. The problem then is to ascertain what portion of the total mortgage debt represents the annual interest on the mortgage which A is bound to pay during his life; subtracting that amount from the total sum, the balance is the share which B must contribute, and for which A may hold the mortgage as a lien on the land. An element of uncertainty — the duration of A's life — is inherent in the problem; but the courts, both of England and of this country, have adopted the standard "life tables" as the basis of calculation in all such cases. The rule is settled, that the present worth of an annuity equal to the annual interest running during the number of years which constitute his expected life represents the sum which A is liable to pay as *his* individual indebtedness; the balance, after subtracting this sum from the mortgage debt actually paid to the mortgagee, is the amount which B is liable to contribute.^{5d} When the life tenant, A, is a dowress,

⁴ Ibid.; *Squire v. Compton*, 2 Eq. Cas. Abr. 387; *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318.

⁵ Knowing A's age, the "life tables" give the number of years he has yet to live, which, for the purposes of the rule, are taken as absolutely certain.

(c) *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Wheeler v. Addison*, 54 Md. 41.

(d) *Damm v. Damm*, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601; *Tindall v. Peterson*, (Nebr.) 98 N. W. 659.

the present worth is calculated upon the basis of one third of the annual interest accruing on the mortgage of the entire premises. If the remainderman or reversioner, B, redeems, the rule is the exact converse of the one above stated.

§ 1224. 3. Inequality of Equities where Titles are not Simultaneous — Between Mortgagor and his Grantee of a Parcel — Between Successive Grantees — Inverse Order of Alienation.* — Where the owners of the premises subject to the mortgage hold under the mortgagor by titles not simultaneous, but successive in order of time, an entirely different inequality of equities among them is introduced; a priority

and correct. He is therefore bound to pay the annual interest on the mortgage for the number of years disclosed by the tables. Knowing the amount of interest due each year, and the number of years it must be paid, the "annuity tables" will give the present worth of such sum payable annually for the required number of years. This present worth is A's proper share; subtracting it from the whole amount paid to the mortgagee, the balance is the sum payable by B. The rule thus formulated applies whenever the entire premises subject to the mortgage are held by A for life and the fee in remainder or reversion is held by B; as, for example, when A is the husband, tenant by the curtesy, and B represents the heirs. Where A is a widow-doweress, a slight modification in the rule is necessary. Since she is entitled to dower in only one third of the mortgaged premises, she is bound to keep down only one third of the interest on the mortgage. The present worth of an annuity for her expected life equal to one third of the annual interest represents the amount of her individual liability. This modification indicates the rule applicable to all life tenants of a portion only of the mortgaged premises. When A is a tenant for years, no resort to the life tables is necessary. The present worth of the annuity must be calculated for the number of years constituting the residue of his term. Whenever the reversioner or remainderman, B, redeems the mortgage, the rule is plainly the exact converse of that above stated: *Carll v. Butman*, 7 Me. 102, 105; *Houghton v. Hapgood*, 13 Pick. 154, 158; *Gibson v. Crehore*, 5 Pick. 146; *Swaine v. Perine*, 5 Johns. Ch. 482, 490; 9 Am. Dec. 318; *Bell v. The Mayor*, 10 Paige, 49; *Jones v. Sherrard*, 2 Dev. & B. Eq. 179, 189; *Foster v. Hilliard*, 1 Story, 77, 90; *Fed. Cas. No. 4,972*; *Lyon v. Robbins*, 45 Conn. 513; *Raynor v. Raynor*, 21 Hun, 36. As to use of "life tables," see *Graves v. Cochran*, 68 Mo. 74; *Unger v. Leiter*, 32 Ohio St. 210; *Nye v. Patterson*, 35 Mich. 413.

(a) This section is cited in *Howser v. Cruikshank*, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76; *Steinmeyer v. Steinmeyer*, 55 S. C.

9, 33 S. E. 15. Sections 1224-1226 are cited in *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

results which not only destroys the right of ratable *contribution* when one of them redeems, but even creates in favor of some a right of *exoneration* as against the others. The foundation of this doctrine is found in the equities subsisting between the mortgagor and his grantee of a part of the mortgaged premises. Whenever the mortgagor conveys a portion of the land "subject to" a mortgage by a warranty deed, and retains the residue of the land in his own hands, that portion of the land retained by the mortgagor becomes, as between himself and his grantee at all events, the fund primarily liable for the whole mortgage debt. The form of the deed shows that the grantee not only assumed payment of no portion of the mortgage debt, but did not buy his parcel even *subject to* the mortgage; and the entire burden was therefore left upon the portion of land remaining in the ownership of the mortgagor. Whatever be the rights of the mortgagee to resort to either or both of the parcels, it is plainly the equitable duty of the mortgagor to assume the whole debt, and thus to free the grantee's parcel from the lien. If, therefore, the mortgagor pays off the mortgage, its lien is ended, and he can claim no contribution from the grantee; if, on the other hand, the grantee redeems, he is entitled to keep the lien alive for the purpose of enforcing an exoneration by the mortgagor, at least to the extent of the value of the premises remaining in the mortgagor's hands and subject to the encumbrance. This view of the equities subsisting between the mortgagor and his own grantee seems to be universally adopted.¹ The doctrine being thus established that the

¹ 2 Washburn on Real Property, 4th ed., p. 202, sec. 5; 2 Jones on Mortgages, secs. 1091, 1092; 2 Lead. Cas. Eq., 4th Am. ed., 291, 305, notes to Aldrich v. Cooper. The rule applies not only to the mortgagor, but also to his heir: Harbert's Case, 3 Coke, 11 b; Wallace v. Stevens, 64 Me. 225; Hahn v. Behrman, 73 Ind. 120; Clowes v. Dickenson, 5 Johns. Ch. 235; Beard v. Fitzgerald, 105 Mass. 134; Chase v. Woodbury, 6 Cush. 143; Kilborn v. Robbins, 8 Allen, 466; Bradley v. George, 2 Allen, 392; Cheever v. Fair, 5 Cal. 337; Root v. Collins, 34 Vt. 173 (mortgagor and his vendee in a land contract); and cases in next following note; see Judson v. Dada, 79 N. Y. 373.

grantee obtains an equitable priority as against the mortgagor, and the portion of the mortgaged premises left in the mortgagor's hands is primarily chargeable with the whole mortgage, the inference is natural, even if not necessary, that the same burden follows this portion, when subsequently conveyed by the mortgagor to a second grantee. If the mortgagor conveys one half of the mortgaged premises by a warranty deed to A, his own half is equitably charged with the entire debt, and A has as against him the priority. When the mortgagor afterwards conveys his half by a similar deed to B, that transaction cannot affect A's pre-existing priority, with *respect to the parcel thus conveyed as the primary fund for payment*, and B cannot acquire any higher equities than those possessed by his immediate grantor; he succeeds to the exact position of the mortgagor towards the first grantee, A. As between the two grantees, therefore, the parcel conveyed to the second grantee, B, is primarily liable for the whole mortgage debt; he can claim no contribution from A, but on the other hand, A may be entitled to *exoneration* against the portion held by him. If this reasoning is correct, it necessarily applies to any number of successive grantees to whom the mortgagor has conveyed separate parcels of the mortgaged premises, and determines these equities among them, whether the mortgagor has conveyed away all the land covered by the mortgage, or retains a portion himself, and whether their respective parcels are of equal or unequal values. In most of the states, though not in quite all, the courts have adopted this reasoning, and have settled the equities of the parties in such a condition of fact by a general rule: Whenever the mortgagor has conveyed separate parcels of the mortgaged premises by warranty deeds to successive grantees, and there are no special provisions in any of their deeds, and no other dealings between themselves or with the mortgagor which disturb the equities otherwise existing, a priority results, depending upon the order of conveyance. As between the mortgagor and all the grantees, the parcel in his hands, if any, is primarily

liable for the whole mortgage debt, and should be exhausted before having recourse to any of theirs; as between the grantees, their parcels are liable in the inverse order of their alienation, and any parcel chargeable first in order must be exhausted before recourse is had to the second.^{2 b}

² In many of these states the rule is applied directly to the mortgagee, and regulates his mode of foreclosure; either by statute, or by rule of court, or by decisions, he is compelled to frame his decree of sale, and to sell the mortgaged premises in compliance with this rule. In other states, the mortgagee is not thus directly controlled, but the rule is applied to the other parties, and regulates the mode in which their equities are worked out, as among themselves, by redemption and exoneration. A single simple case will illustrate. A mortgagor divides the land subject to the mortgage into five lots. He conveys lot 1 by warranty deed to A, and afterwards, by successive deeds, lots 2, 3, and 4, to B, C, and D, and retains lot 5 himself. Lot 5 is then the primary fund, and must be first sold, and if it fully satisfies the mortgage debt, the four other lots are freed. If its proceeds are not sufficient, then lot 4 must be sold; and only so far as is necessary to satisfy the mortgage debt, lots 3, 2 and 1 are sold in the inverse order of their alienation: c 2 Washburn on Real Property, 4th ed., pp. 202-

(b) The text is quoted in *Farmers' Savings & B. & L. Ass'n v. Kent*, 117 Ala. 624, 23 South. 757. See, also, *Stephens v. Clay*, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328; *Citizens' Nat. Bank of Middletown v. Trustees*, 5 Del. Ch. 596; *Diamond Flint Glass Co. v. Boyd*, 30 Ind. App. 485, 66 N. E. 479; *Case Threshing-Machine Co. v. Mitchell*, 74 Mich. 679, 42 N. W. 151; *Mahagan v. Mead*, 63 N. H. 570, 3 Atl. 919; *Welling v. Ryerson*, 94 N. Y. 98; *Milligan's Appeal*, 104 Pa. St. 503; *Deavitt v. Judevine*, 60 Vt. 695, 17 Atl. 410. For application of the rule to enforcement of other liens, see *Ritter v. Cost*, 99 Ind. 80; *Merritt v. Richey*, 97 Ind. 236 (judgment lien); *Hunt v. Ewing*, 12 Lea 519 (judgment lien); *Miller v. Holland*, 84 Va. 652, 5 S. E. 701. If prior purchasers fail to invoke the protection of this rule before foreclosure it is not binding on the courts: *Prickett v. Sibert*, 75 Ala.

315; *Threefoot Bros. & Co. v. Hillman*, 130 Ala. 244, 30 South. 513, 89 Am. St. Rep. 39; *Dobbins v. Wilson*, 107 Ill. 17. In *Gray v. H. M. Loud & Sons Lumber Co.*, 128 Mich. 427, 8 Detroit Leg. N. 714, 87 N. W. 376, 54 L. R. A. 731, the question was raised as to the order of liability between a prior grantee under an unrecorded deed and a subsequent grantee without notice, whose deed was first recorded. It was held that the land included in the unrecorded deed was liable first. "As the prior grantee has failed to record his deed and thus give notice of the true state of the title, the subsequent grantee, unless otherwise notified, may rightfully regard the land, which is thus apparently in the hands of the mortgagor, as primarily liable for the whole debt."

(c) This illustration is quoted in *Farmers' Savings & B. & L. Ass'n v. Kent*, 117 Ala. 624, 23 South. 757.

This inequality of equities plainly destroys all right and liability of *ratable contribution*. If the mortgagor pays off the mortgage, or if the parcel remaining in his hands is sold in full satisfaction of it, he cannot call upon his grantees for any reimbursement. In like manner, if the

206, secs. 5, 5 a; 2 Jones on Mortgages, secs. 1620-1632; 2 Lead. Cas. Eq., 4th Am. ed., 291-305, notes to Aldrich v. Cooper; Randall v. Mallett, 14 Me. 51; Holden v. Pike, 24 Me. 427; Cushing v. Ayer, 25 Me. 383; Sheperd v. Adams, 32 Me. 63; Town of Salem v. Edgerly, 33 N. H. 46; Aiken v. Gale, 37 N. H. 501; Brown v. Simons, 44 N. H. 475; 45 N. H. 211; Gates v. Adams, 24 Vt. 70; Lyman v. Lyman, 32 Vt. 79; 76 Am. Dec. 151; Root v. Collins, 34 Vt. 173; Chase v. Woodbury, 6 Cush. 143; George v. Kent, 7 Allen, 16; Kilborn v. Robbins, 8 Allen, 466; George v. Wood, 9 Allen, 80; 85 Am. Dec. 741; Beard v. Fitzgerald, 105 Mass. 134; Sanford v. Hill, 46 Conn. 42; Gill v. Lyon, 1 Johns. Ch. 447; Clowes v. Dickenson, 5 Johns. Ch. 235; James v. Hubbard, 1 Paige, 228, 234; Jenkins v. Freyer, 4 Paige, 47; Guion v. Knapp, 6 Paige, 35; 29 Am. Dec. 741; Jumel v. Jumel, 7 Paige, 591; Skeel v. Spraker, 8 Paige, 182; Farmers' L. & T. Co. v. Maltby, 8 Paige, 361; Patty v. Pease, 8 Paige, 277; 35 Am. Dec. 683; Schryver v. Teller, 9 Paige, 173; Rathbone v. Clark, 9 Paige, 648; Kellogg v. Rand, 11 Paige, 59; Stuyvesant v. Hall, 2 Barb. Ch. 151; Ferguson v. Kimball, 3 Barb. Ch. 616; Ex parte Merrian, 4 Denio, 254; Howard Ins. Co. v. Halsey, 4 Sandf. 565; Weaver v. Toogood, 1 Barb. 238; La Farge Ins. Co. v. Bell, 22 Barb. 54; Crafts v. Aspinwall, 2 N. Y. 289; Howard Ins. Co. v. Halsey, 8 N. Y. 271; 59 Am. Dec. 478; Ingalls v. Morgan, 10 N. Y. 178; Belmont v. Coman, 22 N. Y. 438; 78 Am. Dec. 213; Zabriskie v. Salter, 80 N. Y. 555; Hopkins v. Wolley, 81 N. Y. 77; Kendall v. Niebuhr, 58 How. Pr. 156; 13 Jones & S. 542; Coles v. Appleby, 22 Hun, 72; 87 N. Y. 114, 121; Cowden's Estate, 1 Pa. St. 267; Carpenter v. Koons, 20 Pa. St. 222; Hiles v. Coult, 30 N. J. Eq. 40; Hill's Adm'rs v. McCarter, 27 N. J. Eq. 41; Mut. Life Ins. Co. v. Boughrum, 24 N. J. Eq. 44; Mount v. Potts, 23 N. J. Eq. 188; Weatherby v. Slack, 16 N. J. Eq. 491; Keene v. Munn, 16 N. J. Eq. 398; Gaskill v. Sine, 15 N. J. Eq. 400; 78 Am. Dec. 105; Winters v. Henderson, 6 N. J. Eq. 31; Black v. Morse, 7 N. J. Eq. 509; Wikoff v. Davis, 4 N. J. Eq. 224; Britton v. Updike, 3 N. J. Eq. 125; Shannon v. Marselis, 1 N. J. Eq. 413, 421; Jones v. Myrick's Ex'rs, 8 Gratt. 179; Henkle's Ex'x v. Allstadt, 4 Gratt. 284; Conrad v. Harrison, 3 Leigh, 532; Stoney v. Shultz, 1 Hill Eq. 465; 27 Am. Dec. 429; Meng v. Houser, 13 Rich. Eq. 210; Norton v. Lewis, 3 S. C. 25; Cumming v. Cumming, 3 Ga. 460; Ritch v. Eichelberger, 13 Fla. 169; P. & M. Bank v. Dundas, 10 Ala. 661; Mobile etc. Co. v. Huder, 35 Ala. 713; Miller v. Rogers, 49 Tex. 398; Hall v. Edwards, 43 Mich. 473; McKinney v. Miller, 19 Mich. 142; Ireland v. Woolman, 15 Mich. 253; Cooper v. Bigly, 13 Mich. 463; Mason v. Payne, Walk. Ch. 459; Hahn v. Behrman, 73 Ind. 120; Evansville Gas-light Co. v. State, 73 Ind. 219; 38 Am. Rep. 129; McCullum v. Turpie, 32 Ind. 146; Aiken v. Bruen, 21 Ind. 137; Day v. Patterson, 18 Ind. 114; Marshall v. Moore, 36 Ill. 321, 326; Matteson v. Thomas, 41 Ill. 110; Iglehart v. Crane, 42 Ill. 261; Dodds v. Snyder, 44 Ill. 53; Lock v. Fulford, 52 Ill. 166,

parcel belonging to a grantee who was a later purchaser is sold, he can claim no contribution from any grantee who was prior in time, since his parcel is itself primarily liable as between the two. In place of contribution, a right of exoneration may arise. It has already been shown how the grantee, under such circumstances, may be exonerated by the mortgagor; in like manner, a right of exoneration may arise among the successive grantees in favor of one whose conveyance was earlier against those who were later in point of time. The exoneration will be complete or partial, according to the circumstances of the case.³

169; *Tompkins v. Wiltberger*, 56 Ill. 385, 391; *Sumner v. Waugh*, 56 Ill. 531; *Niles v. Harmon*, 80 Ill. 396; *Hawhe v. Snyder*, 86 Ill. 197; *Meacham v. Steele*, 93 Ill. 135; *Warner v. De Witt Co. Bank*, 4 Ill. App. 305; *Erlinger v. Boul*, 7 Ill. App. 40; *Layman v. Willard*, 7 Ill. App. 183; *Aiken v. Milwaukee etc., R'y*, 37 Wis. 469; *State v. Titus*, 17 Wis. 241; *Worth v. Hill*, 14 Wis. 559; *Ogden v. Glidden*, 9 Wis. 46; *Johnson v. Williams*, 4 Minn. 260, 268; Cal. Civ. Code, sec. 2899. The doctrine also applies where the mortgagor has conveyed the whole land subject to the mortgage to A, and A in turn conveys in parcels to successive grantees: See *Guion v. Knapp*, 6 Paige, 35; 29 Am. Dec. 741; *Wikoff v. Davis*, 4 N. J. Eq. 224. This rule is rejected by the courts of Iowa and of Kentucky, which hold that the equities of the grantees as between themselves are equal, as though their deeds were simultaneous, and that they are all liable to contribute ratably: *Barney v. Myers*, 28 Iowa, 472; *Massie v. Wilson*, 16 Iowa, 391; *Bates v. Ruddick*, 2 Iowa, 423; 65 Am. Dec. 774; *Dickey v. Thompson*, 8 B. Mon. 312; *Campbell v. Johnston*, 4 Dana, 177, 182; *Poston v. Eubank*, 3 J. J. Marsh. 42; and the same view seems to be taken in Ohio: *Green v. Ramage*, 18 Ohio, 428; 51 Am. Dec. 458; but see *Cary v. Folsom*, 14 Ohio, 365; *Comm. Bank v. West. R. Bank*, 11 Ohio, 444; 38 Am. Dec. 739.

³ It should be constantly remembered that the mortgagee possesses the absolute right to enforce the security of the mortgage for the whole amount thereof, if necessary, against all the parcels in the hands of all the grantees. A single simple case will illustrate this equity of exoneration. A mortgagor conveys one half the premises by warranty deed to A, and afterwards the other half to B. As between the two grantees, the mortgage must be first enforced against B's parcel, but if its proceeds are not sufficient to satisfy the debt, then resort must be had to A's half. In other words, A's parcel continues liable for so much of the mortgage debt as exceeds the value

(d) See *Huff v. Farwell*, 67 Iowa 298, 25 N. W. 252; but that a parcel retained by the mortgagor is first chargeable, see *Windsor v. Evans*,

72 Iowa 692, 34 N. W. 481; *Mickley v. Tomlinson*, 79 Iowa 333, 41 N. W. 311, 44 N. W. 684.

§ 1225. *The Same. What Circumstances Disturb These Equities and Defeat This Rule.*^a — The doctrine stated in the foregoing paragraph is one of purely equitable origin, and is not an absolute rule of law, and if the peculiar equitable reasons on which it rests are wanting, it ceases to operate.¹ Whether it does or does not apply to any particular case may be certainly determined by a careful consideration of the following principles. The doctrine in its full scope and operation primarily depends upon the relation subsisting between the mortgagor, or other owner of the entire mortgaged premises, and his grantee of a parcel of the land. This relation, in turn, results from the form of conveyance, which, being a warranty deed, or equivalent to a warranty, shows conclusively an intention between the two that the grantor is to assume the whole burden of the encumbrance as a charge upon *his own* parcel, while the grantee is to take and hold his portion entirely free.^b Secondly, the conveyance may be of a different character; by its special provisions it may expressly show, or by its general form it

of B's parcel. This liability indicates the true measure and extent of A's right of exoneration against B. If A redeems the mortgage, or if A's parcel is sold first by the mortgagee, he is not necessarily entitled to a complete exoneration by B; he is only entitled to a complete exoneration when B's parcel equals or exceeds in value the amount of the mortgage debt, so that it would have satisfied the mortgage and freed A's land from the burden. If the mortgage debt exceeds the value of B's parcel, A is entitled to exoneration from such an amount thereof as equals the value of B's land; the balance of the debt over and above that amount is A's individual burden, chargeable on his own land. The same reasoning clearly applies to any number of successive grantees and determines the rights of exoneration among them: See cases in the last preceding note.

¹ See *Kendall v. Woodruff*, 87 N. Y. 1, 7, per Folger, C. J.

(a) This section is cited in *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663; *Howser v. Cruikshank*, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Stephens v. Clay*, 17 Colo. 489, 30 Pac. 43, 31 Am. St. Rep. 328.

(b) Quoted in *Howser v. Cruik-*

shank, 122 Ala. 256, 25 South. 206, 82 Am. St. Rep. 76. That the intent may be presumed even in the absence of a warranty is held in *Gray v. H. M. Loud & Sons Lumber Co.*, 128 Mich. 427, 8 Detroit Leg. N. 714, 87 N. W. 376, 54 L. R. A. 731.

may impliedly indicate, that the grantee himself either assumes the whole mortgage debt and charges his parcel with the entire burden of the mortgage, or else takes and holds his parcel subject to and chargeable with its proportionate share of the encumbrance.^c Thirdly, although the deeds are warranties, so that the doctrine will otherwise apply, any particular grantee may by his subsequent omissions, or by his subsequent dealings with other grantees, disturb the order of the equities in his own favor, and create equities in behalf of other owners, and even render his own parcel primarily liable as between *all* the grantees. Finally, whenever the equities of any original grantee towards the other parties have been fixed, either by the form of his deed, or by his own omissions or dealings, then any subsequent purchaser or encumbrancer from such grantee takes the parcel subject to the same equities which originally attached to it; the same equities follow the parcel in its devolutions.² The equities among successive grantees, as determined by the general doctrine of the preceding paragraph, will therefore be disturbed in the following instances: 1. Whenever a

² An examination of the state reports discloses the fact that no single equitable doctrine more frequently arises before the American courts, or produces a greater number of decisions, than that which adjusts the rights of separate owners of land encumbered with the same mortgage, or adjusts the liens of different mortgages resting upon the same parcel or parcels of land. This doctrine in the form as presented in the text is almost exclusively American; very little aid in its application can be obtained from English decisions. The cases which involve it are often exceedingly complicated in their facts, and present great apparent difficulties. However complicated such cases may be, their solution will always be comparatively easy and certain by keeping steadily in view and applying the few well-settled equitable principles formulated in the text. Any detailed examination of the decided cases involving these principles would occupy more space than my limits permit, since each case presents its own peculiar facts, which are often numerous and complicated. I have preferred to formulate the principles, with such explanation as should render them simple and plain; they will, I trust, furnish the correct solution of every case.

(c) *Stephens v. Clay*, 17 Colo. Eq. 522, 41 Atl. 374 (no circumstances from which an agreement could be implied).
489, 30 Pac. 43, 31 Am. St. Rep. 328; *Jackson v. Condict*, 57 N. J.

grantee of any parcel either expressly assumes the payment of the mortgage, or his deed is of such a form that he takes the parcel conveyed to himself *subject to the mortgage as a part of the consideration*, then, as has already been shown, the parcel thus purchased becomes, in the hands of himself and of those holding under him, primarily chargeable with the mortgage debt as against the mortgagor-grantor, and consequently as against all subsequent grantees of other parcels from the mortgagor. By such an express or implied assumption, the doctrine of liability in the inverse order of alienation, and all of its consequences, are defeated with respect to the mortgagor and the subsequent grantees.^{3a} 2. In like manner, when the deeds to the successive grantees are not warranty or equivalent thereto, but simply purport to convey the mortgagor's right, title, and interest in the parcels, the intention is clear that the grantees respectively assume their portions of the burdens. Their several parcels are all liable ratably, and not in the inverse order.^{4e} 3. Where the conveyances were such

³ See *ante*, § 1205; 2 Lead. Cas. Eq., 4th Am. ed., 303; *Zabriskie v. Salter*, 80 N. Y. 555; *Erie Co. Sav. Bank v. Roop*, 80 N. Y. 591; *Hopkins v. Wolley*, 81 N. Y. 77; *Coles v. Appleby*, 22 Hun. 72; *Sanford v. Hill*, 46 Conn. 42; *Evansville Gas-light Co. v. State*, 73 Ind. 219; 38 Am. Rep. 129; *Kilborn v. Robbins*, 8 Allen, 466, 471; *Chapman v. Beardsley*, 31 Conn. 115; *Engle v. Haines*, 5 N. J. Eq. 186, 632; 43 Am. Dec. 624; *Caruthers v. Hall*, 10 Mich. 40; *Halsey v. Reed*, 9 Paige, 446; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Warren v. Boynton*, 2 Barb. 13; *Hoy v. Bramhall*, 19 N. J. Eq. 563; 97 Am. Dec. 687; *Pancoast v. Duvall*, 26 N. J. Eq. 445; *Mut. L. Ins. Co. v. Boughrum*, 24 N. J. Eq. 44; *Briscoe v. Power*, 47 Ill. 447.

⁴ As examples, where the mortgagor conveys by quitclaim deeds, or where the mortgaged premises are sold in parcels by execution on a judgment recovered for some debt other than the mortgage debt: 2 Lead. Cas. Eq., 4th Am. ed., 304; *Erlinger v. Boul*, 7 Ill. App. 40; *Aiken v. Gale*, 37 N. H. 501; *Carpenter v. Koons*, 20 Pa. St. 222; and see *Sanford v. Hill*, 46 Conn. 42; *Hoy v. Bramhall*, 19 N. J. Eq. 563; 97 Am. Dec. 687.

(d) *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Burger v. Greif*, 55 Md. 518; *Michigan State Ins. Co. v. Soule*, 51 Mich. 312, 16 N. W. 662; *Browne v. Lynde*, 91 N. Y. 92; *Tar-*

bell v. Durant, 61 Vt. 516, 17 Atl. 44.

(e) Quoted in *Aderholt v. Henry*, 87 Ala. 415, 6 South. 625, 6 L. R. A. 451. See, also, *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91.

that the rule of inverse order would otherwise have applied, a grantee of a parcel prior in point of time may, by neglecting to record his deed, lose his precedence as against the subsequent grantees of other parcels, and those holding under them, whose deeds and mortgages are recorded without any notice of his title. The absence of the record in such case may, however, be supplied by other kind of notice, actual or constructive.⁵ 4. Finally, any grantee otherwise entitled to precedence may, by his agreements or dealings with other grantees, render his own parcel primarily liable for the mortgage debt, as between himself and such other grantees; and the liability thus attached to the land would follow it in the hands of subsequent purchasers and encumbrancers.⁶

§ 1226. 4. A Release by the Mortgagee of One or More Parcels.^a—Although the equities between the subsequent owners of various parcels of the mortgaged premises, whether equal or unequal, do not prevent the mortgagee from enforcing the mortgage security, if necessary, against

⁵ If the mortgagor conveys one half to A, and afterwards the other half to B, and A's deed is not recorded, and B has no other notice of it, B has a right to assume that he himself is the first grantee, and that one half of the land remains in the mortgagor's hands primarily liable for the mortgage debt. By putting his own deed on record, B thus obtains a precedence over A, which avails on behalf of purchasers and mortgagees of the same parcel holding under him. B might, however, be charged with notice of A's deed, although unrecorded; and if A were in open, exclusive possession of his parcel, this would generally operate as notice: 2 Lead. Cas. Eq., 4th Am. ed., 297; Layman v. Willard, 7 Ill. App. 183; Brown v. Simons, 44 N. H. 475; Chase v. Woodbury, 6 Cush. 143; Chapman v. West, 17 N. Y. 125; New York Life Ins. Co. v. Cutler, 3 Sand. Ch. 176; La Farge F. Ins. Co. v. Bell, 22 Barb. 54.

⁶ See Zabriskie v. Salter, 80 N. Y. 555; Erie Co. Sav. Bank v. Roop, 80 N. Y. 591; Hopkins v. Wolley, 81 N. Y. 77.

(f) Aderholt v. Henry, 87 Ala. 416, 6 South. 625, 6 L. R. A. 451; Moore v. Shurtleff, 128 Ill. 370, 21 N. E. 775.

(a) This section is cited in Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671; Lynchburg P. B. & L. Co. v. Fellers,

96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851; Cohn v. Souders, 175 Mo. 455, 75 S. W. 413; Bridgewater Roller Mills Co. v. Strough, 98 Va. 721, 37 S. E. 290; Skinner v. Harker, 23 Colo. 333, 48 Pac. 648.

all these parcels, yet after the mortgagee has received notice of the subsequent conveyances, the equities affect him to such an extent that he cannot deal with the whole premises, or with any parcel thereof, or with the owner of any parcel, by release or agreement, so as to disturb the equities subsisting among the various owners, or to destroy their rights of precedence in the order of liability, or to defeat their rights of ratable contribution, or of complete or partial exoneration. No such obligation, however, rests upon the mortgagee, nor is he prevented from dealing with the mortgaged premises in any manner consistent with his general rights as a mortgagee, unless he has received notice of the conveyances to the subsequent owners whose interests could be affected by his dealings; but notice of their conveyances would be a notice of all the equities which arise therefrom. Since his mortgage is a prior lien, and creates an encumbrance alike upon all parts of the land subject to it, no subsequent change in the ownership of the mortgaged premises, of which he is ignorant, can in any degree control or limit his original rights and power conferred by the security. It is settled, therefore, that notice must be given to the mortgagee of any subsequent conveyance of a parcel of the mortgaged premises, so as to prevent him from affecting the equities of the grantee therein by his dealings with other portions of the same premises.^{1b} It is also settled, in this connection, that a record of the subsequent

¹ *Hall v. Edwards*, 43 Mich. 473; *Hawhe v. Snyder*, 86 Ill. 197; *Meacham v. Steele*, 93 Ill. 135; *Warner v. De Witt Co. Bank*, 4 Ill. App. 305; *Kendall v. Niebuhr*, 58 How. Pr. 156; 13 Jones & S. 542; *Birnie v. Main*, 29 Ark. 591; *Cheesebrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; *Guion v. Knapp*, 6 Paige, 35; 29 Am. Dec. 741; *Patty v. Pease*, 8 Paige, 227; 35 Am. Dec. 683; *Aiken v. Gale*, 37 N. H. 501, 511; *Iglehart v. Crane*, 42 Ill. 261; *Deuster v. McCamus*, 14 Wis. 307, 311; *Straight v. Harris*, 14 Wis. 509, 513; *McLean v. Lafayette Bank*, 3 McLean, 587; Fed. Cas. No. 8,888; and cases in next following notes.

(b) *Bridgewater Roller Mills Co. v. Receivers of Baltimore B. & L. Ass'n*, 124 Fed. 718; *Hardy v. Beverly Sav. Bank*, 175 Mass. 112, 55 N. E. 811, 78 Am. St. Rep. 479; *Balen v. Lewis*, 130 Mich. 567, 90 N. W. 416, 97 Am. St. Rep. 499; *Cogswell v. Stout*, 32 N. J. Eq. 240;

conveyance is not a constructive notice to the prior mortgagee, so as to prevent him from dealing in any manner with the mortgaged premises.^{2c} The effect of a partial release by the mortgagee who is charged with notice differs in the two cases where the equities of the various owners are equal and where they are unequal. In the first case, where the mortgaged premises have been conveyed to or are held by various owners, in such manner that their equities are equal, and all their parcels or shares are liable to a ratable contribution, if the mortgagee, having notice of such condition, releases one of the parcels or shares, he thereby discharges a part of the mortgage debt, equal to the ratable portion thereof chargeable upon the lot released, while the balance of the debt alone remains a burden upon the other parcels or shares of the premises. The release of one parcel or share would release all the other parcels from the same proportionate amount of their respective original liabilities which the value of the part released bears to the total value of the mortgaged premises; one owner being released, all the others are entitled to a *pro rata* abatement.^{3d} When the equities of the various owners are unequal, so that their respective parcels are liable in the in-

² This is a special instance of the general rule that a record is notice only to subsequent purchasers and encumbrancers, and does not operate as a notice to prior parties: See *ante*, § 657, and cases cited in note; also *King v. McVickar*, 3 Sand. Ch. 192; *Wheelwright v. De Peyster*, 4 Edw. Ch. 232; *Lyman v. Lyman*, 32 Vt. 79; 76 Am. Dec. 151; *Shannon v. Marselis*, 1 N. J. Eq. 413; *Carter v. Neal*, 24 Ga. 346; 71 Am. Dec. 136; *Ritch v. Eichelberger*, 13 Fla. 169.

³ *Hall v. Edwards*, 43 Mich. 473; *Birnie v. Main*, 29 Ark. 591; *Stevens v. Cooper*, 1 Johns. Ch. 425; 7 Am. Dec. 499; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Johnson v. Rice*, 8 Me. 157; *Parkman v. Welch*, 19 Pick. 231; *Paxton v. Harrier*, 11 Pa. St. 312; *Taylor v. Short's Adm'r*, 27 Iowa, 361; 1 Am. Rep. 280.

Turner v. Flenniken, 164 Pa. St. 469, 30 Atl. 486, 35 Wkly. Notes Cas. 366, 44 Am. St. Rep. 624.

(c) *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; *Snyder v. Crawford*, 98 Pa. St.

414; *Lynchburg P. B. & L. Co. v. Fellers*, 96 Va. 337, 31 S. E. 505, 70 Am. St. Rep. 851.

(d) *Brooks v. Benham*, 70 Conn. 92, 38 Atl. 908, 39 Atl. 1112, 66 Am. St. Rep. 87.

verse order of alienation, if the mortgagee, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases all those parcels which are subsequently liable, *in the order of their several liabilities*, from an amount of the mortgage debt *equal to the value of the parcel released*.^{4e} If the value of the parcel released equals the mortgage debt, then all the subsequent

⁴ Warner v. De Witt Co. Bank, 4 Ill. App. 305; Meacham v. Steele, 93 Ill. 135; Hawhe v. Snyder, 86 Ill. 197; Iglehart v. Crane, 42 Ill. 261; Briscoe v. Power, 47 Ill. 447; Cheesebrough v. Millard, 1 Johns. Ch. 409; 7 Am. Dec. 494; Guion v. Knapp, 6 Paige, 35; 29 Am. Dec. 741; Patty v. Pease, 8 Paige, 277; 35 Am. Dec. 683; Stuyvesant v. Hall, 2 Barb. Ch. 151; Stuyvesant v. Hone, 1 Sand. Ch. 419; Kendall v. Niebuhr, 58 How. Pr. 156; 13 Jones & S. 542; Mickle v. Rambo, 1 N. J. Eq. 501; Shannon v. Marselis, 1 N. J. Eq. 413; Blair v. Ward, 10 N. J. Eq. 119, 126; Reilly v. Mayer, 12 N. J. Eq. 55; Gaskill v. Sine, 13 N. J. Eq. 400; 78 Am. Dec. 105; Vanorden v. Johnson, 14 N. J. Eq. 376; 82 Am. Dec. 254; Hoy v. Bramhall, 19 N. J. Eq. 563; 97 Am. Dec. 687; Mount v. Potts, 23 N. J. Eq. 188; Harrison v. Guerin, 27 N. J. Eq. 219; Paxton v. Harrier, 11 Pa. St. 312; Johnson v. Rice, 8 Me. 157, 161; Brown v. Simons, 44 N. H. 475; Town of Salem v. Edgerly, 33 N. H. 46, 50; Parkman v. Welch, 19 Pick. 231; George v. Wood, 9 Allen, 80; 85 Am. Dec. 741; James v. Brown, 11 Mich. 25; Deuster v. McCamus, 14 Wis. 307; Johnson v. Williams, 4 Minn. 260, 268. This rule may be illustrated by an example: A mortgagor has conveyed all the premises in five lots, successively, to A, B, C, D, and E; these lots are liable to be sold in the order, E, D, C, B, A. If the mortgagee should release A's lot, his right to enforce the mortgage in their order against the others would not be affected. If he should release E, and the value of his lot equaled the mortgage debt, the whole mortgage would be discharged. If the value of E's lot was less than the mortgage debt, the mortgagee could then resort to D's lot for the excess only, and if its proceeds equaled that excess, all the remaining lots would be free; if there was a balance still due after the sale of D's lot, C's could be sold *for that balance*, and so on. If the mortgagee should first release C's lot, the situation would be more complicated. The mortgagee could still enforce the whole mortgage against E's lot first, and then for any excess against D's. If a balance was still due after the sale of these two lots, B's would not be liable for all of that balance. The *value* of C's lot which was released must be added to the proceeds of E's and D's, and this sum subtracted from the gross mortgage debt, and if any excess remained, B's lot, and finally A's, would be liable only for that excess; if there was no excess, B's and A's lots would be free. It should

(e) Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Libby v. Tufts, 121 N. Y. 172, 24 N. E. 12; Martin's Appeal, 97 Pa. St. 85; Schrack v. Shriner, 100 Pa. St. 451;

Turner v. Flenniken, 164 Pa. St. 469, 30 Atl. 486, 35 Wkly. Notes Cas. 366, 44 Am. St. Rep. 624; Burson v. Blackley, 67 Tex. 5, 2 S. W. 668.

parcels are wholly relieved from liability; if the value is less than the mortgage debt, the subsequent parcels can, at most, be liable, in their order, only for the excess of the debt over such value. In any case, this effect of a release may be obviated by the consent of the other owners, and perhaps by special equities arising from the provisions of the mortgage, to which all of their parcels are subject.

§ 1227. V. Foreclosure.—The only equitable remedies of the mortgagee for enforcing the lien of the mortgage when it has become due are the two actions to both of which the name “foreclosure” is ordinarily given.¹ These two actions are the “strict foreclosure” and “foreclosure by judicial sale.” The strict foreclosure is a remedy based upon the original conception that the mortgage vests the mortgagee with the legal estate in the mortgaged premises, and its object is to carry out that conception by rendering the mortgagee’s legal estate and title absolute, and cutting off the equity of redemption held by the mortgagor and others claiming or holding under him. It is the common form of remedy in England. In this country it is confined as an ordinary remedy to states which have adopted the first or legal theory of mortgages as heretofore described; and even in many of the states belonging to this class the foreclosure by judicial sale seems to be the form of remedy most frequently used. The strict foreclosure is inconsistent with the theory which regards the mortgage as creat-

be observed that a release does not always thus operate as a discharge; it is not a technical discharge; it is a discharge only where, on principles of equity and justice, it ought to produce that effect:^f See *Kendall v. Woodruff*, 87 N. Y. 1, 7, per Folger, C. J.; *Patty v. Pease*, 8 Paige, 277; 35 Am. Dec. 683. The statute of limitations as applied to the right of redemption is discussed in a very exhaustive manner in 2 *Jones on Mortgages*, secs. 1144–1173; and in 2 *Lead. Cas. Eq.*, 4th Am. ed., 1969–1977, 2006, notes to *Thornbrough v. Baker*.

¹ The subject of foreclosure is so extensive, and involves so many matters of detail, and is so much regulated by statute in many states, that I shall not attempt here to enter upon its discussion. The reader is referred to treatises upon mortgages, and especially to Mr. Jones’s work (vol. 2, c. 25–38).

(f) See *Libby v. Tufts*, 121 N. Y. 172, 24 N. E. 12.

ing only an equitable lien, and as conveying no legal estate. In some of the states which have adopted this system, it is expressly prohibited by statute; in others, it has become practically obsolete, or is resorted to only under special circumstances, where the foreclosure by sale would be insufficient or impracticable.² The strict foreclosure assumes that the mortgagee is already in possession by virtue of his legal title. The decree ascertains and fixes the amount of the debt due and payable, after an accounting, if necessary; prescribes a period — say six months — within which redemption must be made by payment of this sum; and declares that upon default of payment within the specified period, the legal estate and title of the plaintiff shall be absolute, and the equity of redemption of the mortgagor and of all other persons claiming under him, subsequent to the mortgage, who were made defendants in the suit, shall be forever barred, cut off, and foreclosed. By operation of this decree, the mortgagee's legal title to the land, acquired by the mortgage as a conveyance, is finally confirmed and established, free from all equities of redemption.^a

§ 1228. Foreclosure by Judicial Sale.—This form of remedy, which is by far the most common in our own country, is based upon the notion that the mortgage simply creates an equitable lien upon the premises, as a security for the mortgage debt, and its object is to enforce that lien by a

² For example, where a mortgage is in the form of an absolute deed of conveyance, and the grantee-mortgagee is in possession, a strict foreclosure may be appropriate for the purpose of making his title absolute; although even in this case the foreclosure by sale is frequently adopted. The strict foreclosure is also proper in case of a land contract, in order to cut off the vendee's equitable right. Also, where the land had been actually sold under a decree rendered in a suit for a foreclosure by sale, and some subsequent encumbrancer or other person interested in the premises was not made a party defendant to that suit, so that his rights of redemption are not cut off by the sale, the purchaser may maintain an action in the nature of a strict foreclosure against such person, for the purpose of cutting off his rights, unless he comes in and redeems within a prescribed time.

(a) This paragraph is cited in *Jefferson v. Coleman*, 110 Ind. 515, 11 N. E. 465; *Crouch v. Dakota*, W. &

M. R. R. Co., (S. Dak.) 101 N. W. 722.

sale of the premises, in order that the proceeds may be applied in satisfaction of the debt. The decree ascertains the amount due, and orders that the mortgaged premises be sold at public auction by judicial sale, and the proceeds be applied in payment of the amount thus ascertained, after satisfying the expenses of the sale itself. In many of the states, preparatory to the decree, the court orders an inquiry to be made into the present situation and ownership of the premises, so that the equities of the owners may be provided for, and as far as possible secured by the terms of the decree. If the land has been conveyed in successive parcels to different owners, the decree may order that the premises be sold in such parcels in the inverse order of their alienation; even when there are no such equities among the different owners of the premises, the court may order the premises sold in parcels, and not in one gross amount, if that method will best protect the interests of the owner as well as the security of the plaintiff. When the sale is consummated, a deed is given by the sheriff, master, or other officer who conducts the sale to the purchaser, who may be the mortgagee himself, or other holder of the mortgage; and such purchaser is therefore entitled to possession, and will be put into possession, if necessary, by process of the court. The effect of this deed, when given in pursuance of a valid decree and sale, is to convey to the purchaser whatever title the mortgagor had at the time of executing the mortgage, and whatever title he may subsequently have acquired down to the time of the foreclosure. But the sale does not affect the right of any one holding by or claiming under a title paramount to that of the mortgagor. In the states where no statutory right of redemption after a sale is given, the sale under a valid decree immediately cuts off, bars, and forecloses the rights of the mortgagor, and of all subsequent grantees, owners, encumbrancers, and other persons interested, who were made parties defendant, and of all grantees, owners, and encumbrancers subsequent to the filing of a notice of *lis pendens*, although not made defend-

ants.^a Where the proceeds of the premises sold, after paying the expenses, are not sufficient to fully satisfy the amount of the debt as fixed by the decree, the deficiency, of course, remains a personal debt owing and payable by the mortgagor and by his grantee who has assumed payment of the mortgage debt, and has thus made himself personally liable therefor. When such deficiency is officially certified by the report of the officer conducting the sale, upon confirmation of the report the plaintiff is allowed, generally by statutory authority, to enter and docket a personal judgment for the amount of the deficiency, without further suit, against the mortgagor and other persons who are personally liable for the mortgage debt, and who were made defendants in the suit. This judgment, like every other legal money judgment, is enforceable by execution against the general property of the judgment debtors. On the other hand, after defraying the expense of the sale and satisfying the decree, there may be a surplus of the proceeds remaining, as shown by the report of the officer conducting the sale. If the mortgagor remains sole owner of the premises, and there were no other persons interested therein, nor encumbrances thereon, this surplus would clearly belong to him. If there were subsequent encumbrances, or subsequent grantees, or owners, or persons interested in the premises, they would or *might* be entitled to the surplus in the order of their respective liens or interests. Upon the report, therefore, showing such a surplus remaining, the court directs a reference to ascertain the situation of the premises, the persons interested therein or having liens thereon, the order of their claims or liens, and to determine who are entitled to the surplus, and the several shares therein. Upon the confirmation of the referee's report, the court will make an order directing the surplus to be paid or distributed in accordance with its conclusions.

(a) Quoted in *Simmons v. Burlington, C. R. & N. Ry. Co.*, 159 U. S. 278, 16 Sup. Ct. 1, 40 L. ed. 150;

Julian v. Central Trust Co., 53 C. C. A. 438, 115 Fed. 956.

CHAPTER SIXTH.

MORTGAGES OF PERSONAL PROPERTY AND
PLEDGES.

ANALYSIS.

- § 1229. General nature of, at law.
- § 1230. Jurisdiction and remedies in equity.
- § 1231. Pledges: Equitable jurisdiction and remedies.
- § 1232. Chattel mortgages in California.

§ 1229. General Nature of, at Law.—In most of the states, as well as in England, a personal or chattel mortgage is, at law, a conditional sale of the things mortgaged, passing the legal title to the mortgagee, which becomes absolute on the mortgagor's failure to perform the condition. As between the parties, a delivery of the possession to the mortgagee is not essential, although the absence of such delivery may raise a presumption that the transaction was a fraud upon the rights of the mortgagor's creditors, and may thus endanger the validity of the mortgagee's title as against their claims. A pledge, on the other hand, is a delivery of the thing into the actual or constructive possession of the creditor, to be retained by him until the debt is paid. The pledgee acquires only a special property, which is not enlarged by the mere fact that the pledgor fails to pay the debt at the time specified; whereas by such a failure the legal estate of the mortgagee becomes *ipso facto* complete and absolute.¹ Upon a breach of the condition contained in

¹ As to the nature of a chattel mortgage, and especially its differences from a pledge, see *Jones v. Smith*, 2 Ves. 372, 378; *Ryall v. Rolle*, 1 Atk. 165, 166, 167; *Cortelyou v. Lansing*, 2 Caines Cas. 200, 210, 213; *Barrow v. Paxton*, 5 Johns. 258; 4 Am. Dec. 354; *Strong v. Tompkins*, 8 Johns. 98; *McLean v. Walker*, 10 Johns. 471; *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Haskins v. Kelly*, 1 Rob. (N. Y.) 160; *Parshall v. Eggart*, 52 Barb. 367; *Winchester v. Ball*, 54 Me. 558; *Walcott v. Keith*, 22 N. H. 196; *Whittle v. Skinner*, 23 Vt. 531; *Wright v. Ross*, 36 Cal. 414; *Heyland v. Badger*, 35 Cal.

the mortgage, the legal title vests so completely in the mortgagee that all the rights incident to ownership and possession in law at once arise.² By taking possession of the property and selling it at public sale upon due notice, he will then extinguish every right and interest at law of the mortgagor.³

§ 1230. Jurisdiction and Remedies in Equity.—While the legal title of the mortgagee is thus made absolute by a failure to perform the condition, the doctrine is well settled that the mortgagor retains an equity of redemption notwithstanding his default, which he may enforce by an equitable suit to redeem, even though the mortgagee has taken possession of the chattels, at any reasonable time before his right has been cut off by a valid public sale of the property; and even after such sale, if there has been any element of inequitable conduct, or bad faith or fraud on the mortgagee's part, the mortgagor may maintain an equitable action for an accounting against the mortgagee, and hold him responsible for the real value of the property, or what

404; *Dewey v. Bowman*, 8 Cal. 145; *Waldie v. Doll*, 29 Cal. 555; *Goldstein v. Hort*, 30 Cal. 372; *Gay v. Moss*, 34 Cal. 125; *Ponce v. McElvy*, 47 Cal. 154; *Meyerstein v. Barber*, L. R. 2 Com. P. 38, 51; L. R. 4 H. L. 317.^a

² *Burdick v. McVanner*, 2 Denio, 170; *Case v. Boughton*, 11 Wend. 106; 109; *Langdon v. Buel*, 9 Wend. 80; *Patchin v. Pierce*, 12 Wend. 61; *Fuller v. Acker*, 1 Hill, 473.^b The chattels may be taken upon execution against him: *Ferguson v. Lee*, 9 Wend. 258; *Porter v. Parmly*, 43 How. Pr. 445.

³ *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100, 101; *Cortelyou v. Lansing*, 2 Caines Cas. 200, 210, 213; *Dane v. Mallory*, 16 Barb. 46; *Parker v. Brancker*, 22 Pick. 40, 46; *Doane v. Russell*, 3 Gray, 382, 384; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Bryant v. Carson River L. Co.*, 3 Nev. 313; 93 Am. Dec. 403. See *Davenport v. McChesney*, 86 N. Y. 242.^c

(a) See, also, as to the general nature of a chattel mortgage, *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. 334; *Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co.*, 119 Wis. 54, 94 N. W. 777; what agreements constitute chattel mortgages: *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, 33 N. W. 117.

(b) As to mortgagee's right to possession, see *Cline v. Libby*, (Wis.) 49 N. W. 832.

(c) It is held that if no time is fixed for payment, the implied power of sale may be exercised on the expiration of a reasonable time fixed by notice by the mortgagee: *Deverges v. Sandeman, Clark & Co.*, [1902] 1 Ch. 579.

might have been obtained for it by a fair and reasonable sale.¹ On the other hand, although a foreclosure in equity is not necessary, yet equity has undoubted jurisdiction to entertain a suit on behalf of the mortgagee, and to decree a foreclosure by a judicial sale of the mortgaged chattels, as in the case of a mortgage of land.^{2b}

§ 1231. Pledges.—A like equitable jurisdiction exists in cases of pledges. As a general rule, the pledgor may un-

¹ *Kemp v. Westbrook*, 1 Ves. Sr. 278; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100, 101; *Stoddard v. Denison*, 7 Abb. Pr., N. S., 309; *Flanders v. Chamberlain*, 24 Mich. 305; *Heyland v. Badger*, 35 Cal. 404; *Blodgett v. Blodgett*, 48 Vt. 32; *Landers v. George*, 49 Ind. 309; *Halstead v. Swartz*, 1 Thomp. & C. 559; *Pulver v. Richardson*, 3 Thomp. & C. 436; *Porter v. Parmly*, 43 How. Pr. 445. See *Davenport v. McChesney*, 86 N. Y. 242.^a After the mortgagee has taken possession upon a default, a tender of the amount due by the mortgagor will not revest the title in himself; his only remedy is by an equity suit to redeem: *Blodgett v. Blodgett*; *Halstead v. Swartz*. When the chattels are sold at public sale on default, and purchased by the mortgagee himself, the mortgagor's equitable remedy of redemption still exists: *Pulver v. Richardson*. Cases of accounting and personal judgment against the mortgagees when his sale or conversion of the chattels has rendered their redemption impossible: *Blodgett v. Blodgett*; *Flanders v. Chamberlain*. Where the mortgage expressly provides that the mortgagee may take possession and sell the chattels whenever he may deem himself insecure, a court of equity will not interfere on behalf of the mortgagor to restrain the mortgagee from exercising such option: *Cline v. Libby*, 46 Wis. 123; 32 Am. Rep. 700, 49 N. W. 832.

² Under some circumstances, this remedy is not only preferable, but the only practicable one; as, for example, in mortgages of things in action, of railroad rolling stock, etc.: *Dyson v. Morris*, 1 Hare, 413, 422, per Wigram, V. C.; *Kemp v. Westbrook*, 1 Ves. Sr. 278; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100; *Lansing v. Goelet*, 9 Cow. 372, per Jones, C.; *Charter v. Stevens*, 3 Denio, 33; 45 Am. Dec. 444; *Huntington v. Mather*, 2 Barb. 538; *Mattison v. Baucus*, 1 N. Y. 295; *Briggs v. Oliver*, 68 N. Y. 336; *Porter v. Parmly*, 43 How. Pr. 445; *Stoddard v. Denison*, 7 Abb. Pr., N. S., 309; *Gregory v. Cable*, 26 N. J. Eq. 178; *Marx v. Davis*, 56 Miss. 745; 55 Miss. 376. See *Putnam v. Reynolds*, 44 Mich. 113; *Wyllder v. Crane*, 53 Ill. 490.

(^a) See, also, *Boyd v. Beaudin*, 54 Wis. 193, 11 N. W. 521.

(b) This paragraph of the text is cited in *McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357 (injunction to protect mortgagee's interest). See, also, *Brown v. Russell*, 105 Ind. 46, 4 N. E. 428 (the suit is of equitable

cognizance); *Clark v. Baker*, 6 Mont. 153, 9 Pac. 911; *Davis v. Childers*, 45 S. C. 133, 55 Am. St. Rep. 757, 22 S. E. 784 (when the legal title has not passed, the mortgage can be enforced only in equity).

doubtedly obtain complete relief at law by a tender and by an action to recover the chattel or its value; but under special circumstances, as where an accounting or a discovery is needed, or where the pledge has been assigned, the pledgor may certainly maintain an equitable suit for a redemption.^{1 a} The modern decisions have generally settled the rule that, in ordinary pledges of chattels, the pledgee may enforce his security and cut off the pledgor's right of redemption without any action, by means of a public sale of the pledged article, after a demand of payment made upon and notice of the sale given to the pledgor. The equitable jurisdiction, however, still exists, and the pledgee may enforce his security by a suit in equity for a foreclosure and judicial sale; and this mode by suit in equity must be resorted to when the pledged articles are negotiable instruments, or other things in action having no market price or value, and also, whenever, in case of any kind of article pledged, it is impossible to make demand of or give notice to the pledgor as necessary preliminaries to a foreclosure by sale.^{2 b}

¹ Jones v. Smith, 2 Ves. 372; Bartlett v. Johnson, 9 Allen, 530; Merrill v. Houghton, 51 N. H. 61; White Mts. R. R. v. Bay State Iron Co., 50 N. H. 57; Hasbrouck v. Vandervoort, 4 Sand. 74; Conyngham's Appeal, 57 Pa. St. 474; and see Brown v. Runals, 14 Wis. 693.

² In some of the states a foreclosure by suit in equity seems to be the ordinary remedy in all cases: Ex parte Mountfort, 14 Ves. 606; Carter v. Wake, L. R. 4 Ch. Div. 605; Boynton v. Payrow, 67 Me. 587; Freeman v. Freeman, 17 N. J. Eq. 44; Dupuy v. Gibson, 36 Ill. 197; Donohoe v. Gamble, 38 Cal. 340; 99 Am. Dec. 399; Strong v. Nat. Mech. Bkg. Ass'n, 45 N. Y. 718; Booth v. Eighmie, 60 N. Y. 238; 19 Am. Rep. 171; Stearns v. Marsh, 4 Denio, 227; 47 Am. Dec. 248; Diller v. Brubaker, 52 Pa. St. 498, 502; 91 Am. Dec. 177; Worthington v. Tormey, 34 Md. 182. If personal notice cannot be given to the pledgor, or if the articles are things in action,—except government bonds, and

(a) See, also, Nelson v. Owen, 113 Ala. 372, 21 South. 75; Colburn v. Riley, 11 Colo. App. 184, 52 Pac. 684. The necessity for an accounting, urged as ground for redemption in equity, must be a real necessity: De Bevoise v. H. & W. Co., (N. J. Eq.) 58 Atl. 91.

(b) The text is cited in Knapp, Stout & Co. v. McCaffrey, 178 Ill. 107, 69 Am. St. Rep. 290, 52 N. E. 898; Cleghorn v. Minnesota T. I. & T. Co., 57 Minn. 341, 47 Am. St. Rep. 615, 59 N. W. 320. See, also, 32 Am. St. Rep. 729, note; Wilson v. Johnson, 74 Wis. 337, 43 N. W. 148.

§ 1232. **Chattel Mortgage in California.**— By the Civil Code of California, and of the other states and territories which have adopted the same type of legislation, the common-law view of the chattel mortgage as a conditional *sale* has been wholly abandoned; the mortgage itself has been assimilated to the mortgage of lands as creating only a lien, the legal ownership and all its incidents, including the right of possession, being left in the mortgagor until the lien is enforced and his interest is extinguished either by an equitable suit for foreclosure or by a public sale. The personal mortgage, however, is only permitted to be given upon certain kinds and classes of chattels specified in the statute.¹

stocks, etc., which have a regular market value, and can therefore be sold for their real value at an auction,—the pledgee must resort to equity: *Stearns v. Marsh*, *supra*; *Wheeler v. Newbould*, 16 N. Y. 392 (negotiable paper); *Gay v. Moss*, 34 Cal. 125; *Donohoe v. Gamble*, 38 Cal. 340; 99 Am. Dec. 399; Cal. Civ. Code, secs. 3006, 3011.

¹ The same definition and the same description of its incidents and of the rights of the two parties apply alike to the mortgage of chattels and to that of land. The form of the chattel mortgage given in the code excludes all notion of a *sale*, and plainly indicates nothing but a lien. The following is the form: "This mortgage, made etc., by etc., witnesseth that the mortgagor mortgages to the mortgagee (description of the property) as security for the payment to him of (statement of the amount, time, and terms)." Possession by the mortgagee is not required; the notion that possession by the mortgagor raises any presumption of an intent to defraud his creditors or subsequent purchaser is wholly rejected; in place thereof, the code provides that the mortgage shall be void as against such creditors and purchasers, unless it is accompanied by an affidavit of all the parties that it is made in good faith and without intent to defraud them, and unless it is properly acknowledged and recorded. The code specifies the kinds of chattels upon which a mortgage may be given, and a mortgage upon other species of personal property would be nugatory: See Cal. Civ. Code, secs. 2920, 2923, 2927, 2931, 2936, 2956, 2957, 2967–2970, 3000–3002.

CHAPTER SEVENTH.

EQUITABLE LIENS.

SECTION I.

THEIR GENERAL NATURE.

ANALYSIS.

§ 1233. What are included in this term; what is an equitable lien.

§ 1234. Origin and *rationale* of the doctrine.

§ 1233. What are Included in This Term—What is an Equitable Lien.—Analogous to mortgages considered from the purely equitable point of view are the important class of interests embraced under the denomination of “equitable liens”; and I include within this general term those interests which are not regarded by the American jurisprudence as true mortgages, but which are commonly called by English writers and judges “equitable mortgages.”¹ An equitable lien is not an estate or property in the thing

¹ The most important species of “equitable mortgages,” according to the English theory, are, in all the states of this country, *legal* mortgages. In England certain mortgages are called “equitable,” because no legal estate is transferred by them to the mortgagee; for example, every mortgage of the equity of redemption,—that is, every second or other subsequent mortgage is “equitable,” since the legal estate has already been conveyed by the first mortgage. In this country no such distinction is recognized. In the states adopting the legal system,—the first class heretofore described,—*every* successive mortgage conveys a legal estate to the mortgagee; while in the states of the second class every mortgage simply creates a lien. In England the deposit of title deeds as security is called an “equitable mortgage.” It is better to include all cases of such liens which are not proper mortgages within the general class of “equitable liens”; this division is both simple and natural.

(a) The text, §§ 1233–1237, is cited in Wood v. Holly Mfg. Co., 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56. This section is cited in Hovey v. Elliott, 118 N. Y. 124, 136, 23 N. E. 475.

itself, nor a right to recover the thing,—that is, a right which may be the basis of a possessory action; it is neither a *jus ad rem* nor a *jus in re*.² It is simply a right of a special nature *over* the thing, which constitutes a charge or encumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists.³ It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the encumbrance.⁴ The equitable lien differs essentially from the common-law lien, which is simply a right to retain possession of the chattel until some debt or demand due to the person thus retaining is satisfied; and possession is such an inseparable element, that if it be voluntarily surrendered by the creditor, the lien is at once extinguished.⁵

² See *Peck v. Jenness*, 7 How. 612, 620, 12 L. ed. 841, per Grier, J.

³ The equitable lien is strictly analogous to, and is undoubtedly derived from, the *hypotheca* of the Roman law. *Hypotheca* was the right given to a creditor over a thing belonging to another, in order to secure the payment of a debt, while the property and possession remained in the debtor. It was thus distinguished from *pignus*, in which the possession was delivered to the creditor, and he thus acquired a special property. *Hypotheca* was generally created by agreement, express or implied, between the parties; but in some cases it was created by operation of law, and then called *hypotheca tacita*, as over the property of a tutor in favor of his ward, and in favor of a wife over her dowry in the hands of the husband: See Sandars's Institutes of Justinian, 205, 206.

⁴ *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Ex parte Knott*, 11 Ves. 609, 617.

⁵ *Heywood v. Waring*, 4 Camp. 291, 295, per Lord Ellenborough; *Hammonds v. Barclay*, 2 East, 227, 235; *Ex parte Heywood*, 2 Rose, 355, 357. In some instances of the common-law lien the creditor acquires no right but that of simple detention,—e. g., the lien of an attorney on the papers of his client. In most, however, he may have a remedy against the thing itself, and in some cases equity will aid the creditor by its more efficient remedy of foreclosure by judicial sale:^b See *Oxenham v. Esdaile*, 2 Younge & J. 493; *Gladstone v. Birley*, 2 Mer. 401, 404.

(b) *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921; *Knapp, Stout & Co. v. McCaffrey*, 178 Ill. 107, 52 N. E.

§ 1234. *Origin and Rationale of the Doctrine.*—The doctrine of equitable liens is one of great importance and of wide application in administering the rights and remedies peculiar to equity jurisprudence. There is perhaps no doctrine which more strikingly shows the difference between the legal and the equitable conceptions of the juridical results which flow from the dealings of men with each other, from their express or implied undertakings.^a A brief explanation of the foundation and reasons upon which this branch of the equity jurisprudence rests is essential to a full understanding of the subject. It is sometimes, although I think unnecessarily and even incorrectly, spoken of as a species of implied trusts.¹ If any reference to the theory of trust is made, it is more accurate to describe these liens as *analogous to trusts*; for while the two have some similar features, they are unlike in their essential elements. The common-law remedies upon all contracts except those which transfer a legal estate or property, such as conveyances of land and sales or bailments of chattels ("real" contracts, *contractus reales*), are always mere recoveries of money; the judgments are wholly pecuniary and personal, enforced in ancient times against the person of the

¹ Incorrectly, in my opinion, because the very essence of every real trust, express, resulting, or constructive, is the existence of two *estates* in the same thing,—a legal estate vested in the trustee, and an equitable estate held by the beneficiary. In an equitable lien there is a legal estate with possession in one person, and a special right *over* the thing held by another; but here the resemblance, which at most is external, ends. This special right is not an *estate* of any kind; it does not entitle the holder to a conveyance of the thing nor to its use; it is merely a right to secure the performance of some outstanding obligation, by means of a proceeding directed against the thing which is subject to the lien. To call this a trust, and the owner of the thing a trustee for the lien-holder, is a misapplication of terms which have a very distinct and certain meaning.

898, 69 Am. St. Rep. 290 (bailee's lien); *Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 941 (suit to foreclose a lien created by pledge); *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389 (foreclosure of mechanics' lien). But see *Aldine Mfg.*

Co. v. Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380; *Burrough v. Ely*, (W. Va.) 46 S. E. 371.

(a) This sentence is quoted in *Society of Shakers v. Watson*, 68 Fed. 730, 37 U. S. App. 141, 15 C. C. A. 632.

judgment debtor by imprisonment, and in modern times against his property by means of an execution. This species of remedy is seldom granted by equity, and is opposed to its general theory. The remedies of equity are, as a class, specific. Although it is commonly said of them that they are not *in rem*, because they do not operate by the inherent force of the decree in an equitable suit to change or to transfer the title or estate in controversy, yet these remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing, — a tract of land, personal property, or a fund, — rather than a right to recover a sum of money generally out of the defendant's assets. Remedies in equity, as well as at law, require some primary right or interest of the plaintiff which shall be maintained, enforced, or redressed thereby. When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies cannot be carried out, unless the notion is admitted that the contract creates some right or interest in or over specific property, which the decree of the court can lay hold of, and by means of which the equitable relief can be made efficient. The doctrine of "equitable liens" supplies this necessary element; and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express and implied, which the law regards as creating no property right, nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals, which it calls a "lien," and which, though not property, is analogous to property,^b and by means of which the plaintiff is enabled to follow

(b) Quoted by Bradley, J., in *Hovey v. Elliott*, 118 N. Y. 124, 139, 23 N. E. 475.

the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or securities, a certain fund, and the like.^c It is necessary to divest one's self of the purely legal notion concerning the effect of such contracts, and to recognize the fact that equity regards them as creating a charge upon or hypothecation of the specific thing, by means of which the personal obligation arising from the agreement may be more effectively enforced than by a mere pecuniary recovery at law.

SECTION II.

ARISING FROM EXPRESS CONTRACT.

ANALYSIS.

- § 1235. The general doctrine; requisites of the contract.
- § 1236. On property to be acquired in future.
- § 1237. The form and nature of the agreement; illustrations of particular agreements; agreements to give a mortgage; defective mortgages; assignments; bills of exchange, etc.

§ 1235. **The General Doctrine — Requisites of the Contract.** — The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encum-

(c) The text is quoted in *Williams v. Vanderbilt*, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476.

brancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property.¹ The ultimate grounds and motives of this doc-

¹ Ex parte Wills, 1 Ves. 162; 2 Cox, 233; Brown v. Heathcote, 1 Atk. 160, 162; Russel v. Russel, 1 Brown Ch. 269; Card v. Jaffray, 2 Schoales & L. 374, 379; Berrington v. Evans, 3 Younge & C. 384, 392; Collyer v. Fallon, Turn. & R. 459, 475, 476; Countess of Mornington v. Keane, 2 De Gex & J. 292, 313; Gibson v. May, 4 De Gex, M. & G. 512; Meyers v. United etc. Co., 7 De Gex, M. & G. 112; Twynam v. Hudson, 4 De Gex, F. & J. 462; Hastie v. Hastie, L. R. 2 Ch. Div. 304; Husted v. Ingraham, 75 N. Y. 251, 257; Hale v. Omaha Nat. Bank, 49 N. Y. 626; 64 N. Y. 550; Payne v. Wilson, 74 N. Y. 348; Chase v. Peck, 21 N. Y. 581; Stevens v. Watson, 4 Abb. App. 302; Lanning v. Tompkins, 45 Barb. 308, 316; Williams v. Ingersoll, 23 Hun, 284; Burdick v. Jackson, 7 Hun, 488; Arnold v. Morris, 7 Daly, 498; In re Howe, 1 Paige, 125; 19 Am. Dec. 395; Mitchell v. Winslow, 2 Story, 630; Bank of Washington v. Nock, 9 Wall. 373; Skiddy v. Atlantic etc. R. R., 3 Hughes, 320; Pinch v. Anthony, 8 Allen, 536; Gilson v. Gilson, 2 Allen, 115; Bank of Muskingum v. Carpenter's Adm'rs, 7 Ohio, 21; 28 Am. Dec. 616; Cotterell v. Long, 20 Ohio, 464; Monticello Hydraulic Co. v. Loughry, 72 Ind. 562; Boorman v. Wisconsin etc. Co., 36 Wis. 207; Delaire v. Keenan, 3 Desaus. Eq. 74; 4 Am. Dec. 604; Kirksey v. Means, 42 Ala. 426; Morrow v. Turney's Adm'r, 35 Ala. 131; Petrie v. Wright, 6 Smedes & M. 647; Adams v. Johnson, 41 Miss. 258; Daggett v. Rankin, 31 Cal. 321; Love v. Sierra Nevada Co., 32 Cal. 639, 652; 91 Am. Dec. 602; and other cases in the subsequent notes.^a An equitable lien passes to the assignee of the debt, although not named in the

(a) See, also, Hauselt v. Harrison, 105 U. S. 401; 26 L. ed. 1075; Gest v. Packwood, 39 Fed. 525; Smith v. Hiles-Carver Co., 107 Ala. 272, 18 South. 37; Fresno C. & I. Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112 (lien of irrigation company for water furnished under contract); Fresno C. & I. Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275; Higgins v. Higgins, 121 Cal. 487, 53 Pac. 1081, 66 Am. St. Rep. 57 (lien on husband's property resulting from separation agreement); Margarum v. J. S. Christie Orange Co., 37 Fla. 165, 19 South. 637; Gage v. Cameron, (Ill.) 72 N. E. 204; Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee, 25 Ky. Law Rep. 1570, 78 S. W. 413 (lien on personal property for advances made); Bradley v. Merrill, 88 Me.

319, 34 Atl. 160; Sibley v. Ross, 88 Mich. 315, 50 N. W. 379; Whitney v. Foster, 117 Mich. 643, 76 N. W. 114; Piper v. Sawyer, 73 Minn. 332, 76 N. W. 57; Hyde v. Hartford Fire Ins. Co., (Nebr.) 97 N. W. 629 (lien on proceeds of fire insurance policy taken by mortgagor under terms of mortgage); Cummings v. Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Hovey v. Elliott, 118 N. Y. 124, 26 N. E. 475 (lien on personal property); Smith v. Smith, 125 N. Y. 224, 26 N. E. 259; Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; Armstrong v. Burkitt, (Tex. Civ. App.) 34 S. W. 759; Cole v. Smith, 24 W. Va. 287 (lien expressly reserved of vendor of real and personal property for a gross sum for both); Feely v. Bryan, (W. Va.) 47 S. E. 307. That the express agreement

trine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done.^{2 b} In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation.^{3 c}

instrument of assignment: *Payne v. Wilson*, 74 N. Y. 348; and such a specific lien on land is preferred to a subsequent legal lien by judgment: *Stevens v. Watson*, 4 Abb. App. 302.

² *Daggett v. Rankin*, 31 Cal. 321, 326, per Currey, C. J.; see the admirable statement of this truth in the passage quoted *ante*, in note under § 373.

³ *Countess of Mornington v. Keane*, 2 De Gex & J. 292; *Fremoult v. Dedire*, 1 P. Wms. 429; *Williams v. Lucas*, 2 Cox, 160; *Ravenshaw v. Hollier*, 7 Sim. 3; *Wellesley v. Wellesley*, 4 Mylne & C. 561; *Adams v. Johnson*, 41 Miss. 258; *Pinch v. Anthony*, 8 Allen, 536. Thus an agreement to give security by mortgage on lands, when called upon to do so, does not constitute an equitable lien upon any land which the covenantor owned: *Williams v. Lucas*, 2 Cox,

creating a lien on land must be in writing, see *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580.

(b) This portion of the text is quoted in *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. ed. 865; *Walker v. Brown*, 63 Fed. 204, 11 C. C. A. 135, 27 U. S. App. 291 (affirming 58 Fed. 23); *Howard v. Delgado*, 121 Fed. 26, 57 C. C. A. 270; *Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. 755; *Farmers' L. & T. Co. v. Pennsylvania Plate Glass Co.*, 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710; *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266. This section is cited in *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. ed. 853; *Gest v. Packwood*, 39 Fed. 525; *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 103 Fed. 132, 151, 43 C. A. 114 (lien of mortgagee upon

proceeds of fire insurance policy taken out by mortgagor must be based on express contract); *Columbus, S. & H. R. Co. Appeals*, 109 Fed. 177, 196, 48 C. C. A. 275; *Higgins v. Manson*, 126 Cal. 467, 59 Pac. 907, 77 Am. St. Rep. 192; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Bank v. Johnson*, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; *Howard v. Iron & Land Co.*, 62 Minn. 298, 64 N. W. 896; *Smith v. Smith*, 125 N. Y. 224, 26 N. E. 259; *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875.

(c) This portion of the text is quoted in *Lee v. Cole*, 17 Oreg. 559, 21 Pac. 819. See, also, *Lighthouse v. Third Nat. Bank*, 162 N. Y. 336, 56 N. E. 738; *Jones v. Kennedy*, (Miss.) 35 South. 465 (intent is to be determined from evidence *aliunde* the writing).

§ 1236. *On Property to be Acquired in Future.*—The doctrine is carried still further, and applied to property not yet in being at the time when the contract is made. It is well settled that an agreement to charge, or to assign, or to give security upon, or to affect property not yet in existence, or in the ownership of the party making the contract, or property to be acquired by him in the future, although, with the exception of one particular species of things, it creates no legal estate or interest in the things when they afterwards come into existence or are acquired by the promisor,^{1 a} does constitute an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract.^{2 b}

160; nor an agreement to give a mortgage on *sufficient* lands: *Adams v. Johnson*, 41 Miss. 258; nor a general covenant to give security on or before a specified day on *lands* or on the covenantor's lands: *Countess of Mornington v. Keane*, 2 De Gex & J. 292; and see *ante*, § 583; but a covenant that all the land which the covenantor shall have on a certain day shall be charged or be security will create a lien, since the description enables the particular land to be identified: *Countess of Mornington v. Keane*, 2 De Gex & J. 292, 313; and see *Roundell v. Breary*, 2 Vern. 482; *Pinch v. Anthony*, 8 Allen, 536, 539; as further example of no lien, see *Person v. Oberteuffer*, 59 How. Pr. 339; *Chamberlin v. Peltz*, 1 Mo. App. 183; *Bank of Washington v. Nock*, 9 Wall. 373; 19 L. ed. 717; *Goembel v. Arnett*, 100 Ill. 34; *Cook v. Black*, 54 Iowa, 693; 7 N. W. 121.^a

¹ *Otis v. Sill*, 8 Barb. 102, and cases cited. The excepted case is that of an agreement to sell chattels not yet in existence, which are of the kind said to have a "potential existence," the most familiar example of which is an expected crop: *Andrew v. Newcomb*, 32 N. Y. 417, 420; *Grantham v. Hawley*, Hob. 132; *Trull v. Eastman*, 3 Met. 121; 37 Am. Dec. 126; *Jones v. Richardson*, 10 Met. 481, 488; *Smith v. Atkins*, 18 Vt. 461; *Van Hoozer v. Cory*, 34 Barb. 9, 12; *Conderman v. Smith*, 41 Barb. 404; *Arques v. Wasson*, 51 Cal. 620; 21 Am. Rep. 718; *Phila. etc. R. R. v. Woelpper*, 64 Pa. St. 366, 371; 3 Am. Rep. 596; *Forman v. Proctor*, 9 B. Mon. 124.

² *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Wellesley v. Wellesley*, 4 Mylne

(d) A general charge on all the existing property of the mortgagor is not void for uncertainty, if the property to which it attaches can be ascertained at the time of enforcement: *In re Kelcey*, [1899] 2 Ch. 530.

(a) See, also, *France v. Thomas*, 86 Mo. 80.

(b) This section is cited in *Higgins v. Manson*, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; *Leopold v. Weeks*, 96 Md. 280, 53 Atl. 937; *Howard v. Iron & Land Co.*, 62 Minn.

§ 1237. Form and Nature of the Agreement — Illustrations of Particular Agreements.— The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if the intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows.^{1a} Among the

& C. 561, 579, per Lord Cottenham; *Metcalf v. Archbishop of York*, 6 Sim. 224; 1 Mylne & C. 547, 556; *Lyde v. Mynn*, 4 Sim. 505; 1 Mylne & K. 683; *Lewis v. Madocks*, 17 Ves. 48; *Tooke v. Hastings*, 2 Vern. 97; *Curtis v. Auber*, 1 Jacob & W. 526; *Douglas v. Russell*, 4 Sim. 524; 1 Mylne & K. 488; *Alexander v. Duke of Wellington*, 2 Russ. & M. 35; cited 1 Mylne & C. 556; *Williams v. Winsor*, 12 R. I. 9; *Clay v. East Tenn. etc. R. R.*, 6 Heisk. 421; *McClure v. McDearmon*, 26 Ark. 66. This subject is more fully treated in the subsequent chapter upon assignments: See *post*, §§ 1283, 1288. The most common examples of such contracts in this country are chattel mortgages, and leases containing a clause in the nature of a chattel mortgage, which purport to embrace future-acquired property of the mortgagor or lessee. These instruments, although creating no legal interest in the property thus described, constitute an equitable lien between the immediate parties, and also against subsequent volunteers and persons affected with notice, except so far as local statutes concerning the filing or recording of chattel mortgages may interfere.^c

¹ *Flagg v. Mann*, 2 Sum. 486, 533, Fed. Cas. No. 4,847, per Story, J.: "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage [lien]."

298, 64 N. W. 896; *Sporer v. McDermott*, (Nebr.) 96 N. W. 232. See, also, *Farmers' L. & T. Co. v. Denver L. & G. R. Co.*, 126 Fed. 46, 60 C. C. A. 588; *Central Trust Co. v. Washington Co. R. Co.*, 124 Fed. 813; *Knowles Loom Works v. Ryle*, 97 Fed. 730, 38 C. C. A. 494; *Harris v. Youngstown Bridge Co.*, 93 Fed. 355, 35 C. C. A. 341; *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 63 Fed. 891, 12 C. C. A. 350, 24 U. S. App. 38; *Howze v. Dew*, 90 Ala. 178, 7 South. 239, 24 Am. St. Rep. 783; *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; *Pere Marquette R. Co. v. Graham*, (Mich.)

99 N. W. 408; *St. Joseph, St. L. & S. F. Ry. Co. v. Smith*, 170 Mo. 328, 70 S. W. 700; *Monmouth Co. Elect. Co. v. Central R. Co.*, (N. J. Eq.) 54 Atl. 140; *Chester v. Jumel*, 125 N. Y. 237, 251, 252, 26 N. E. 297; *Taylor v. Huck*, 65 Tex. 238.

(c) See *Reynolds v. Ellis*, 103 N. Y. 116, 8 N. E. 392, 57 Am. Rep. 701, for example of such lease.

(a) This passage of the text is quoted in *Columbus, S. & H. R. Co. Appeals*, 109 Fed. 177, 196, 48 C. C. A. 275. This section is cited in *Hovey v. Elliott*, 118 N. Y. 124, 23 N. E. 475; *Woodruff v. Adair*, 131 Ala. 530, 32 South. 515; *Bell v. Pelt*,

kinds of agreement from which liens have been held to arise, the following are some important examples: Executory agreements which do not convey or transfer any legal estate in the property, but which stipulate that the property shall be security, or which pledge it, for the performance of an obligation.² As an agreement to give a mortgage creates a lien, so a mortgage which, through some informality

²An agreement by which the maker incurs an obligation, and pledges the produce of certain land, or the land itself, or "gives a lien on land" as security for the performance: *Chase v. Peck*, 21 N. Y. 581; *Gilson v. Gilson*, 2 Allen, 115; *Kirksey v. Means*, 42 Ala. 426; a clause in a lease that the lessor "is to have a lien" upon certain property for the rent: *Whiting v. Eichelberger*, 16 Iowa, 422; an agreement to give a mortgage on the party's share of his father's estate under a will when a division was made: *Lynch v. Utica Ins. Co.*, 18 Wend. 236. And generally a written agreement to give a mortgage on certain land, or even a verbal agreement to give a mortgage on chattels, or a fund of securities, will create an equitable lien:^b *Husted v. Ingraham*, 75 N. Y. 251, 257; *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; 64 N. Y. 550; *Boorman v. Wisconsin etc. Co.*, 36 Wis. 207; *Monticello etc. v. Loughry*, 71 Ind. 562. For further illustrations of such agreements, see *Skiddy v. Atlantic etc. R. R.*, 3 Hughes, 320, Fed. Cas. No. 12,922; *Arnold v. Morris*, 7 Daly, 498; *Williams v. Ingersoll*, 23 Hun, 284; *Stewart v. Hutchins*, 6 Hill, 143; *Jackson v. Carswell*, 34 Ga. 279; *Mobile etc. R. R. v. Talman*, 15 Ala. 472; *Racouillat v. Sansevain*, 32 Cal. 376; *De Leon v. Higuera*, 15 Cal. 483; *Barroilhet v. Battelle*, 7 Cal. 450.^c

51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247; *Allis v. Jones*, 45 Fed. 148; *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092; *Society of Shakers v. Watson*, 68 Fed. 730, 15 C. C. A. 632, 37 U. S. App. 141; *Higgins v. Manson*, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; *Harrigan v. Gilchrist*, (Wis.) 99 N. W. 909, 981; *Sporer v. McDermott*, (Nehr.) 96 N. W. 232.

(b) *Bridgeport Electric & Ice Co. v. Meader*, 72 Fed. 115, 18 C. C. A. 451; *King v. Williams*, 66 Ark. 333, 50 S. W. 695; *Lohmeyer v. Durbin*, 206 Ill. 574, 69 N. E. 523; *Wickes v. Hynson*, 95 Md. 511, 52 Atl. 747; *Davis v. Childers*, 45 S. C. 133, 22 S. E. 784, 55 Am. St. Rep. 757 (agreement to give chattel mortgage). In *Sprague v. Cochran*, 144 N. Y. 104,

38 N. E. 1000, a verbal agreement to give a mortgage was held to bind property which by mistake was omitted from the mortgage subsequently executed in pursuance of the agreement.

(c) *Gest v. Packwood*, 39 Fed. 525; *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745; *Bush v. Garner*, 73 Ala. 162 (equitable lien on crop); *Jackson v. Rutherford*, 73 Ala. 155 (parol agreement by debtor that certain personal property "should stand good for his indebtedness"); *Bell v. Pelt*, 51 Ark. 433, 11 S. W. 684, 14 Am. St. Rep. 57, 4 L. R. A. 247; *Parks v. O'Connor*, 70 Tex. 385, 8 S. W. 104; and see *Boehl v. Wadgyman*, 54 Tex. 589; *Perry v. Board of Missions*, 102 N. Y. 99, 6 N. E. 116.

or defect in its terms or mode of execution, is not complete and valid as a true and proper mortgage, will nevertheless generally create an equitable lien upon the property described. The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security.³ An assignment of the rents and profits

Any agreement that certain property shall be appropriated as security for or for the payment of an indebtedness; *a* e. g., an agreement written on the back of a note that it should be a charge upon certain land was held to create a lien on the land: *Peckham v. Haddock*, 36 Ill. 38; and see *Chadwick v. Clapp*, 69 Ill. 119; *Blackburn v. Twcedie*, 60 Mo. 505.

³ *Payne v. Wilson*, 74 N. Y. 348; *Daggett v. Rankin*, 31 Cal. 321; *Remington v. Higgins*, 54 Cal. 620; *Newlin v. McAfee*, 64 Ala. 357; *Lewis v. Small*, 71 Me. 552; *In re Howe*, 1 Paige, 125; 19 Am. Dec. 395; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21; 28 Am. Dec. 616; *Nelson v. Hagerstown Bank*, 27 Md. 51, 76; *Dow v. Ker*, 1 Speers Eq. 414, 417; *Massey v. McIlwain*, 2 Hill Eq. 421, 428; *Welsh v. Usher*, 2 Hill Eq. 167, 170; 29 Am. Dec. 63; *Delaire v. Keenan*, 3 Desaus. Eq. 74; 4 Am. Dec. 604; *Read v. Gaillard*, 2 Desaus. Eq. 552; 2 Am. Dec. 696. Examples: Where the seal was accidentally omitted: *McClurg v. Phillips*, 49 Mo. 315; 57 Mo. 214; *Dunn v. Raley*, 58 Mo. 134; *Harrington v. Fortner*, 58 Mo. 468; *Gill v. Clark*, 54 Mo. 415; ^f where the instrument omitted to state that it was sealed: *Jones v. Brewington*, 58 Mo. 210; where there was no valid acknowledgment: *Black v. Gregg*, 58 Mo. 565; where the instrument was not properly witnessed: *Lake v. Doud*, 10 Ohio, 415; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; where in a trust deed in the nature of a mortgage the name of the trustee was omitted: *McQuie v. Peay*, 58 Mo. 56; *Burnside v. Wayman*, 49 Mo. 356; where a mortgage purporting to be given by a corporation was not executed in its name nor attested by its corporate seal, but was executed in the names of its officers, they having authority, however, to bind the corporation by executing the mortgage in its name, it was

(*d*) *Butts v. Broughton*, 72 Ala. 294 (declaration in notes that they are "covered by" or "subject to" a prior mortgage); *Prickett v. Sibert*, 71 Ala. 194 (the fact that lands conveyed are described in the purchase-money note does not create an equitable mortgage, as distinguished from the grantor's lien); *Tedder v. Steele*, 70 Ala. 347 (same, overruling *Bryant v. Stephens*, 58 Ala. 636); *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763.

(*e*) This sentence is quoted in

Hackett v. Watts, 138 Mo. 502, 40 S. W. 113. See, also, *Society of Shakers v. Watson*, 68 Fed. 730, 15 C. C. A. 632, 37 U. S. App. 141; *Margarum v. J. S. Christie Orange Co.*, 37 Fla. 165, 19 South. 637; *Wayt v. Carwithen*, 21 W. Va. 516.

(*f*) *Allis v. Jones*, 45 Fed. 148; *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544.

(*g*) *Dulaney v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 775.

of land as security for a debt is another mode of creating an equitable lien on the land in favor of the assignee, and the assignment of a lease by way of security produces the same effect.⁴¹ The assignment for a similar purpose of a contract for the purchase and sale of land may in like

held to create an equitable lien: *Love v. Sierra Nevada Co.*, 32 Cal. 639, 652, 653; 91 Am. Dec. 602, per Shafter, J.: "It was urged that the defective execution of the mortgage was caused by a mistake of law, and that therefore it cannot be aided. The answer is, that where there is a defective execution of a power, it is a matter of no equitable moment whether the error came of a mistake of law or a mistake of fact. It is enough that the power existed, and that there was an attempt to act under it. The relief is not so much by way of reforming the instrument as by aiding its defective execution; which aid is administered through or by the application of the maxims already quoted. Or, as in the class of cases to which this belongs, the instrument defectively executed as a deed is considered properly executed as a contract for a deed, and therefore as requiring neither reformation nor aid, but as ripe for enforcement according to the methods peculiar to courts of equity."⁴²

⁴ *Ex parte Wills*, 1 Ves. 162 (in which Lord Thurlow, speaking of assignments of rents and profits as a security, said: "It is an odd way of conveying, but it amounts to an equitable lien"); *Jackson v. Green*, 4 Johns. 186; *Smith v. Patton*, 12 W. Va. 541 (a contract charging the rents and profits of land as security). A provision in a lease that a building erected by the lessee "is mortgaged as security" for the rent was held to constitute an equitable lien: *Barroilhet v. Battelle*, 7 Cal. 450.

(h) Where the trust deed was properly acknowledged, but the signature of the grantor was omitted by mistake: *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; where a mortgage was executed to a partnership in the firm name of the partnership, instead of the separate partners: *Bank v. Johnson*, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; where a purchase-money mortgage was given by minors to secure part of the price of land conveyed to them: *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306, 26 Pac. 119. But "in order that a lien may arise by reason of a defectively executed mortgage, it must appear that the instrument was attempted to be executed by the mortgagor, or his duly authorized agent, in pursuance of an agree-

ment indicating an intent that the property described, or rendered capable of identification, is to be held, given, or transferred as security for an obligation or debt of the mortgagor": *Brown v. Farmers' Supply Depot Co.*, 23 Oreg. 541, 32 Pac. 548.

(i) This sentence is quoted in *Gest v. Packwood*, 39 Fed. 525. See, also, *Smith Co. v. McGuinness*, 14 R. I. 59 (irrevocable power of attorney to collect rents given as security for money loaned); *Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092. Likewise, an assignment of a lease as security may amount to an equitable lien: *Commercial Bank v. Pritchard*, 126 Cal. 600, 59 Pac. 130. But an agreement by an owner of real estate to collect the rents and turn them over

manner operate to create an equitable lien in favor of the assignee.^{5j} The equitable liens which arise from such assignment must largely depend upon a performance of the conditions and stipulations contained in the original contracts, whatever be their form, which are assigned. An equitable lien may sometimes be created upon bills of exchange or upon a consignment upon which bills of exchange are drawn, by means of a specific appropriation, at all events where the drawers or acceptors have become insol-

⁵The assignment of a contract for the purchase of land, made by the vendee therein, as security for a debt or other obligation, will thus create a lien: *Brockway v. Wells*, 1 Paige, 617; *Fessler's Appeal*, 75 Pa. St. 483; *Fitzhugh v. Smith*, 62 Ill. 486; *Purdy v. Bullard*, 41 Cal. 444. In *Dwen v. Blake*, 44 Ill. 135, land-warrants were thus transferred into the creditor's name as security. A formal mortgage of land by one who only holds the equitable title as vendee under a contract of purchase is, in effect, an assignment of the contract, and constitutes an equitable mortgage or lien: *Alden v. Garver*, 32 Ill. 32.

The assignment of a bond conditioned for the conveyance of land — a form of land contract in general use in several of the states — produces the same effect: *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Neligh v. Michenor*, 11 N. J. Eq. 539; *Alderson v. Ames*, 6 Md. 52; *Fenno v. Sayre*, 3 Ala. 458; *Newhouse v. Hill*, 7 Blackf. 584; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Bull v. Sykes*, 7 Wis. 449; *Jones v. Lapham*, 15 Kan. 540; *Christy v. Dana*, 34 Cal. 548.^k A bond conditioned to convey by deed upon payment of the purchase price is in its operation tantamount to an agreement to convey, and the liens arising from it are identical with the liens of the vendor and the vendee arising from the ordinary contract for the sale of land described in a subsequent section: See *Lewis v. Boskins*, 27 Ark. 61; *Shall v. Biscoe*, 18 Ark. 142; *Graham v. McCampbell*, Meigs, 52; 33 Am. Dec. 126; *Tanner v. Hicks*, 4 Smedes & M. 294; *Button v. Schroyer*, 5 Wis. 598. The assignment by a vendee of a *partial* interest under his contract of purchase also creates an equitable lien to the extent of such interest: *Northrup v. Cross*, Seld. Notes, 111. The assignment of certificates of purchase of public lands issued by a state as security of a debt in like manner constitutes an equitable

to his creditor in payment of a debt, even though the money represented by the debt was expended to increase the value of the property, does not create a lien in such creditor's favor, in the absence of language clearly showing such an intention: *Elmore v. Symonds*, (Mass.) 67 N. E. 314, citing many cases.

(j) *Shipman v. Lord*, 58 N. J. Eq.

380, 44 Atl. 215 (affirmed, 46 Atl. 1101); *Scharman v. Scharman*, 38 Nebr. 39, 56 N. W. 704; *Burrows v. Hovland*, 40 Nebr. 464, 58 N. W. 947; *Lovejoy v. Chapman*, 23 Oreg. 571, 32 Pac. 687; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113.

(k) See, also, *Trader v. Jarvis*, 23 W. Va. 100; *Morris v. Nyswanger*, 5 S. Dak. 307, 58 N. W. 800.

vent.⁶ The foregoing instances are sufficient to illustrate the doctrine of equitable lien arising from express contract. They show that the form is immaterial, if the intent appears to make any identified property a security for the fulfillment of an obligation.

lien: *Wright v. Shumway*, 1 Biss. 23; *Heirs of Stover v. Heirs of Bounds*, 1 Ohio St. 107; *Dodge v. Silverthorne*, 12 Wis. 644; *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Wis. 307; *Hill v. Eldred*, 49 Cal. 398;¹ also, of certificates of stock in a joint-stock company, where such certificates represent land held by the company or its stockholders: *Durkee v. Stringham*, 8 Wis. 1. The lien acquired by the assignee in all these cases is, of course, subject to the payment of the amount due on the contract, bond, or certificate: *Dodge v. Silverthorne*, 12 Wis. 644.

⁶ In the leading case of *Ex parte Waring*, 19 Ves. 345, Lord Eldon rested his decision involving this rule upon the fact that both the drawers and acceptors were insolvent. This view was criticised in *Powles v. Hargreaves*, 3 De Gex, M. & G. 430, but in all the cases in which the rule has been applied it will be found that one or both these parties had become insolvent. In *Ex parte Imbert*, 1 De Gex & J. 152, A bought ten bills of exchange drawn by L. & Co., on a firm in Liverpool. Some time after, L. & Co. sent other bills to the Liverpool firm, with a letter specifically appropriating them to meet the ten first-mentioned bills, held by A. L. & Co., the drawers, the Liverpool firm, the drawees, became insolvent. Held, that A had a lien on the bills last sent, and was entitled as against the assignees in bankruptcy that their proceeds should be applied upon the bills which he held; and see *Bock v. Gorrissen*, 2 De Gex, F. & J. 434. In *Frith v. Forbes*, 4 De Gex, F. & J. 409, A consigned a cargo to defendant, and at the same time wrote him that he had drawn a bill of exchange on said cargo in favor of B, "which please protect." On the same day he gave B a bill of exchange drawn on defendant, informing B that it was drawn against the cargo. Defendant refused to accept the bill when presented by B, and A soon after failed. Held, that B had a lien on the proceeds of the cargo in defendant's hands, and was entitled to prior payment out of such proceeds. In the subsequent cases of *Robey etc. Iron Works v. Ollier*, L. R. 7 Ch. 695, and *Ex parte Lamhton*, L. R. 10 Ch. 405, the court held that the mere drawing of a bill of exchange against a cargo or consignment did not of itself create a lien upon the goods or their proceeds in favor of the holder of the bill; and the decision in *Frith v. Forbes* was somewhat criticised. But in the still later case of *Ranken v. Alfaro*, L. R. 5 Ch. Div. 786, the lien was upheld upon facts quite analogous to those of *Frith v. Forbes*. The following cases also involve the question as to such a lien: *Vaughan v. Halliday*, L. R. 9 Ch. 561; *Ex parte Dewhurst*, L. R. 8 Ch. 965; *Ex parte Smart*, L. R. 8 Ch. 220; *City Bank v. Luckie*, L. R. 5 Ch. 773; *Ex parte Alliance Bank*, L. R. 4 Ch. 423; *In re New Zealand Bkg. Co.*, L. R. 4 Eq. 226; see also post, § 1284.^m

(1) *Stewart v. McLaughlin*, 11 Colo. 458, 18 Pac. 619.

(^m) The authority of *Frith v. Forbes* has been greatly weakened,

if not destroyed, by the cases of *Phelps v. Comber*, 29 Ch. Div. 813, and *Brown v. Kough*, 29 Ch. Div. 848.

SECTION III.

ARISING FROM IMPLIED CONTRACTS.

ANALYSIS.

- § 1238. Nature of "implied contract" in equity.
- § 1239. General doctrine as to liens arising *ex æquo et bono*.
- § 1240. Expenditure by one joint owner.
- § 1241. Expenditure for the benefit of the true owner.
- § 1242. Expenditure by a life tenant.
- § 1243. In other special cases.

§ 1238. Nature of "Implied Contract" in Equity.—The term "implied contract" is a pure fiction of the common-law system of pleading, invented so that certain equitable liabilities, not arising from express promise, but recognized as existing by the courts of law, might be consistently enforced by the action of *assumpsit*. The phrase is not only a misnomer in equity, but it violates equitable conceptions. There is no necessity for resorting to the notion of "implied contract" to account for the existence of any equitable rights and liabilities which do not arise from express promise. The class of equitable rights and liabilities which at law are referred to the fiction of "implied contract" really exist *ex æquo et bono*; they arise wholly from considerations of right and justice, and from the application to particular conditions of fact of those maxims which lie at the foundation of equity jurisprudence.

§ 1239. General Doctrine as to Liens Arising *ex Æquo et Bono*.—In addition to the general doctrine that equitable liens are created by executory contracts which, in express terms, stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation, there are some further instances where equity raises similar liens, without agreement therefor between the parties, based either upon general considerations of justice (*ex æquo et bono*), or upon the particular equitable principle that he who seeks the aid of equity in enforcing

some claim must himself do equity, — that is, must recognize and admit the equitable rights of the opposite party directly connected with or arising out of the same subject-matter. I shall briefly describe the most important instances which belong to this species of equitable liens.

§ 1240. **Expenditure by One Joint Owner.**— Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportionate shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors.¹

§ 1241. **Expenditure for the Benefit of the True Owner.**— Such an equitable lien has not always been confined to cases in which a contract to reimburse could be implied at law. The right to a contribution or reimbursement from the owner, and the equitable lien on the property benefited as

¹ Lake v. Gibson, 1 Eq. Cas. Abr. 290, pl. 3; Lake v. Craddock, 3 P. Wms. 158; 1 Lead. Cas. Eq., 4th Am. ed., 264, 268; Gladstone v. Birley, 2 Mer. 401, 403; Scott v. Nesbitt, 14 Ves. 437, 444; Rathburn v. Colton, 15 Pick. 471. ^a If one joint owner makes such expenditures, and the other sues in equity for a partition, allowance will be made for the outlays: Swan v. Swan, 8 Price, 518.

(^a) The text is quoted in Williams v. Harlan, 88 Md. 1, 71 Am. St. Rep. 394, 41 Atl. 51, holding also that a third person lending money to the co-tenant for the purpose of making the improvements is subrogated to his lien. See, also, Gavin v. Carling, 55 Md. 530; Alexander v. Ellison, 79 Ky. 148. It has been held that a joint tenant has no lien for rents collected by his co-tenant: Burch v. Burch, 82 Ky. 622; but see Scott v. Guernsey, 60 Barb. 163, 180, affirmed, 48 N. Y. 106, 124; if such a lien, as

distinguished from a mere equity to an accounting, exists, it does not come into operation until the filing of the bill for partition, so as to override a prior mortgage executed by a co-tenant upon his interest: Omohundro v. Elkins, 109 Tenn. 711, 71 S. W. 590, and cases cited. That a co-tenant who has paid more than his share of the purchase-money for the property is entitled to a lien on the shares of the other co-tenants on partition, see Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

a security therefor, have been extended to other cases where a party innocently and in good faith, though under a mistake as to the true condition of the title, makes improvements or repairs or other expenditures which permanently increase the value of the property, so that the real owner, *when he seeks the aid of equity* to establish his right to the property itself, or to enforce some equitable claim upon it, having been substantially benefited, is required, upon principles of justice and equity, to repay the amount expended.^{1 a}

¹ In *Neesom v. Clarkson*, 4 Hare, 97, it was said that while a person expending money through mistake on another's property has no claim in equity for reimbursement, as an *actor*, against the owner, who was ignorant of the expenditure, and did nothing to encourage it: *Nicholson v. Hooper*, 4 Mylne & C. 179; yet whenever it is necessary for the true owner himself, under such circumstances, to proceed in equity, the principle that he who seeks equity must do equity will be applied, and he will only be entitled to seek the aid of the court upon making compensation for the outlays. In pursuance of this doctrine, when a person in peaceable possession under claim of lawful title, but really under a defective title, has in good faith made permanent improvements, the true owner, who seeks the aid of equity to establish his own title, will be compelled, it has been held, to reimburse the occupant for his expenditure:^b *Robinson v. Ridley*, 6 Madd. 2; *Att'y-Gen. v. Baliol College*, 9 Mod. 407, 411; *Bright v. Boyd*, 1 Story, 478; *Fed. Cas. No. 1,875*; 2 Story, 605; *Fed. Cas. No. 1,876*; *Rathburn v. Colton*, 15 Pick. 471; *Miner v. Beekman*, 50 N. Y. 337; *Smith v. Drake*, 23 N. J. Eq. 302; *McLaughlin v. Barnum*, 31 Md. 425; *Sale v. Crutchfield*, 8 Bush, 636; and see *Preston v. Brown*, 35 Ohio St. 18; but, *per contra*, this doctrine seems to be wholly rejected in Pennsylvania: *Appeal of Cross and Gault*, 97 Pa. St. 471.^c And if the true owner stands by and suffers the occupant, without

(a) The text is quoted in *Hunter v. McDevitt*, (N. Dak.) 97 N. W. 869; and cited in *Howard v. Massengale*, 13 Lea 577; *Putnam v. Tyler*, 117 Pa. St. 570, 12 Atl. 43; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51; *Anderson v. Reid*, 14 App. D. C. 54, 73; *Lagger v. Mutual Union L. & B. Assn.*, 146 Ill. 283, 33 N. E. 946; *Williams v. Vanderbilt*, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489; *Floyd v. Mackey*, 112 Ky. 646, 66 S. W. 518; *Green v. McDonald*, 75 Vt. 93, 53 Atl. 332; *Williamson v. Jones*, 43 W. Va. 563, 64 Am. St. Rep. 891, 27 S.

E. 411, 38 L. R. A. 694, 707; *Keller v. Fenske*, (Wis.) 101 N. W. 378.

(b) Quoted by *Ruger, C. J.*, in *Thomas v. Evans*, 105 N. Y. 614, 12 N. E. 571, 59 Am. Rep. 519. See, also, *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. 303, 28 L. ed. 354; *Hicklin v. Marco*, 46 Fed. 424; *Skiles's Appeal*, 110 Pa. St. 248, 20 Atl. 722.

(c) In *Skiles's Appeal*, 110 Pa. St. 248, 20 Atl. 722, and *Putnam v. Tyler*, 117 Pa. St. 570, 12 Atl. 43, the general rule was recognized and followed.

§ 1242. **Expenditure by a Life Tenant.**—In pursuance of the same general doctrine, if a tenant for life, holding under a will, expends money in completing permanently beneficial improvements to the property, *which had been commenced by the testator*, such an outlay is held to constitute a valid claim for reimbursement against the reversioner, and an equitable lien upon the property as security for its repay-

notice of his title, and acting in innocent mistake, to make repairs and improvements, he will be compelled in equity to repay the amount thus expended, and the claim for repayment will constitute an equitable lien on the property: See *ante*, vol. 2, §§ 807, 821, and cases cited; *Shine v. Gough*, 1 Ball & B. 436, 444; *Lord Cawdor v. Lewis*, 1 Younge & C. 427; *Preston v. Brown*, 35 Ohio St. 18; *Green v. Biddle*, 8 Wheat. 1, 77, 78; 5 L. ed. 547; *Bright v. Boyd*, 1 Story, 478, 493; Fed. Cas. No. 1,875. In all these cases, however, the element of good faith and innocent mistake is essential; for if a person lays out money on another's property, with knowledge or notice of the true state of the title,—e. g., a purchaser with notice of another's title,—he has no claim to be reimbursed, and of course no lien: *Rennie v. Young*, 2 De Gex & J. 136; *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Cook v. Kraft*, 3 Lans. 512; *Davidson v. Barclay*, 63 Pa. St. 406; *Dart v. Hercules*, 57 Ill. 446; *Cannon v. Copeland*, 43 Ala. 252.^d Finally, in order that there may be a claim for reimbursement and a lien as security therefor in any case of this general kind, either the aid of a court of equity must be requisite on behalf of the owner against whom the claim for reimbursement is made, so that he can be compelled to do equity, or else there must be some element of fraud in the transaction as ground of equitable interference. If, therefore, the true owner can recover his land by an action at law, equity will not, in the absence of fraud, compel him to reimburse the occupant even in good faith for disbursements made in repairs and improvements: See *ante*, §§ 807, 821; *Moore v. Cable*, 1 Johns. Ch. 385; *Green v. Winter*, 1 Johns. Ch. 26, 39; 7 Am. Dec. 475; *Putnam v. Ritchie*, 6 Paige, 390, 403; *Bright v. Boyd*, 1 Story, 478, 494; Fed. Cas. No. 1,875.^e This rule has been changed by statute in several of the states, which allow compensation to defendants, even in actions of ejectment, when the land is recovered from them for the "betterments" which they have added to the land.^f

(^d) See, also, *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Gresham v. Ware*, 79 Ala. 192; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51; *Anderson v. Reid*, 14 App. D. C. 54 (constructive notice by record); *Cable v. Ellis*, 120 Ill. 136, 11 N. E. 188; *Hunter v. McDevitt*, (N. Dak.) 97 N. W. 869 (constructive notice by record did not defeat the lien); *Effinger v. Hall*, 81 Va. 94.

(^e) See, also, *Anderson v. Reid*, 14 App. D. C. 54; *Williams v. Vanderbilt*, 145 Ill. 238, 251, 36 Am. St. Rep. 486, 494, 34 N. E. 476, 21 L. R. A. 489.

(^f) See *Jones on Liens*, secs. 1140-1146; *Griswold v. Bragg*, 18 Blatchf. 204, 48 Fed. 519, 520, 48 Conn. 579; *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250.

ment; while outlays for altogether new and original improvements, being made with full knowledge of the title, would create no such claims.¹

§ 1243. In Other Special Cases.—Where a person, not being owner of a policy of life insurance, nor bound to pay the premium, but having some claim or color of interest in it, voluntarily pays the premiums thereon, and thus keeps it alive for the benefit of a third party, he may thereby acquire an equitable lien on the proceeds of the policy as security for the repayment of his advances.^{1a} There are certain maritime liens which have sometimes been recognized and enforced by courts of equity in England, but which in this country would rather belong to the exclusive jurisdiction of admiralty.² Another equi-

§ 1242, ¹ *Hibbert v. Cooke*, 1 Sim. & St. 552; *Dent v. Dent*, 30 Beav. 363 (a life tenant allowed for certain improvements, but not for others); *Dunne v. Dunne*, 3 Smale & G. 22; *In re Leigh's Estate*, L. R. 6 Ch. 887; *Sohier v. Eldredge*, 103 Mass. 345; see *Floyer v. Bankes*, L. R. 8 Eq. 115; *Taylor v. Foster's Adm'r*, 22 Ohio St. 255; and *Todd v. Moorhouse*, L. R. 19 Eq. 69.^a

§ 1243, ¹ *Norris v. Caledonian Ins. Co.*, L. R. 8 Eq. 127; *Gill v. Downing*, L. R. 17 Eq. 316. Mr. Snell, on the authority of these cases, lays down as a general rule that when *any* person pays the premiums in order to keep a policy alive, he becomes entitled to a lien on the proceeds: *Snell's Equity*, 115. The cases certainly fall very far short of establishing such a general rule.^b It is doubtful, indeed, whether they lay down any *rule* at all, certainly none more extensive than that given above in the text.

In *Todd v. Moorhouse*, L. R. 19 Eq. 69, it was held that where a life tenant, under a settlement comprising shares in stock companies, at the request of the trustees pays the calls on the shares, and thus prevents their forfeiture and loss to the estate, he has a lien on the shares for his advances, with interest.

§ 1243, ² They are the liens which materialmen have for repairs or supplies furnished to a foreign ship in a domestic port: See *The Aurora*, 1 Wheat. 96, 105; 4 L. ed. 45; *The General Smith*, 4 Wheat. 438; 4 L. ed. 609, and similar cases; and that which the part owner of a ship may have for his advances towards her outfit, on the proceeds of her voyage, or on the ship itself: See *Doddington v. Hallet*, 1 Ves. Sr. 497, per Lord Hardwicke; *Ex parte Young*, 2 Ves. & B. 242, per Lord Eldon; *Nicoll v. Mumford*, 4 Johns. Ch. 522; 20 Johns. 611. As these particular liens are wholly maritime, and

§ 1242, (a) See, also, *Gavin v. Carling*, 55 Md. 530.

140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833.

§ 1243, (a) The text is quoted in *Stockwell v. Mutual Life Ins. Co.*,

§ 1243, (b) *Meier v. Meier*, 15 Mo. App. 68; affirmed, 88 Mo. 566.

table lien, recognized and enforced by courts of equity, is that ordinarily known as "the partners' lien,"—a lien which each partner has upon the entire firm assets, as a security that those assets shall be applied in discharge of the firm debts, and that he shall receive his just share of the surplus remaining after all the firm debts are paid.³

SECTION IV.

ARISING FROM CHARGES BY WILL OR BY DEED.

ANALYSIS.

- § 1244. General doctrine; nature of a charge.
- § 1245. What amounts to a charge creating such a lien.
- § 1246. The same; express charge.
- § 1247. The same; implied charge; English and American rules stated in foot-note.
- § 1248. Observations upon the rules adopted by American courts.

§ 1244. General Doctrine — Nature of a "Charge."— Another species of equitable lien not growing out of contract directly between the parties arises when specific property—a lot of land, a fund of securities, or the land contained in a residuary devise—is conveyed, devised, or bequeathed subject to or charged with the payment of debts, legacies, portions, or annuities in favor of third persons given by the same instrument. The legal title to the property vests in the grantee, devisee, or other recipient, but a lien thereon is created in favor of the beneficiary named, which can be enforced in equity. Where, for example, land is devised charged with the payment of the testator's debts generally, a lien arises in favor of the creditors, and any one or more

belong to the admiralty jurisdiction, any discussion of their nature and extent is unnecessary.

³ This lien is mentioned here in order to complete the general survey: See *West v. Skip*, 1 Ves. Sr. 239, 456; *Lake v. Gibson*, 1 Lead. Cas. Eq., 4th Am. ed., 264, 268; *Mycock v. Beatson*, L. R. 13 Ch. Div. 384; *Nicoll v. Mumford*, 4 Johns. Ch. 522.

of these can enforce it against the land so devised; or where a lot is devised charged with the payment of a particular legacy, the legatee can in like manner enforce his lien against such tract in the hands of the devisee.¹ There is a

¹ Such charges may be contained in conveyances *inter vivos*, and are sometimes found in family settlements, real estate settled upon sons being charged with the payment of portions in favor of daughters, and the like. They are much more frequently, especially in this country, found in wills. When real estate given by will is thus charged with the payment of debts and legacies, the effects may be various. The first, and perhaps the most important, result from the ordinary form of such charge is, to break over the common-law rule which makes the personal property the fund out of which debts and legacies are primarily payable, and to render the real estate of the testator liable *pari passu* with the personal for such payment. Still the charge may be made in such terms as to exonerate the personalty, and thus to admit the doctrine of marshaling. When the charge is of the ordinary form, not exonerating the personalty, the creditor or legatee is not precluded from enforcing his demand in the usual manner against the executor in the regular course of administration. But in addition to that ordinary mode of compelling payment of his debt or legacy, he is also entitled to enforce his lien upon the land or other specific fund charged with its payment, against the devisee or person deriving title from or under the devisee, by means of a suit in equity. In the very recent case of *Brown v. Knapp*, 79 N. Y. 136, which was a suit in equity to enforce such a lien in favor of a legatee, the court said: "The executor also contended that his legacy was payable only out of the personal estate, and that there was not sufficient of such estate to pay the two legacies given in the will. It is claimed on the part of the plaintiff that the legacy was charged upon the real estate; and I am of that opinion. It is well settled that when a legacy is given and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy. And the rule is the same when the legacy is directed to be paid by the executor who is the devisee of real estate [citing many cases]. If the devisee in such case accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay. The payment of such a legacy can be enforced by a suit in equity against the real estate, or by a common-law action directly against the devisee upon the implied promise to pay it, — a promise implied by his acceptance of the devise." It should be remarked, however, in this connection, that every charge does not thus render the devisee personally liable. Where the charge consists, as above stated, in a direction that the devisee shall pay a legacy or debt, his acceptance creates a personal liability.^a But where there is no such direction, and the land is given simply subject to the payment, or the charge is in any manner made

(a) *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243.

plain distinction pointed out in the previous chapter on trusts, between a gift of property in trust merely to pay debts or legacies, and a gift of property charged with or subject to the payment of debts or legacies.

§ 1245. What Amounts to a Charge Creating Such a Lien.— Since, according to the settled general doctrine, the personalty is ordinarily the primary fund for the payment of debts, and is the primary and even only fund for the pay-

upon the land alone, the devisee assumes no personal liability;^b the remedy of the legatee or creditor, based upon such charge, is confined to his enforcement of the lien upon the land. In enforcing the lien on behalf of a legatee, the English courts will determine whether it should be done by a sale or by a mortgage of the lands.^c As illustrations of the text, see *King v. Denison*, 1 Ves. & B. 260, 272, 276; *Hill v. Bishop of London*, 1 Atk. 618, 620; *Graves v. Graves*, 8 Sim. 43; *Bright v. Larcher*, 4 De Gex & J. 608; *Makings v. Makings*, 1 De Gex, F. & J. 355; *Richardson v. Morton*, L. R. 13 Eq. 123 (legatee held not entitled on the special facts); *Pearson v. Helliwell*, L. R. 18 Eq. 411; *Metcalfe v. Hutchinson*, L. R. 1 Ch. Div. 591; *Hoyt v. Hoyt*, 85 N. Y. 142; *Finch v. Hull*, 24 Hun, 226; *Dill v. Wisner*, 23 Hun, 123; *Ferris v. Van Vechten*, 9 Hun, 12; *Loder v. Hatfield*, 4 Hun, 36; *Horning v. Wiederspallen*, 28 N. J. Eq. 387; *Grode v. Van Valen*, 25 N. J. Eq. 95; *Gardenville etc. Ass'n v. Walker*, 52 Md. 452; *Siron v. Ruleman's Ex'r*, 32 Gratt. 215; *Burch v. Burch*, 52 Ind. 136; *Rhoades v. Rhoades*, 88 Ill. 139. And the lien may be enforced not only against the devisee, but also against his grantees, mortgagees, etc.: *Perkins v. Emory*, 55 Md. 27; *Donnelly v. Edelen*, 40 Md. 117 (against purchaser of the land at an execution sale); *Blauvelt v. Van Winkle*, 29 N. J. Eq. 111;^d and a record of the will and probate is notice to such grantee: *Wilson v. Piper*, 77 Ind. 437.^e Where a legacy was charged upon a fund of personal property bequeathed to testator's widow, the decree held her personally liable for its payment, and as a security for its payment sequestered the rents and profits of her lands: *Talbot v. Rountree*, 3 Ill. App. 275. The remedy of the legatee may be defeated by his laches in enforcing the lien,—here a delay of fifty-three years after the testator's death: *Smiley v. Jones*, 3 Tenn. Ch. 312. As to the distinction between a gift *in trust* to pay debts or legacies, and a gift merely *subject to or charged with* such payment, see *ante*, § 1033, note. Such charge is not a trust: *Dill v. Wisner*, 88 N. Y. 153, 158; *In re Fox*, 52 N. Y. 530, 536, 537; 11 Am. Rep. 751.

(b) The text is cited to this effect in *Clift v. Moses*, 116 N. Y. 144, 22 N. E. 393.

(c) See, as to this discretionary jurisdiction, *Hambro v. Hambro*, [1894] 2 Ch. 565; *In re Tucker*, [1893] 2 Ch. 323.

(d) *Nudd v. Powers*, 136 Mass. 273;

if sold in parcels, these are subject in the inverse order of alienation: *Scott v. Patchin*, 54 Vt. 253; *Lovejoy v. Raymond*, 58 Vt. 509, 2 Atl. 156. See *ante*, § 1224.

(e) *Scott v. Pattison*, 54 Vt. 253; *Lovejoy v. Raymond*, 58 Vt. 509, 2 Atl. 156.

ment of legacies as between the legatees and the devisees, it follows that an intention on the part of the testator to change this natural order by a charge upon lands devised, which should render them primarily or even ratably liable for the payment of all or of any particular debts or legacies, must clearly appear, either from the express language of the will or by fair and necessary implication from the various dispositions made by the testator.¹ A charge of debts or legacies upon lands devised may be either express or implied.

§ 1246. **The Same. Express Charge.**—A testator may in express terms charge the payment of all his debts, or any individual debt, and all his legacies, or any of them, either upon the lands devised by a residuary clause, or upon any particular lot or parcel of land specifically devised, and the charge may be upon the *corpus* of the land, or upon the rents and profits alone. The same is true of an express charge upon any particular fund of personal property bequeathed, or upon the residue given to the residuary legatee. What language will amount to an express charge must always be a matter of construction and interpretation, depending upon the terms employed in each individual case. Some examples of express charges are given in the foot-note.¹

§ 1245, 1 Hoyt v. Hoyt, 85 N. Y. 142; Taylor v. Dodd, 58 N. Y. 335; Owens v. Claytor, 56 Md. 129; Steele v. Steele's Adm'r, 64 Ala. 438; 38 Am. Rep. 15; Taylor v. Harwell, 65 Ala. 1; Heslop v. Gatton, 71 Ill. 528; Kirkpatrick v. Chesnut, 5 S. C. 216.^a

§ 1246, 1 The express charges here referred to all arise independently of the nature and form of the general dispositions of his property made by the testator. The charge may be in the most positive and certain terms; as, "I hereby direct that the debt due to A, or the legacy given to A, shall be a charge upon the land herein devised to B"; or "the land herein devised to B is subject to or charged with the payment of the debt — or the legacy — to A," and the like; or "I direct that the payment of all my debts — or of all the legacies herein given — be charged upon the real estate devised by my will," etc. Again, an express charge may be personal. If testator devises a parcel of land to A, and then directs that A shall pay a certain debt due to B, or a certain legacy

(a) See, also, Matter of Powers, Moses, 116 N. Y. 144, 22 N. E. 393; 124 N. Y. 361, 26 N. E. 940; Clift v. Arnold v. Dean, 61 Tex. 249.

§ 1247. **The Same. Implied Charge.**—The intention of a testator to charge debts and legacies upon the real estate devised may also be implied from the general dispositions of the will,—from the mode in which the real and the

given to B, or uses language of like import, the land devised to A is not only charged with the payment, but the devisee himself, by accepting the gift, becomes personally liable therefor to the creditor, or legatee, B: *Brown v. Knapp*, 79 N. Y. 136, 143; *Dodge v. Manning*, 1 N. Y. 298; *Reynolds v. Reynolds*, 16 N. Y. 257; *Gridley v. Gridley*, 24 N. Y. 130; *McLachlan v. McLachlan*, 9 Paige, 534; *Harris v. Fly*, 7 Paige, 421; *Mensch v. Mensch*, 2 Lans. 235; *Wood v. Wood*, 26 Barb. 356; *Olmstead v. Brush*, 27 Conn. 530.^a It should be observed, however, in this connection, that the courts of several states *virtually* require every charge upon land devised to be express, and hold that a direction to a devisee, A, that he shall pay a certain legacy or debt does not, without further language of the testator showing such an intention, create a charge on the land devised to A: See *Cable's Appeal*, 91 Pa. St. 327; *Owens v. Claytor*, 56 Md. 129.^b On the other hand, a mere charge on the land devised, or devise of the land merely subject to or charged with a debt or legacy, does not create a personal liability upon the devisee,—that is, a liability beyond the value of the land in his hands.^c The following are examples of express charges found in recent decisions: In *re Cooper's Trusts*, 4 De Gex, M. & G. 757; *Kempe v. Kempe*, 5 De Gex, M. & G. 346; *Makings v. Makings*, 1 De Gex, F. & J. 355; *Maskell v. Farrington*, 3 De Gex, J. & S. 338 (a general charge of all debts and all legacies upon the whole of testator's real estate charges the legacies upon lands specifically devised); *Phillips v. Gutteridge*, 3 De Gex, J. & S. 332 (a legacy charged upon rents and profits is charged upon the *corpus*); *Earl of Portarlington v. Damer*, 4 De Gex, J. & S. 161; *Brook v. Badley*, L. R. 4 Eq. 106; 3 Ch. 672 (a legacy thus charged is an interest in land); In *re Hill's Trusts*, L. R. 16 Ch. Div. 173 (same); *Mannox v. Greener*, L. R. 14 Eq. 456; *Taylor v. Taylor*, L. R. 17 Eq. 324 (on rents and profits, not on the *corpus*);^d *Birch v. Sherratt*, L. R. 2 Ch. 644; *Kermode v. Macdonald*, L. R. 3 Ch. 584; *Metcalf v. Hutchinson*, L. R. 1 Ch. Div. 591 (charge on rents and profits is *prima facie* a charge on the *corpus*); a testatrix devised to each of her three daughters one third of her estate, "provided there shall be set apart from her share" a certain legacy to each of her children payable when such children reached the age of twenty-one; held, that these legacies to the grandchildren were charged respectively on each parent's share: *Frampton v. Blume*, 129 Mass. 152; a farm being devised to testator's son "upon condition that he shall keep, provide for, and support" the testator's widow, the land is thereby charged in hands of the devisee and of his grantee: *Gardenville*

(a) *Couch v. Eastham*, 29 W. Va. 784, 3 S. E. 23, citing the text.

(b) *Penny's Appeal*, 109 Pa. St. 323. In Virginia, the realty must be expressly charged: *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

(c) *Clift v. Moses*, 116 N. Y. 144, 22 N. E. 393.

(d) *Irwin v. Wollpert*, 128 Ill. 527, 21 N. E. 501 (same); but *Taylor v. Taylor* was doubted in *In re Tucker*, [1893] 2 Ch. 323, where the annuity was charged on the *corpus*.

personal property are donated. The English and the American decisions all recognize this fact, but they are not all agreed upon the effects produced by particular dispositions. In England, a number of general rules on this subject have been definitely settled as a part of the law concerning property.¹ These rules are based upon three

etc. *Ass'n v. Walker*, 52 Md. 452; *Donnelly v. Edelen*, 40 Md. 117; ^e lands devised subject to testator's debts, his widow's allowance, and the rebuilding of certain houses on vacant lots, creates a charge: *Caruthers v. McNeill*, 97 Ill. 256; a bequest of the use of a certain room in a house devised to another creates a charge on the devise: *Ogle v. Tayloe*, 49 Md. 158; a devise of land, and then a direction to the devisee to pay a certain legacy bequeathed to another, creates a charge on the land so devised: *Ogle v. Tayloe*, *supra*; *Horning v. Wiederspallen*, 28 N. J. Eq. 387; *Merrill v. Bickford*, 65 Me. 118; *Wilson v. Piper*, 77 Ind. 437; *Markillie v. Ragland*, 77 Ill. 98; ^f *per contra*, such a direction does not constitute a charge: *Kirkpatrick v. Chesnut*, 5 S. C. 216; *Cable's Appeal*, 91 Pa. St. 327; *Owens v. Claytor*, 56 Md. 129. See also *Talbot v. Rountree*, 3 Ill. App. 275; *Bayless v. Bayless*, 6 Baxt. 324; *Hoyt v. Hoyt*, 85 N. Y. 142; *Dill v. Wisner*, 23 Hun, 123; *Perkins v. Emory*, 55 Md. 27; *Siron v. Ruleman's Ex'r*, 32 Gratt. 215; *Harkins v. Hughes*, 60 Ala. 316; *Burch v. Burch*, 52 Ind. 136.^g

¹ The following is a brief summary of the most important of these rules. In general, the same rules apply alike to charges of debts and of legacies: *Wheeler v. Howell*, 3 Kay & J. 198.

1. Where a testator directs, in terms however general, that his debts or legacies shall be paid, not saying *by his executors*, and afterwards devises his real estate, the devisees take the land devised charged with the payment; and it is not necessary that the direction to pay should be accompanied with such words as "in the first place," "*imprimis*," and the like, although in some of the early cases they were treated as important: *Shallcross v. Finden*, 3 Ves. 738; *Graves v. Graves*, 8 Sim. 43, 55; *Cook v. Dawson*, 29 Beav. 123; *Harris v. Watkins*, Kay, 438, 447; *Harding v. Grady*, 1 Dru. & War. 430; *Ronalds v. Feltham*, Turn. & R. 418; *Douce v. Lady Torrington*, 2 Mylne & K. 600; *Taylor v. Taylor*, 6 Sim. 246; *Jones v. Williams*, 1 Coll. C. C. 156; *Coxe v. Basset*, 3 Ves. 155.

2. The same result follows when *executors* are directed to pay the debts or legacies, and real estate is devised to them, either personally or as executors; in either case the land so devised is charged: *Henvell v. Whitaker*, 3 Russ. 343; *Cross v. Kennington*, 9 Beav. 150; *Gallimore v. Gill*, 2 Smale & G. 158; *8 De Gex, M. & G.* 567; *Preston v. Preston*, 2 Jur., N. S., 1040; *Dormay v.*

(e) See, also, *Bank of Florence v. Gregg*, 46 S. C. 169, 24 S. E. 64. Devise upon condition that the devisee pay an annuity to a certain church creates a charge upon the land: *Mer-*

ritt v. Bucknam, 78 Me. 504, 7 Atl. 383, citing the author's note.

(f) *Dudgeon v. Dudgeon*, 87 Mo. 218; *Yearly v. Long*, 40 Ohio St. 27.

(g) *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. 303, 28 L. ed. 354.

main considerations or motives of interpretation: 1. That a gift of personal property, in terms, *after* the payment of debts or legacies indicates that the debts or legacies are to be paid out of the real as well as the personal estate; 2. That

Borradaile, 10 Beav. 263; Hartland v. Murrell, 27 Beav. 204; In re Tanqueray-Willaume, L. R. 20 Ch. Div. 465; In re Bailey, L. R. 12 Ch. Div. 268; Parker v. Fearnley, 2 Sim. & St. 592, *contra*, is overruled. But a devise to only one of two or more executors does not operate to charge his estate: Warren v. Davies, 2 Mylne & K. 49; unless the devise to him is expressly *subject* to the debts: Dowling v. Hudson, 17 Beav. 248.

3. But where *executors* are simply directed to pay debts or legacies, and *no real estate is devised to them*, the lands devised to others are not charged, since it is always the duty of the executors to pay debts and legacies out of the personalty: Powell v. Robins, 7 Ves. 209; Willan v. Lancaster, 3 Russ. 108.

4. Where legacies are given generally, and this is followed by a residuary devise of the rest or residue of the real and personal property as one mass, the legacies are charged upon this residue of the real as well as the personal estate:^a Cole v. Turner, 4 Russ. 376; Greville v. Browne, 7 H. L. Cas. 689; Wheeler v. Howell, 3 Kay & J. 198; Gyett v. Williams, 2 Johns. & H. 429; In re Bellis's Trusts, L. R. 5 Ch. Div. 504; Bray v. Stevens, L. R. 12 Ch. Div. 162; In re Brooke, L. R. 3 Ch. Div. 630. Such a general charge, however, of legacies on the residue of real and personal property does not charge property which is *specifically* devised or bequeathed: Castle v. Gillett, L. R. 16 Eq. 530; Spong v. Spong, 3 Bligh, N. S., 84; Conron v. Conron, 7 H. L. Cas. 168; but it is otherwise when *both debts and legacies* are thus charged: Maskell v. Farrington, 8 Jur., N. S., 1198; 3 De Gex, J. & S. 338.

5. Where legacies are generally given, and this is followed by a direction to convert the real estate, and that its proceeds shall be deemed a part of the residuary personal estate, the legacies are thereby charged on the entire fund, notwithstanding the residue may be specifically bequeathed: Field v. Peckett, 29 Beav. 568.

6. A devise of real estate, followed by a bequest of personal estate *after payment of debts*, operates to charge the debts on the real as well as the personal property:^b Withers v. Kennedy, 2 Mylne & K. 607; Soames v. Robinson, 1 Mylne & K. 500; Shakels v. Richardson, 2 Coll. C. C. 31; and see Jones v.

(a) The rule applies although the words "rest" or "residue" are not used: In re Bawden, [1894] 1 Ch. 693 ("all the real and personal estate not otherwise disposed of;") explaining Gainsford v. Dunn, L. R. 17 Eq. 405, 408 (Jessel, M. R.), and following Hassel v. Hassel, 2 Dick. 527. But the legacies are payable *primarily* out of the personalty, unless the testator directs that they are to be paid out of the mixed fund, in

which case they are payable ratably out of realty and personalty: Elliott v. Dearsley, 16 Ch. Div. 322; In re Boards, [1895] 1 Ch. 499, overruling *dictum* of Jessel, M. R., in Gainsford v. Dunn, L. R. 17 Eq. 405, to the effect that without such direction the legacies are payable ratably out of personalty and realty.

(b) The author's note is quoted in full and approved in Hutchinson v. Gilbert, 86 Tenn. 464, 7 S. W. 126.

a direction in any form *to a devisee* to pay debts or legacies indicates an intention that the payment must or may be made out of the real estate devised to him; and 3. That a gift of legacies or a direction to pay debts, followed by a gift of *the residue* of the real and personal estate, indicates an intention that the former are to be paid out of the testator's real as well as his personal estate, *since otherwise there could not be any residue of the real estate.*^c These general canons of interpretation, and the several rules based upon them, as formulated in the foot-note, have not been fully adopted and acted upon by the courts of the American states.² The doctrine that a devise to the executors or

Price, 11 Sim. 557; Bright v. Larcher, 3 De Gex & J. 148; and see 2 Lead. Cas. Eq., 4th Am. ed., 369-372, note to Silk v. Prime.

² The very recent case of Hoyt v. Hoyt, 85 N. Y. 142, 146, 149, discloses so clearly the condition of the American law, and indicates so plainly the points of difference between it and the English rules, that I shall quote some passages from the opinion of Folger, C. J. He says (p. 146): "There is no express direction in this will that these legacies shall be charged upon the real estate. Yet legacies may be charged upon real estate without express direction in the will, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and extraneous circumstances may be considered in aid of the terms of the will. The will, in this case, is lean of the clauses and expressions that have been mainly rested upon in the earlier adjudications of this state as showing that intention. It does not direct the legacies to 'be first paid,' and then devise the real estate; it does not devise the real estate, nor the remainder of the real and personal estate, 'after the payment of the legacies'; it does not devise the real estate to a person in his own right, or as executor, and expressly direct him to pay the legacies; it does not make a residuary devise of 'all not herein otherwise disposed of.' These several forms of expressions have been held to indicate an intention in the testator to charge the payment of the legacies upon the real estate devised. None of them are here." The same judge further said (p. 149): "It is a rule in England that if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate [citing English cases quoted in the last note]. Such is the rule in some of the states of the Union, and in the United States supreme court [citing several cases quoted subsequently in this note]. We were urged to adopt this rule in deciding Bevan v. Cooper, 72 N. Y. 317; but while we did not undertake to question the soundness of the reasoning in the decisions there cited, we had in mind the remarks of the chancellor in Lupton v. Lupton, 2 Johns. Ch. 614, 623, and of Potter, J., in Myers v. Eddy, 47 Barb.

(c) The text is quoted in Hutchinson v. Gilbert, 86 Tenn. 464, 7 S. W. 126.

to third persons, accompanied by a direction to pay debts or legacies, and that a devise, substantially, in terms, "after

263; and as we could dispose of the case then without adopting or rejecting the rule, we did neither. Nor is it needed in the case at hand that we adopt the close rule above given, or question the correctness of *Lupton v. Lupton* and *Myers v. Eddy*. As we understand them, they assert that, unaided and alone, the words which make up the usual residuary clause of a will are not enough to evince an intention in the testator to charge a general legacy upon real estate." I would remark that, so far as I am aware, no case holds that the words of a residuary clause, unaided and alone, can, of themselves, produce such an effect. The rule, as settled by English decisions, is certainly very different.

The following collection of American cases, mostly recent, will furnish a general view of the condition of the law on this subject in the various states; but still, for a perfectly accurate notion, the decisions of each state must be separately examined.

1. The English rules, that a devise, either to the executors or to third persons, accompanied by a direction to pay debts or legacies, creates a charge upon the lands devised, and that a devise "after payment of" debts or legacies, or with the debts or legacies "to be first paid," and the like, also creates a charge, have been generally adopted by the courts of this country. Many cases illustrating these conclusions have already been cited in the foregoing notes under § 1247. See also *Chapin v. Waters*, 116 Mass. 140; *Lapham v. Clapp*, 10 R. I. 543; *Hoyt v. Hoyt*, *supra*; *Guelich v. Clark*, 3 Thomp. & C. 315; *Corwine v. Corwine*, 24 N. J. Eq. 579; 23 N. J. Eq. 368; *Bynum v. Hill*, 71 N. C. 319; *Finch v. Hull*, 24 Hun, 226; *Stoddard v. Johnson*, 13 Hun, 606; *Smith v. Fellows*, 131 Mass. 20 (after payment of legacies, etc.); *O'Donnell v. Barbey*, 129 Mass. 453 (same); *Hill v. Jones*, 65 Ala. 214; *Ogle v. Tayloe*, 49 Md. 158 (devisee directed to pay a legacy); *Turner v. Turner*, 57 Miss. 775 (same); *Merrill v. Bickford*, 65 Me. 118 (same); *Tuohy v. Martin*, 2 McAr. 572 (after payment, etc.); but *per contra*, in Alabama, a devise after payment of debts does not create a charge: *Starke v. Wilson*, 65 Ala. 576.^e

2. Gift of the residue of real and personal estate. The English doctrine as to the effect of a gift of the residue of real and personal property in one mass, after general legacies, is the one which the American courts have been most reluctant to adopt, and in respect of which there is the greatest diversity of opinion among their decisions. In *New York* the court of last resort has neither accepted nor rejected the English rule, while the decisions of lower courts — the supreme court and the court of chancery — are directly conflicting. The doctrine thus far settled by weight of authority in *New York* is as follows: When legacies are given generally, and the residue of the real and personal estate is afterwards devised in one mass, and it appears from other provisions on the face of the will that the testator must have contemplated,

(d) *Pond v. Allen*, 15 R. I. 171, 2 Atl. 302.

(e) See, also, *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285

(devise to executor); *Cram v. Cram*, 63 N. H. 35 (same); but see *Cunningham v. Parker*, 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635.

payment of debts or legacies," indicate an intention of the testator to charge the lands so devised has been generally

from the known condition of his property, that the personal estate would not be sufficient to pay his legacies, and that they could not be paid without resorting to the real estate embraced within the terms of the residuary clause, then an intention on his part will be implied that the legacies shall be payable out of such real estate as well as out of the personalty; or in other words, the residue of the real estate will be charged with their payment. In Hoyt v. Hoyt, above quoted, Folger, C. J., said (p. 147): "It is assumed that no man, in making a final disposition of his estate, will make a legacy, save with the honest, sober-minded intention that it shall be paid. Hence when, from the provisions of a will prior to the gift of legacies, it is seen that the testator must have known that he had already so far disposed of his personal estate as that there would not be enough left to pay the legacies, it is reasoned that the bare fact of giving a legacy indicates an intention that it shall be met from real estate. So it was reasoned in Goddard v. Pomeroy. Courts have been urged to go a step further, and say, when the facts of the estate, *aliunde* the will, show that the testator must have known that if a legacy was to be paid only from personal estate it would be a barren gift, he must have intended to subject the real estate to a liability for it. We were so urged in Bevan v. Cooper, but could not yield to it": Bevan v. Cooper, 72 N. Y. 317; Le Fevre v. Toole, 84 N. Y. 95; Kalbfleisch v. Kalbfleisch, 67 N. Y. 354; Taylor v. Dodd, 58 N. Y. 335; Reynolds v. Reynolds, 16 N. Y. 257; Lupton v. Lupton, 2 Johns. Ch. 614; Myers v. Eddy, 47 Barb. 263; Shulters v. Johnson, 38 Barb. 80; Goddard v. Pomeroy, 36 Barb. 546, 556; Finch v. Hull, 24 Hun, 226; Stoddard v. Johnson, 13 Hun, 606;^f but in the following cases the supreme court seems rather to have followed the English rule without limitation: Forster v. Civill, 20 Hun, 282; Hall v. Thompson, 23 Hun, 334; Ragan v. Allen, 7 Hun, 537; Buckley v. Buckley, 11 Barb. 43, 77. The conclusions maintained as above by the New York court of appeals have been substantially adopted in Connecticut: Canfield v. Bostwick, 21 Conn. 550; Gridley v. Andrews, 8 Conn. 1.^g In New Jersey, a series of cases finds the intent to charge legacies upon the real estate given with the personal in one mass by the residuary clause from facts and circumstances outside of the provisions of the will, from the fact that the legacies are given to children, that the personal property is actually insufficient, and the like: Van Winkle v. Van Houten, 3 N. J. Eq. 172, 187; Leigh v. Savidge, 14 N. J. Eq. 124; Dey v. Dey's Adm'r, 19 N. J. Eq. 137; Corwine v. Corwine's Ex'rs, 23 N. J. Eq. 368; Massaker v. Massaker, 13 N. J. Eq. 264. But in the later case of Corwine v. Corwine, 24 N. J. Eq. 579, the English rule seems rather to have been followed.^h In Johnson v. Poulson, 32 N. J. Eq. 390, the testator gave legacies to his three daughters, and then devised to his sons "all the rest and residue of my property, . . . subject, nevertheless, to certain payments to be made by them *hereinafter mentioned*," and finally gave an annuity and another legacy. Held, that these latter dispositions

(^f) Scott v. Stebbins, 91 N. Y. 605; McCorn v. McCorn, 100 N. Y. 511, 3 N. E. 480.

(^g) See, also, White v. Kaufmann, 66 Md. 89, 5 Atl. 865.

(^h) See, also, Vernon v. Mabbett, (N. J. Eq.) 58 Atl. 298.

adopted and acted upon in this country, although not without modification and even exception in a few of the states.¹

showed an intent that the first legacies to the three daughters were not to be charged upon the residue.

In the United States supreme court and in several of the states, the English rule as to legacies being charged on the residuary real estate is adopted without modification: *Lewis v. Darling*, 16 How. 1; *Hays v. Jackson*, 6 Mass. 149; *Adams v. Brackett*, 5 Met. 280, 282; *Wilcox v. Wilcox*, 13 Allen, 252; *Smith v. Fellows*, 131 Mass. 20; *Gallagher's Appeal*, 48 Pa. St. 121; *Becker v. Kehr*, 49 Pa. St. 223; *McGlaughlin v. McGlaughlin*, 24 Pa. St. 20; *Davis's Appeal*, 83 Pa. St. 348; *Wert's Appeal*, 69 Pa. St. 173; *Brisben's Appeal*, 70 Pa. St. 405; *Robinson v. McIver*, 63 N. C. 645, 649; *Hart v. Williams*, 77 N. C. 426; *Moore v. Beckwith's Ex'r*, 14 Ohio St. 129, 135; *Clyde v. Simpson*, 4 Ohio St. 445, 459; *Knotts v. Bailey*, 54 Miss. 235; 28 Am. Rep. 348; *Lapham v. Clapp*, 10 R. I. 543; *Derby v. Derby*, 4 R. I. 414, 431; *Corwine v. Corwine*, 24 N. J. Eq. 579; and see *Hall v. Thompson*, 23 Hun, 334; *Forster v. Civill*, 20 Hun, 282; *Ragan v. Allen*, 7 Hun, 537; *Buckley v. Buckley*, 11 Barb. 43, 77.¹

In the following cases no charge, it was held, is created: A will contained a general direction for paying debts; an equal share of the whole estate was given to each child; and a codicil gave pecuniary legacies, directing them to be paid without delay; the land held not charged with the legacies: *Power v. Davis*, 3 McAr. 153. In Alabama a power to sell lands for payment of debts contained in the will does not create a charge on the lands; the court leans strongly *against* an interpretation which would create a charge of either debts or legacies; the general rules of charges by implication do not seem to be followed: *Steele v. Steele's Adm'r*, 64 Ala. 438; 38 Am. Rep. 15; *Taylor v. Harwell*, 65 Ala. 1.¹ Even a devise or bequest "after payment of debts" does not charge the debts: *Starke v. Wilson*, 65 Ala. 576. A will, "after all my debts are paid," gave the widow her support from the home farm, then several pecuniary legacies, then a specific tract of land to one son, A., then to another son, F., "all the residue of my lands in T. and U. counties," and finally divided the residue of the personal estate among all the children, and appointed F. executor; held, that the legacies were not charged on any of the lands devised, and that the appointment of F. as executor did not operate to charge the lands devised to him: *Read v. Cather's Adm'rs*, 18 W. Va. 263 (this case seems to conflict with the general course of authorities). No

(1) See, also, *Atmore v. Walker*, 46 Fed. 429; *Lewis v. Ford*, 67 Ala. 143; *Lafferty v. People's Savings Bank*, 76 Mich. 35, 43 N. W. 34; *Heatherington v. Lewenberg*, 61 Miss. 372; *Cook v. Petty*, 108 Pa. St. 138; *Sloan's Appeal*, 168 Pa. St. 422, 47 Am. St. Rep. 889, 32 Atl. 42; *Jaudon v. Ducker*, 27 S. C. 295, 3 S. E. 465; *Hutchinson v. Gilbert*, 86 Tenn. 464, 7 S. W. 126, quoting this paragraph of the text;

Thomas v. Rector, 23 W. Va. 26; *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852.

(3) See, also, *Newsom v. Thornton*, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743. Charge by implication not recognized in Virginia: *Allen v. Patton*, 83 Va. 255, 2 S. E. 143.

(k) The text is cited to this effect in *Worley v. Taylor*, 21 Oreg. 589, 28 Am. St. Rep. 771, 28 Pac. 903.

Our courts have shown a much greater reluctance to adopt the English doctrine concerning the effect of a gift of the residue of the real and personal property in one mass, made after a bequest of general legacies. By the United States courts, and by the courts of several states, the doctrine has been fully accepted. In certain states it has been directly rejected; while in still another group a modification of it has been suggested, according to which the question in each particular case depends upon the testator's whole property, as indicated by other clauses of his will, or as actually shown by extrinsic evidence of circumstances outside of the will.

§ 1248. **Observations upon the American Rules.**—In concluding the foregoing survey of this important subject, I would venture to express the conviction that the unwillingness of American judges to accept and apply these English doctrines seems to be remarkable and even inexplicable. The rules as established by the English equity, when carried out to their fullest extent, completely accord with the fundamental conceptions of our American jurisprudence concerning real property, with all the tendencies of our modern state legislation, and with the sentiments of our people in regard to landed ownership. The tendency of our legislation, the fundamental principles of our jurisprudence, and the sentiments of our landed proprietorship, all agree in breaking down the superiority of real over personal property, and in establishing the ownership of both upon a perfect equality. That English courts should formulate rules in such direct opposition to the feudal dogmas, and to the

charge of the legacy results from a simple devise of real estate after the gift of a general legacy, without other language indicating such an intent: *Chase v. Davis*, 65 Me. 102. A will directed that the debts should be paid by the executors, and then gave to testator's two sons all the real estate in equal moieties, "and also my personal estate, after paying the legacies herein-after mentioned," and finally gave certain legacies; these legacies were not charged upon the real estate: *Gilder v. Gilder*, 1 Del. Ch. 331.

The rule is settled that if a charge on lands depends upon some contingency which fails, the charge thereby sinks for the benefit of whoever may be entitled

supremacy of land ownership, is perhaps remarkable; but it is certainly more strange that any American courts should refuse to adopt these rules which so fully express the conceptions and tendencies of our national civilization.

SECTION V.

THE GRANTOR'S LIEN ON CONVEYANCE.

ANALYSIS.

- §§ 1249-1254. The ordinary grantor's lien for unpaid purchase price.
 - § 1249. General doctrine; in what states adopted or rejected; states classified in foot-notes.
 - § 1250. Origin and *rationale*; Ahrend v. Odiorne, discussed.
 - § 1251. Requisites, extent, and effects of this lien; great uncertainty and conflict in the results of judicial opinion.
 - § 1252. How discharged or waived; effect of taking other security, etc.
 - § 1253. Against whom the lien avails.
 - § 1254. In favor of whom the lien avails; whether or not assignable.
- §§ 1255-1259. Grantor's lien by reservation.
 - § 1255. General description.
 - § 1256. What creates a lien by reservation.
 - § 1257. Essential nature of the lien.
 - § 1258. Its operation and effect.
 - § 1259. The grantor's dealing with this lien; waiver; assignment.

§ 1249. General Doctrine — In What States Adopted or Rejected.— Although the grantor's and the vendor's lien are ordinarily treated of together by one and the same description and discussion, yet they are essentially different, producing different consequences, and governed in many important and practical respects by different rules. By presenting them separately, more accuracy and certainty will result, and much unnecessary confusion will, I think, be avoided.¹ It is a firmly established doctrine of the English

to the principal estate; that is, such person takes the estate free from the charge: *Whitehead v. Thompson*, 79 N. C. 450.

¹ The *grantor's* lien is purely equitable, exists only in the equitable jurisprudence, and is exclusively of equitable cognizance, the entire legal estate with the possession being vested in the grantee. The *vendor's* lien, on the other hand, is accompanied by the legal title and estate. Although in equity

equity, that the grantor of land, who has sold and conveyed and delivered possession to the grantee, as well as the vendor in a contract for the sale and purchase of land who has delivered possession to his vendee, retains an equitable lien upon the land for the unpaid purchase-money, although he has taken no distinct agreement or separate security for it, and even though the deed recites that the consideration has been fully paid.^{2 a} The grantor's lien exists in the fol-

the vendee acquires the equitable estate, and the vendor is said to have a lien thereon, still the legal estate and title are remaining in the vendor, and the vendee's estate is *only* equitable. Here is, at the outset, a fundamental difference between the position of the grantor and that of the vendor. This distinction runs through all the relations between these parties and third persons acquiring interest in or claims on the land. The method of regarding the two liens as one and the same has produced much unnecessary confusion and apparent conflict of decision.

² Mackreth v. Symmons, 15 Ves. 329; 1 Lead. Cas. Eq., 4th Am. ed., 447; Blackburn v. Gregson, 1 Brown Ch. 420; Smith v. Hibbard, 2 Dick. 730; Chapman v. Tanner, 1 Vern. 267; Austen v. Halsey, 6 Ves. 475; Smith v. Evans, 28 Beav. 59; Rose v. Watson, 10 H. L. Cas. 672. In the leading case of Mackreth v. Symmons, *supra*, Lord Eldon thus states the doctrine in his own peculiar dialect: "The settled doctrine is, that where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt indorsed upon the back, if it is the simple case of a conveyance, the money or part of it not being paid, as between the vendor and vendee and persons claiming as volunteers, upon the doctrine of this court, which, when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case for the whole consideration, in the other for that part of the money which was not paid." As to the vendor's lien on a sale of chattels, see *Coman v. Lakey*, 80 N. Y. 345, 350, 351.^b

(a) This portion of the text is quoted in *Brisco v. Minah Consol. Min. Co.*, 82 Fed. 952. This section is cited in *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72; *First Nat. Bank v. Salem C. F. M. Co.*, 39 Fed. 89; *Gee v. McMillan*, 14 Oreg. 268, 12 Pac. 417, 58 Am. Rep. 315; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *Maroney v. Boyle*, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821.

(b) But see *Dunn v. Hastings*, 54 N. J. Eq. 503, 34 Atl. 256, per Pitney,

V. C.: "The doctrine of vendor's lien, as far as I can find, has never been extended to personal chattels beyond the exercise of the right of stoppage *in transitu*. The suggestions to the contrary by Prof. Pomeroy (3 Pom. Eq. Jur. § 1249 *et seq.*) rest upon cases where the original contract of sale provided for a lien for a portion of the purchase-money, and the formal means adopted for insuring it were defective. *Coman v. Lakey*, 80 N. Y. 345; *Amerman v. Wiles*, 24 N. J. Eq. 13."

lowing states and territories: Alabama, Arkansas, California, Colorado, Dakota, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oregon, Tennessee, Texas, Wisconsin.³ In several

³ *Alabama*: *Haley v. Bennett*, 5 Port. 452; *Roper v. McCook*, 7 Ala. 318; *Burns v. Taylor*, 23 Ala. 255; *Bradford v. Harper*, 25 Ala. 337; *Griffin v. Camack*, 36 Ala. 695; 76 Am. Dec. 344; *Dennis v. Williams*, 40 Ala. 633; *Wood v. Sullens*, 44 Ala. 686; *Gordon v. Bell*, 50 Ala. 213; *Flinn v. Barber*, 61 Ala. 530; *Terry v. Keaton*, 58 Ala. 667; *Dugger v. Tayloe*, 60 Ala. 504; *Bryant v. Stephens*, 58 Ala. 636; *Moore v. Worthy*, 56 Ala. 163; *Simpson v. McAllister*, 56 Ala. 228; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *Bankhead v. Owen*, 60 Ala. 457; *Thames v. Caldwell*, 60 Ala. 644; *Pylant v. Reeves*, 53 Ala. 132; 25 Am. Rep. 605; *Barnett v. Riser's Ex'rs*, 63 Ala. 347; *Thurman v. Stoddard*, 63 Ala. 336; *Chapman v. Lee*, 64 Ala. 483; *Burgess v. Greene*, 64 Ala. 509; *Shorter v. Frazer*, 64 Ala. 74; *Carver v. Eads*, 65 Ala. 190; *Walker v. Carroll*, 65 Ala. 61.^c

Arkansas: *English v. Russell*, Hemp. 35; *Scott v. Orbison*, 21 Ark. 202; *Shall v. Biscoe*, 18 Ark. 142; *Harris v. Hanks*, 25 Ark. 510, 517; *Refield v. Ferrell*, 27 Ark. 534; *Campbell v. Rankin*, 28 Ark. 401; *Turner v. Horner*, 29 Ark. 440; *Lavender v. Abbott*, 30 Ark. 172; *Neal v. Speigle*, 33 Ark. 63; *Mayes v. Hendry*, 33 Ark. 240; *Swan v. Benson*, 31 Ark. 728; *Blevins v. Rogers*, 32 Ark. 258; *Johnson v. Nunnerly*, 30 Ark. 153; *Linthicum v. Tapscott*, 28 Ark. 267; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Stroud v. Pace*, 35 Ark. 100; *Young v. Harris*, 36 Ark. 162; *Harris v. Hanie*, 37 Ark. 348.^d

(^c) *Alabama*.—See, also, *Craft v. Russell*, 67 Ala. 9; *Ware v. Curry*, 67 Ala. 274; *Wilkinson v. May*, 69 Ala. 33; *McCarty v. Williams*, 69 Ala. 174; *Hooper v. Armstrong*, 69 Ala. 343; *Walker v. Struve*, 70 Ala. 167; *Tedder v. Steele*, 70 Ala. 347; *Donegan's Admr. v. Hentz*, 70 Ala. 437; *Hooper v. Strahan*, 71 Ala. 75; *Prickett v. Sibert*, 71 Ala. 194; *Stringfellow v. Ivie*, 73 Ala. 209; *Preston v. Ellington*, 74 Ala. 133; *Williams v. McCarty*, 74 Ala. 295; *Daily's Admr. v. Reid*, 74 Ala. 415; *Dickerson v. Carroll*, 76 Ala. 377; *McDonald v. Elyton Land Co.*, 78 Ala. 382; *Kyle v. Bellenger*, 79 Ala. 516; *Kelly v. Karsner*, 81 Ala. 500, 2 South. 164; *Betts v. Sykes*, 82 Ala. 378, 2 South. 648; *Crampton v. Prince*, 83 Ala. 246, 3 South. 519, 3

Am. St. Rep. 718; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273; *Woodall v. Kelly*, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57; *Jackson v. Stanley*, 87 Ala. 270, 6 South. 193; *Weaver v. Brown*, 87 Ala. 533, 6 South. 354; *Davis v. Smith*, 88 Ala. 596, 7 South. 159; *Jones v. Lockard*, 89 Ala. 575, 8 South. 103; *Parrish v. Hastings*, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50; *Hood v. Hammond*, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159.

(^d) *Arkansas*.—*Chapman v. Liggett*, 41 Ark. 292; *Waddell v. Carlock*, 41 Ark. 523; *Stephens v. Shannon*, 43 Ark. 464; *Rodman v. Sanders*, 44 Ark. 504; *Springfield, etc., R. R. Co. v. Stewart*, 51 Ark. 285, 10 S. W. 767.

of these commonwealths the lien has been recognized by statute; and in a few of them, it seems, under a somewhat

California: Civ. Code, sec. 3046; Truebody v. Jacobson, 2 Cal. 269; Cahoon v. Robinson, 6 Cal. 225; Walker v. Sedgwick, 8 Cal. 398; Sparks v. Hess, 15 Cal. 186; Williams v. Young, 17 Cal. 403; Taylor v. McKinney, 20 Cal. 618; Baum v. Grigsby, 21 Cal. 172; 81 Am. Dec. 153; Burt v. Wilson, 28 Cal. 632; 87 Am. Dec. 142; Gallagher v. Mars, 50 Cal. 23; Wells v. Harter, 56 Cal. 342.●

Colorado: Francis v. Wells, 2 Col. 660.

Dakota: Civ. Code, sec. 1801.

District of Columbia: Ford v. Smith, 1 McAr. 592.

Florida: Bradford v. Marvin, 2 Fla. 463; Woods v. Bailey, 3 Fla. 41.†

Illinois: Dyer v. Martin, 4 Scam. 146; Trustees v. Wright, 11 Ill. 603; Keith v. Horner, 32 Ill. 524; McLaurie v. Thomas, 39 Ill. 291; Boynton v. Champlin, 42 Ill. 57; Wilson v. Lyon, 51 Ill. 166; Kirkham v. Boston, 67 Ill. 599; Wing v. Goodman, 75 Ill. 159; Moshier v. Meek, 80 Ill. 79; Andrus v. Coleman, 82 Ill. 26; 25 Am. Rep. 289; Henson v. Westcott, 82 Ill. 224; Small v. Stagg, 95 Ill. 39; Manning v. Frazier, 96 Ill. 279.Ⓔ

Indiana: Lagow v. Badollet, 1 Blackf. 416; 12 Am. Dec. 258; Evans v. Goodlet, 1 Blackf. 246; Deibler v. Barwick, 4 Blackf. 339; McCarty v. Pruett, 4 Ind. 226; Merritt v. Wells, 18 Ind. 171; Mattix v. Weand, 19 Ind. 151; Cox's Adm'r v. Wood, 20 Ind. 54; Yaryan v. Shriner, 26 Ind. 364; Anderson v. Donnell, 66 Ind. 150; Haskell v. Scott, 56 Ind. 564; Fouch v. Wilson, 60 Ind. 64; 28 Am. Rep. 651; Nichols v. Glover, 41 Ind. 24; Martin v. Cauble, 72 Ind. 67; Higgins v. Kendall, 73 Ind. 522; Richards v. McPherson, 74 Ind. 158.Ⓜ

Iowa: Peirson v. David, 1 Iowa, 23; Grapengether v. Fejervary, 9 Iowa, 163; 74 Am. Dec. 336; Hays v. Horine, 12 Iowa, 61; 79 Am. Dec. 518; Rakestraw v. Hamilton, 14 Iowa, 147; Patterson v. Linder, 14 Iowa, 414; Tupples

(e) *California*.—See, also, Fitzell v. Leaky, 72 Cal. 477, 14 Pac. 198; Bancroft v. Crosby, 74 Cal. 583, 16 Pac. 504; Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272; Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; Selna v. Selna, 125 Cal. 357, 58 Pac. 16, 73 Am. St. Rep. 47.

(†) *Florida*.—McKeown v. Collins, 38 Fla. 276, 21 South. 103.

(Ⓔ) *Illinois*.—See, also, Hett v. Collins, 103 Ill. 74; Ryhiner v. Frank, 105 Ill. 326; Chicago, etc., Land Co. v. Peck, 112 Ill. 408, 451; Sidwell v. Wheaton, 114 Ill. 267, 2 N. E. 183; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Strong v. Strong, 126 Ill. 301, 18 N. E. 665; Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18.

(Ⓜ) *Indiana*.—See, also, McClellan v. Coffin, 93 Ind. 456; Bakes v. Gilbert, 93 Ind. 70; Lowry v. Smith, 97 Ind. 466; Barrett v. Lewis, 106 Ind. 120, 5 N. E. 910; Otis v. Gregory, 111 Ind. 504, 13 N. E. 39; Yetter v. Fitts, 113 Ind. 34, 14 N. E. 707; Strohm v. Good, 113 Ind. 93, 14 N. E. 901; Brower v. Witmeyer, 121 Ind. 83, 22 N. E. 975; Petry v. Ambroscher, 100 Ind. 510; Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689; Fleece v. O'Rear, 83 Ind. 200; Dwenger v. Branigan, 95 Ind. 221; Upland Land Co. v. Ginn, 144 Ind. 434, 43 N. E. 443, 55 Am. St. Rep. 181; Reeder v. Nay, 95 Ind. 164; Masters v. Templeton, 92 Ind. 447; Himes v. Langley, 85 Ind. 77.

modified form, to be the ordinary mode of securing payment in conveyances of land on credit. In the remaining

v. Viers, 14 Iowa, 515; *Poler v. Dubuque*, 20 Iowa, 440; *McDole v. Purdy*, 23 Iowa, 277; *Johnson v. McGrew*, 42 Iowa, 555;¹ *Rev. Laws 1860*, p. 653; but by the Code of 1873, sec. 1940, the lien must be reserved in the deed to the grantee, in order to avail against his conveyance: *Tinsley v. Tinsley*, 52 Iowa, 14; *Stuart v. Harrison*, 52 Iowa, 511; *Allen v. Loring*, 34 Iowa, 499; *Escher v. Simmons*, 54 Iowa, 269.¹

Kentucky: *Fowler v. Heirs of Rust*, 2 A. K. Marsh. 294; *Thornton v. Knox's Ex'r*, 6 B. Mon. 74; *Muir v. Cross*, 10 B. Mon. 277; *Tiernan v. Thurman*, 14 B. Mon. 224; *Gritton v. McDonald*, 3 Met. (Ky.) 252; *Burrus v. Roulhac's Adm'x*, 2 Bush, 39; *Maupin v. McCormick*, 2 Bush, 206; *Ledford v. Smith*, 6 Bush, 129; *Emison v. Risque*, 9 Bush, 24. The lien has been somewhat limited by statute as against *bona fide* purchasers from and creditors of the grantee: *Gen. Stats. 1873*, p. 589; *Phillips v. Skinner*, 6 Bush, 662.

Maryland: *Moreton v. Harrison*, 1 Bland, 491; *Iglehart v. Armiger*, 1 Bland, 519; *Ringgold v. Bryan*, 3 Md. Ch. 488; *White v. Casenave's Heirs*, 1 Har. & J. 106; *Ghiselin v. Fergusson*, 4 Har. & J. 522; *Pratt v. Vanwyck's Ex'rs*, 6 Gill & J. 495; *Magruder v. Peter*, 11 Gill & J. 217; *Repp v. Repp*, 12 Gill & J. 341; *Carr v. Hobbs*, 11 Md. 285; *Hummer v. Schott*, 21 Md. 307; *Hall v. Jones*, 21 Md. 439; *Bratt v. Bratt*, 21 Md. 578; *Carrico v. Farmers' etc. Bank*, 33 Md. 235; *Gen. Laws*, art. 16, sec. 130; *Rev. Code 1878*, art. 66, sec. 5.¹

Michigan: *Carroll v. Van Rensselaer*, Harr (Mich.) 225; *Sears v. Smith*, 2 Mich. 243; *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230; *Payne v. Avery*, 21 Mich. 524; *Merrill v. Allen*, 38 Mich. 487; *Palmer v. Sterling*, 41 Mich. 218; *Clark v. Stilson*, 36 Mich. 482; *Hiscock v. Norton*, 42 Mich. 320; *Brown v. Porter*, 2 Mich. N. P. 12.^m

(i) *Iowa*.—See, also, *Kendrick v. Eggleston*, 56 Iowa 128, 41 Am. Rep. 90, 8 N. W. 786; *Gnash v. George*, 58 Iowa 492, 12 N. W. 546; *Webster v. McCollough*, 61 Iowa 496, 16 N. W. 578; *Cutler v. Ammon*, 65 Iowa 281, 21 N. W. 604; *Erickson v. Smith*, 79 Iowa 374, 44 N. W. 681; *Fisher v. Shropshire*, 147 U. S. 133, 37 L. ed. 109, 13 Sup. Ct. 201; *Brown v. Byam*, 65 Iowa 374, 21 N. W. 684; *Kendrick v. Eggleston*, 56 Iowa 128, 41 Am. Rep. 90, 8 N. W. 786; *Akers v. Luse*, 56 Iowa 346, 9 N. W. 303.

(j) *Iowa*.—See, also, *Dean v. Scott*, 67 Iowa 233, 25 N. W. 147; *Prouty v. Clark*, 73 Iowa 55, 34 N. W. 614; *Chrisman v. Hay*, 43 Fed. 552.

(k) *Kentucky*.—*Gen. Stats. c. 63*,

sec. 24. See, also, *Brown v. Ferrell*, 83 Ky. 417; *Exchange Bank v. Stone*, 80 Ky. 109.

(l) *Maryland*.—*Pub. Gen. Laws 1888*, art. 16, sec. 193. See, also, *Dance v. Dance*, 56 Md. 433; *Thompson v. Corrie*, 57 Md. 197; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Baltimore & Liberty Turnpike Co. v. Moale*, 71 Md. 353, 18 Atl. 658; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

(m) *Michigan*.—See, also, *Ortmann v. Plummer*, 52 Mich. 76, 17 N. W. 703; *Dunton v. Outhouse*, 64 Mich. 419, 31 N. W. 411; *Waterfield v. Wilber*, 64 Mich. 642, 31 N. W. 553; *Richards v. Shingle, etc.*,

states of the Union, the doctrine has either been condemned by the courts, or after having been judicially accepted, has

Minnesota: Selby v. Stanley, 4 Minn. 65; Daughaday v. Paine, 6 Minn. 443; Duke v. Balme, 16 Minn. 306; Dawson v. Girard L. Ins. Co., 27 Minn. 411.^m

Mississippi: Stewart v. Ives, 1 Smedes & M. 197; Tanner v. Hicks, 4 Smedes & M. 294; Dunlap v. Burnett, 5 Smedes & M. 702; 45 Am. Dec. 269; Upshaw v. Hargrove, 6 Smedes & M. 286; Trotter v. Erwin, 27 Miss. 772; Servis v. Beatty, 32 Miss. 52; Littlejohn v. Gordon, 32 Miss. 235; Richardson v. Bowman, 40 Miss. 782; Harvey v. Kelly, 41 Miss. 490; 93 Am. Dec. 267; Russell v. Watt, 41 Miss. 602; 93 Am. Dec. 270; Dodge v. Evans, 43 Miss. 570; Pitts v. Parker, 44 Miss. 247; Rutland v. Brister, 53 Miss. 683; Perkins v. Gibson, 51 Miss. 699; 24 Am. Rep. 644; Tucker v. Hadley, 52 Miss. 414; McLain v. Thompson, 52 Miss. 418; Walton v. Hargroves, 42 Miss. 18; 97 Am. Dec. 429; Lindsey v. Bates, 42 Miss. 397.^o

Missouri: McKnight v. Brady, 2 Mo. 110; Marsh v. Turner, 4 Mo. 253; Delassus v. Poston, 19 Mo. 425; Davis v. Lamb, 30 Mo. 441; Bledsoe v. Games, 30 Mo. 448; Pratt v. Clark, 57 Mo. 189; Stevens v. Rainwater, 4 Mo. App. 292; Davenport v. Murray, 68 Mo. 198; Pearl v. Hervey, 70 Mo. 160.^p

New Jersey: Vandoren v. Todd, 3 N. J. Eq. 397; Brinkerhoff v. Vansciven, 4 N. J. Eq. 251; Herbert v. Scofield, 9 N. J. Eq. 492; Dudley v. Matlack, 14 N. J. Eq. 252; Armstrong v. Ross, 20 N. J. Eq. 109; Corlies v. Howland, 26 N. J. Eq. 311; Graves v. Coutant, 31 N. J. Eq. 763; Ogden v. Thornton, 30 N. J. Eq. 569.^q

New York: Champion v. Brown, 6 Johns. Ch. 398, 402; 10 Am. Dec. 343; Garson v. Green, 1 Johns. Ch. 308; Stafford v. Van Rensselaer, 9 Cow. 316;

Co., 74 Mich. 57, 41 N. W. 860; Curtis v. Clarke, 113 Mich. 458, 71 N. W. 845; Lyon v. Clark, (Mich.) 94 N. W. 4.

(^m) *Minnesota.*—See, also, Hammond v. Peyton, 34 Minn. 529, 27 N. W. 72; Peters v. Turrell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

(^o) *Mississippi.*—See, also, Parker v. McBee, 61 Miss. 134; Cummings v. Moore, 61 Miss. 184; Louisiana Nat. Bank v. Knapp, 61 Miss. 485; Tate v. Bush, 62 Miss. 145; Lissa v. Posey, 64 Miss. 352, 1 South. 500.

(^p) *Missouri.*—See, also, Orrick v. Durham, 79 Mo. 174; Bennett v. Shipley, 82 Mo. 448; Zoll v. Carnahan, 83 Mo. 35; Bronson v. Wanzer, 86 Mo. 408; Christy v. McKee, 94 Mo. 241, 6 S. W. 656; Green v. Betts, 1 Fed. 289; Johnson v. Burks, 103

Mo. App. 221, 77 S. W. 133; Williams v. Crow, 84 Mo. 298; Boyer v. Austin, 75 Mo. 81; Hunt v. Marsh, 80 Mo. 396; Thomas v. Bridges, 73 Mo. 530; Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445; Sloan v. Campbell, 71 Mo. 387, 36 Am. Rep. 493; Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339.

(^q) *New Jersey.*—See, also, Porter v. Woodruff, 36 N. J. Eq. 174; Butterfield v. Okie, 36 N. J. Eq. 482; Acton v. Waddington, 46 N. J. Eq. 16, 18 Atl. 356; Harter v. Capital City Brewing Co., 64 N. J. Eq. 155, 53 Atl. 560; Traphagen v. Hand, 36 N. J. Eq. 384.

(^r) *New York.*—Maroney v. Boyle, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821; Hubbell v. Henrickson, 175 N. Y. 175, 67 N. E. 302; Ten Eick v. Simpson, 1 Sandf. Ch. 244;

been abrogated by statute, or the question as to its existence does not seem to have been finally determined. The

White v. Williams, 1 Paige, 502; *Fish v. Howland*, 1 Paige, 20; *Warner v. Van Alstyne*, 3 Paige, 513; *Shirley v. Sugar Ref. Co.*, 2 Edw. Ch. 505; *Warren v. Fenn*, 28 Barb. 333; *Dubois v. Hull*, 43 Barb. 26; *Smith v. Smith*, 9 Abb. Pr., N. S., 420; *Chase v. Peck*, 21 N. Y. 581; *Hazeltine v. Moore*, 21 Hun, 355; *Lamberton v. Van Voorhis*, 15 Hun, 336; *Gaylord v. Knapp*, 15 Hun, 87.

Ohio:^s *Tiernan v. Beam*, 2 Ohio, 383; 15 Am. Dec. 557; *Williams v. Roberts*, 5 Ohio, 35; *Brush v. Kinsley*, 14 Ohio, 20; *Mayham v. Coombs*, 14 Ohio, 428; *Neil v. Kinney*, 11 Ohio St. 58; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Whetsel v. Roberts*, 31 Ohio St. 503.

Oregon: *Pease v. Kelly*, 3 Or. 417.*

Tennessee: *Eskridge v. McClure*, 2 Yerg. 84; *Ross v. Whitson*, 6 Yerg. 50; *Campbell v. Baldwin*, 2 Humph. 248; *Marshall v. Christmas*, 3 Humph. 616; 39 Am. Dec. 199; *Uzzell v. Mack*, 4 Humph. 319; 40 Am. Dec. 648; *Medley v. Davis*, 5 Humph. 387; *Norvell v. Johnson*, 5 Humph. 489; *Taylor v. Hunter*, 5 Humph. 569; *Brown v. Vanlier*, 7 Humph. 239; *Ellis v. Temple*, 4 Cold. 315; 94 Am. Dec. 200; *Choate v. Tighe*, 10 Heisk. 621; *Durant v. Davis*, 10 Heisk. 522; *Irvine v. Muse*, 10 Heisk. 477; *Russell v. Dodson*, 6 Baxt. 16.■

Texas: *Briscoe v. Bronaugh*, 1 Tex. 326; 46 Am. Dec. 108; *Pinchain v. Col-lard*, 13 Tex. 333; *Glasscock v. Glasscock's Adm'r*, 17 Tex. 480; *Wheeler v. Love*, 21 Tex. 583; *McAlpine v. Burnett*, 23 Tex. 649; *Burford v. Rosenfield*, 37 Tex. 42; *White v. Downs*, 40 Tex. 225; *Yarborough v. Wood*, 42 Tex. 91; 19 Am. Rep. 44; *Robinson v. McWhirter*, 52 Tex. 201; *Baker v. Compton*, 52 Tex. 252; *Dibrell v. Smith*, 49 Tex. 474; *Burgess v. Millican*, 50 Tex. 397; *Ball v. Hill*, 48 Tex. 634; *Irvin v. Garner*, 50 Tex. 48; *Wasson v. Davis*, 34 Tex. 159; *De Bruhl v. Maas*, 54 Tex. 464; *Waldrom v. Zacharie*, 54 Tex. 503.▼

Hare v. Van Deusen, 32 Barb. 92; *Hulett v. Whipple*, 58 Barb. 224; *Camp v. Gifford*, 67 Barb. 434; *Wal-rath v. Abbott*, 75 Hun 445, 454, 27 N. Y. Supp. 529; *Fisk v. Potter*, 2 Keyes 64; *Benedict v. Benedict*, 85 N. Y. 625.

(*) *Ohio*.—*Dietrich v. Folk*, 40 Ohio St. 635.

(†) *Oregon*.—The existence of the lien in Oregon was doubted in *Kelly v. Ruble*, 11 Oreg. 75, 4 Pac. 593, but was recognized in *Gee v. McMil-lan*, 14 Oreg. 268, 12 Pac. 417, 58 Am. Rep. 315; *Coos Bay W. Co. v. Crocker*, 4 Fed. 577, 6 Sawy. 574; *First Nat. Bank of Salem v. Salem C. F. M. Co.*, 39 Fed. 89. In *Frame v. Sliter*, 29 Oreg. 121, 45 Pac. 290, 54 Am. St. Rep. 781, 34 L. R. A. 690,

the court met the question squarely and decided that the lien does not exist. "The whole doctrine is in-consistent with the general policy prevailing in this country of making all matters of title depend upon rec-ord evidence."

(■) *Tennessee*.—*Cate v. Cate*, 87 Tenn. 41, 9 S. W. 231; *Jackson v. Rutledge*, 3 Lea 626, 31 Am. Rep. 655; *Jarman v. Farley*, 7 Lea 141; *Jobe v. Chedister*, 5 Lea 346; *Bow-man v. Faw*, 5 Lea 472.

(▼) *Texas*.—See, also, *Salmon v. Downs*, 55 Tex. 243; *Hunt v. Makem-son*, 56 Tex. 9; *Thorn v. Dill*, 56 Tex. 145; *Hicks v. Morris*, 57 Tex. 658; *Wooters v. Hollingsworth*, 58 Tex. 374; *Senter v. Lambeth*, 59 Tex. 259; *Joiner v. Perkins*, 59 Tex. 300; *Bailey*

following states belong to this class, in which the lien does not exist, either because rejected or not adopted by the courts, or abolished by statutes: Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia.⁴

Wisconsin: Tobey v. McAllister, 9 Wis. 463; Willard v. Reas, 26 Wis. 540; Madden v. Barnes, 45 Wis. 135; 30 Am. Rep. 703; De Forest v. Holum, 38 Wis. 516.^w

Rhode Island.—A recent decision in Rhode Island recognizes and enforces the lien, at least under the circumstances of the case: Kent v. Gerhard, 12 R. I. 92; 34 Am. Rep. 612.

⁴ *Connecticut*.—Not adopted; leaning of the courts strongly against it; but the question not perhaps finally settled: Watson v. Wells, 5 Conn. 468; Dean v. Dean, 6 Conn. 285; Meigs v. Dimock, 6 Conn. 458, 464; Atwood v. Vincent, 17 Conn. 575; Chapman v. Beardsley, 31 Conn. 115.

Delaware.—Not adopted; question still left open: Budd v. Busti, 1 Harr. (Del.) 69.^x

Georgia.—Abolished by statute: Code 1882, sec. 1997; Jones v. Janes, 56 Ga. 325; but see Drinkwater v. Moreman, 61 Ga. 395. Former decisions had established it: Mims v. Macon etc. R. R., 3 Ga. 333; Mounce v. Byars, 16 Ga. 469; Mims v. Lockett, 23 Ga. 237; 68 Am. Dec. 521; Chance v. McWhorter, 26 Ga. 315; Still v. Mayor etc., 27 Ga. 502, 504.

Kansas.—Existence denied: Simpson v. Mundee, 3 Kan. 172; Brown v. Simpson, 4 Kan. 76; Smith v. Rowland, 13 Kan. 245; Greeno v. Barnard, 18 Kan. 518.

Maine.—Entirely rejected: Philbrook v. Delano, 29 Me. 410, 415; Gilman v. Brown, 1 Mason, 191, 210.

Massachusetts.—Entirely rejected: Ahrend v. Odiorne, 118 Mass. 261; 19 Am. Rep. 449; Gilman v. Brown, *supra*.

Nebraska.—Rejected: Edminster v. Higgins, 6 Neb. 265.

New Hampshire.—Not adopted; its existence questioned: Buntin v. French, 16 N. H. 592; Arlin v. Brown, 44 N. H. 102.

v. Tindall, 59 Tex. 540; Porterfield v. Taylor, 60 Tex. 264; Slaughter v. Owens, 60 Tex. 668; Brooks v. Young, 60 Tex. 32; Russell v. Kirkbride, 62 Tex. 455; Cresap v. Manor, 63 Tex. 485; Houston v. Dixon, 66 Tex. 79, 1 S. W. 375; Bynum v. Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49; Hamblen v. Folts, 70 Tex. 132, 7 S. W. 834; Ballard v. Carter, 71 Tex. 161, 9 S. W. 92; Howe v. Harding, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17; Oury v. Saunders, 77 Tex. 278, 13 S. W. 1030; Johnson

v. Townsend, 77 Tex. 639, 14 S. W. 233; Johnson v. Dyer, 19 Tex. Civ. App. 602, 47 S. W. 727.

(^w) *Wisconsin*.—See, also, Carey v. Boyle, 53 Wis. 574, 11 N. W. 47, 56 Wis. 145, 14 N. W. 32; Evans v. Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22. But such a lien cannot be acquired on a homestead: Berger v. Berger, 104 Wis. 282, 80 N. W. 585, 76 Am. St. Rep. 877.

(^x) *Delaware*.—See, also, Rice v. Rice, 36 Fed. 860.

North Carolina.—Held not to exist; but sustained by earlier cases: *McGahee v. Sneed*, 1 Dev. & B. Eq. 333; *Womble v. Battle*, 3 Ired. Eq. 182; *Henderson v. Burton's Ex'r*, 3 Ired. Eq. 259; *Cameron v. Mason*, 7 Ired. Eq. 180. See *Mast v. Raper*, 81 N. C. 330; *McKay v. Gilliam*, 65 N. C. 130.^v

Pennsylvania.—Does not exist under its ordinary form: *Kauffelt v. Bower*, 7 Serg. & R. 64; 10 Am. Dec. 428; *Semple v. Burd*, 7 Serg. & R. 286; *Megargel v. Saul*, 3 Whart. 19; *Bear v. Whisler*, 7 Watts, 144, 147; *Cook v. Trimble*, 9 Watts, 15; *Hepburn v. Snyder*, 3 Pa. St. 72; *Springer v. Walters*, 34 Pa. St. 328; *Stephen's Ex'rs' Appeal*, 38 Pa. St. 9; *Hiester v. Green*, 48 Pa. St. 96; 86 Am. Dec. 569; *Heist v. Baker*, 49 Pa. St. 9; *Strauss's Appeal* 49 Pa. St. 353; but a lien may be created by an express and appropriate provision in the deed: *Heist v. Baker*, *supra*.

Rhode Island.—Not adopted; its existence questioned: *Perry v. Grant*, 10 R. I. 334; but in the recent case of *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612, the lien is admitted and enforced under the facts of the case.

South Carolina.—Does not exist: *Wragg v. Comptroller-General*, 2 Desaus. Eq. 509, 520.

Vermont.—Abolished by statute: *Laws 1851*, c. 47; *Gen. Stats. 1862*, c. 65, sec. 33; had been approved in *Manly v. Slason*, 21 Vt. 271; 52 Am. Dec. 60, per *Redfield*, C. J.

Virginia.—Abrogated by statute, unless expressly reserved in the deed: *Code 1873*, c. 115, sec. 1; *Yancey v. Mauck*, 15 Gratt. 300; prior decisions had adopted it: *Cole v. Scot*, 2 Wash. 141; *Tompkins v. Mitchell*, 2 Rand. 428; *Redford v. Gibson*, 12 Leigh, 332; *Kyles v. Tait's Adm'r*, 6 Gratt. 44.

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West Virginia.—Abrogated, unless expressly reserved in the deed: *Code 1870*, c. 75, sec. 1; *Hempfield R. R. v. Thornburg*, 1 W. Va. 261.^{bb}

United States.—Courts of the United States have recognized and enforced the lien, but in this, as in all other questions of real-property law, they follow the doctrines established in the particular state where the land is situated and the controversy arises: *Gilman v. Brown*, 1 Mason, 191; *Fed. Cas. No. 5,441*; *Brown v. Gilman*, 4 Wheat. 255; 4 L. ed. 272; *Bayley v. Greenleaf*, 7 Wheat. 46; 5 L. ed. 393; *McLearn v. Wallace*, 10 Pet. 625, 640; 9 L. ed. 559; *Galloway v. Finley*, 12 Pet. 264; 9 L. ed. 1079; *Bush v. Marshall*, 6 How. 284; 12 L. ed. 440; *Chilton v. Braiden's Adm'r*, 2 Black, 458; 17 L. ed. 304; *Cordova v. Hood*, 17 Wall. 1, 5; 21 L. ed. 587.^{cc}

(^v) *North Carolina.*—See, also, *Moore v. Ingram*, 91 N. C. 376; *White v. Jones*, 92 N. C. 388; *Peck v. Culbertson*, 104 N. C. 425, 10 S. E. 511.

(^z) *Oregon.*—*Frame v. Sliter*, 29 Oreg. 121, 45 Pac. 290, 54 Am. St. Rep. 781.

(^{aa}) *Washington.*—The lien does not exist unless it has been reserved by the deed or by an agreement between the parties: *Smith v. Allen*,

18 Wash. 1, 50 Pac. 783, 63 Am. St. Rep. 864.

(^{bb}) *West Virginia.*—See, also, *Poe v. Paxton*, 26 W. Va. 607; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335.

(^{cc}) *United States.*—See, also, *Green v. Betts*, 1 Fed. 289, 1 McCrary 72; *Coos Bay Wagon Co. v. Crocker*, 6 Sawy. 574, 4 Fed. 577; *First Nat. Bank of Salem v. Salem*

§ 1250. *Origin and Rationale.*²— With regard to the origin and *rationale* of the grantor's lien, there has been a great diversity of opinion. It has been accounted for as a trust; as an equitable mortgage; as arising from a natural equity; and as a contrivance of the chancellors to evade the unjust rule of the early common law by which land was free from the claims of simple contract creditors.^{1b} Notwithstanding

¹ The commonly received opinion regards the lien as wholly referable to the doctrine of trusts, and as constituting a species of constructive trusts: *Blackburn v. Gregson*, 1 Brown Ch. 420, per Lord Loughborough; *Mackreth v. Symmons*, 15 Ves. 329, per Lord Eldon; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Moreton v. Harrison*, 1 Bland, 491; *Iglehart v. Armiger*, 1 Bland, 519, 524, 525; 2 Story's Eq. Jur., secs. 1218 et seq.; *Snell's Equity*, 5th ed., 136; *Perry on Trusts*, secs. 231, 232. Notwithstanding the array of authority in support of this opinion, it is the one, as it seems to me, having the least foundation of fact, of principle, or of analogy. It is an instance of the tendency, frequently mentioned in previous chapters, to refer all equitable rights and interests to the doctrine of trusts,—a tendency which has produced much unnecessary confusion throughout the whole domain of equity jurisprudence. There is, in fact, not a single element really in common between this or any other equitable lien and a trust: See remarks *ante*, at the commencement of the present chapter, §§ 1233, 1234. Some writers and judges have considered the lien to be a species of equitable mortgage; but this is merely to give it another name, and not to explain its origin: See *Wilson v. Davisson*, 2 Rob. (Va.) 384, 404; *Adams's Equity*, 127. It has also, with much more reason, been said to arise from a natural equity that the land shall be charged with the unpaid purchase-money: *Chapman v. Tanner*, 1 Vern. 267; *Warren v. Fenn*, 28 Barb. 333, per Potter, J. Finally, all of these theories have been rejected, and the existence of the lien has been ascribed to the fact that, by the common law, land was free from the claims of simple contract creditors, and that it was invented by the chancellors from a desire to evade this unjust rule, and to give the grantor a security for his unpaid purchase-money. In the quite recent case of *Ahrend v. Odiorne*, 118 Mass. 261, 266, 19 Am. Rep. 449, Mr. Chief Justice Gray, as the result of an elaborate examination, maintains this view. He rejects the theory of natural equity, because that would apply to a sale of chattels as well as of land, and the theory of a trust, because, if true, that would include too many other cases to which con-

C. F. M. Co., 39 Fed. 89. It will not be enforced by federal courts in any state, unless it has been previously adopted by the state laws, or is recognized by the courts of the state in which the land sought to be charged is situated: *Rice v. Rice*, 36 Fed. 860.

(a) This section is cited in *First Nat. Bank v. Salem C. F. M. Co.*, 39 Fed. 89; *Gee v. McMillan*, 14 Oreg. 268, 12 Pac. 417, 58 Am. Rep. 315.

(b) Quoted in *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72.

all these differing theories, as illustrated by the quotations in the foot-notes, the original and true ground of this lien appears to me very simple and obvious. It is clearly one of the many instances to be found in the early English jurisprudence, whether legal or equitable, of the higher importance, consideration, and value given to real than to personal property. It is a most natural judicial conception that upon the sale of *any* thing on credit, the very identical thing sold should be regarded in some sort as a special fund out of which payment of the price was to be obtained, or at least secured, and that the seller should not be considered as parting *absolutely* with his whole interest and dominion until the price was fully paid. This natural conception would undoubtedly have manifested itself in a universal rule, applicable to the sales of all things, had not other considerations and motives of policy prevented. Such con-

fessedly the doctrine had not been extended, and reaches the following conclusions: "The most plausible foundation of the English doctrine would seem to be: that justice required that the vendor [grantor] should be enabled, by some form of judicial process, to charge the land in the hands of the vendee [grantee] as security for the unpaid purchase-money. And the restriction of the doctrine to real estate suggests the inference that the court of chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases or to a limited extent, be taken in execution for debt." The American editors of the *Leading Cases in Equity* reach a somewhat similar conclusion: 4th Am. ed., 500. Rejecting the theory of a mortgage because there is no semblance of a contract for a security on the land, and that of a trust because a constructive trust cannot arise from a mere breach of contract to pay, without any element of fraud, they say: "The true nature of the claim appears to be this: It had its origin in a country where lands were not liable, both during and after the life of the debtor, for all personal obligations, including debts by simple contract; and it seems to be an original and natural equity that the creditor, whose debt was the consideration of the land, should, by virtue of that consideration, be allowed to charge the land upon a failure of the personal assets." The force of Mr. Justice Gray's argument is very much weakened, even if not destroyed, by the fact that the lien does, under some circumstances, extend to a sale of chattels. The reason why it has not generally been applied to chattels must be found in considerations of convenience and expediency. The explanation suggested in the foregoing quotations is, in my opinion, altogether too narrow and partial as a *rationale* of the entire doctrine, although the common-law mode of dealing with land may have entered as one element into the motives operating upon the minds of the chancellors.

siderations and motives did interfere and prevail in the case of chattels and all personal property. The interests of trade and commerce required that the transmission of these things should be free, and that ownership should go or appear to go with possession. These reasons, joined with the comparatively slight importance given to the ownership of personal property resulting from feudal institutions, prevented the application of the principle to the sale of chattels and things in action, in the same manner as, at a later day, the same reasons were applied with even greater force to the transfer of negotiable instruments. Land, however, not being looked upon as a subject of commerce, being closely associated with family interests and social distinction, its free transmission not being considered as essential, and its ownership being highly favored and surrounded with sentiments of peculiar feudal honor, it was inevitable that the natural principle which I have described should have been allowed its full force and effect upon the sale of real estate. Its ownership being so high and almost sacred a right, the proprietor selling on credit was not considered as parting with every interest or dominion over the particular tract, although he had delivered possession, until he had received full payment of the price which had been agreed upon *as a substitute* for the land itself. As the common-law rules furnished no means for working out this idea, it was both natural and inevitable that equity should make the conception practical under the familiar form of an equitable lien.² In later times, the equity

²It is evident from the foregoing account that the theory of trust is utterly without foundation, while that lately advanced by the Massachusetts court is imperfect and unsatisfactory,—substituting, in fact, an effect for a cause. The absence of any power at the common law to make land liable for ordinary debts, instead of being the source of the grantor's lien, was itself only another instance and consequence of the same general superiority given to the ownership of land; both were incidents of one common mode of treating real estate as compared with personal. I venture the opinion that it is also obvious from the explanation of the text that the original grounds and reasons for admitting the grantor's lien do not exist in our own country, and the lien itself is not in harmony with our general

judges, attempting to give some explanation of the doctrine, invented the theories of trust, mortgage, and the like. The correctness of this *rationale* further appears from the fact that under some circumstances the lien has been extended by modern judges to sales of personal property.

§ 1251. Requisites, Extent, and Effect of This Lien — Uncertain and Conflicting Results of Judicial Opinion.— The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase price, and not for any other indebtedness nor liability. There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent, or unliquidated demand.^{1a} No other single topic

real-property law. The tendency both of our legislation and of our social customs is to make land a subject of commerce, and its transmission as free as possible; while the rights of grantors can be fully protected by mortgages which, in nearly all the states, are widely different from the instrument bearing the same name in England.^c

¹ Harris v. Hanie, 37 Ark. 348; Toombs v. Con. Poe Min. Co., 15 Nev. 444; Hiscock v. Norton, 42 Mich. 320; Young v. Harris, 36 Ark. 162 (when al-

(c) Quoted in Frame v. Sliter, 29 Oreg. 121, 45 Pac. 290, 54 Am. St. Rep. 781, 34 L. R. A. 690.

(a) The text is cited to this effect in Betts v. Sykes, 82 Ala. 378, 2 South. 648. See, also, Stringfellow v. Ivie, 73 Ala. 209 (gross sale of real and personal property; presumption against the lien); Wilkinson v. Parmer, 82 Ala. 367, 3 South. 4 (same); Peters v. Turrell, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252 (same); see, however, Cole v. Smith, 24 W. Va. 287 (if the lien in such a case is expressly reserved in the writing it may be enforced); Doty v. Deposit Bld'g & L. Assn., 20 Ky. L. Rep. 625, 46 S. W. 219, 47 S. W. 433. In general, Parrish v. Hastings, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50 (agreement to fence not secured

by grantor's lien); McDonald v. Elyton Land Co., 78 Ala. 382 (agreement to erect building on land creates no lien); Waterfield v. Wilbur, 64 Mich. 642, 31 N. W. 553; Ortman v. Plummer, 52 Mich. 76, 17 N. W. 703 (where the purchase price of one parcel of land is so blended in a mortgage with that of another that it cannot be separated, no lien beyond the mortgage can be enforced). Where the consideration for land sold is other land or personal property, with no monetary price fixed, for which the land or personal property shall be delivered, there can be no lien: Harter v. Capital City Brewing Co., 64 N. J. Eq. 155, 53 Atl. 560. The lien does not exist for unliquidated damages resulting from the vendee's fraudulent misrepresentations as to the value of personal property which

belonging to the equity jurisprudence has occasioned such a diversity and even discord of opinion among the American courts as this of the grantor's lien. Upon nearly every question that has arisen as to its operation, its waiver or discharge, the parties against whom it avails, and the parties in whose favor it exists, the decisions in different states, and sometimes even in the same state, are directly conflict-

lowed for personal services); *De Forest v. Holum*, 38 Wis. 516 (if future contingency happens); *Clark v. Stilson*, 36 Mich. 482; *Palmer v. Sterling*, 41 Mich. 218; *Sears v. Smith*, 2 Mich. 243; *Payne v. Avery*, 21 Mich. 524; *Vandoren v. Todd*, 3 N. J. Eq. 397; *Patterson v. Edwards*, 29 Miss. 67; as, for example, an agreement to assume a debt or encumbrance:^b *Lea v. Fabbri*, 13 Jones & S. 361; *Chapman v. Beardsley*, 31 Conn. 115; or an agreement to support the grantor for life:^c *Chase v. Peck*, 21 N. Y. 581; *McKillip v. McKillip*, 8 Barb. 552; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh, 522. With respect to the lien arising on an exchange of lands, see^d *Drinkwater v. Moreman*, 61 Ga. 395; *Bryant v. Stephens*, 58 Ala. 636; *Pratt v. Clark*, 57 Mo. 189; *Dawson v. Girard Life Ins. Co.*, 27 Minn. 411; *McDole v. Purdy*, 23 Iowa, 277; *Coit v. Fougera*, 36 Barb. 195; *Hare v. Van Deusen*, 32 Barb. 92. On conveyances to married women, see^e *Haskell v. Scott*, 56 Ind. 564; *Moore v. Worthy*, 56 Ala. 163; *Davenport v. Murray*, 68 Mo. 198; *McLain v. Thompson*, 52 Miss. 418; *Pylant v. Reeves*, 53 Ala. 132; 25 Am. Rep. 605; *Carver v. Eads*, 65 Ala. 190; *Martin v. Cauble*, 72 Ind. 67. For special circumstances under which the lien has been held to exist,^f see *Manning v. Frazier*, 96 Ill. 279 (on minerals); *Perkins v. Gibson*, 51 Miss. 699; 24 Am. Rep. 644; *Rutland v. Brister*, 53 Miss. 683; *Merrill v. Allen*, 38 Mich. 487 (from fraud).

formed part of the price: *Graham v. Moffett*, 119 Mich. 303, 75 Am. St. Rep. 393, 78 N. W. 132.

(b) *Agreement to assume incumbrance*.—See, however, *Woodall v. Kelly*, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57; *Williams v. Crow*, 84 Mo. 298.

(c) *Agreement to support grantor for life*.—*Peters v. Turrell*, 43 Minn. 473, 45 N. W. 867, 19 Am. St. Rep. 252.

(d) *Lien arising on an exchange of lands*.—*Betts v. Sykes*, 82 Ala. 378, 2 South. 648; *Beal v. Harrington*, 116 Ill. 113, 4 N. E. 664; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Johnson v. Burks*, 103 Mo. App. 221,

77 S. W. 133; *Bennett v. Shipley*, 82 Mo. 448.

(e) *Conveyances to married women*.—*Crampton v. Prince*, 83 Ala. 246, 3 South. 519, 3 Am. St. Rep. 718; *Ogle v. Ogle*, 41 Ohio St. 359; *Jackson v. Rutledge*, 3 Lea 626, 31 Am. Rep. 655.

(f) *Howe v. Harding*, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17 (on grant of right of way). That the lien may arise on the sale of an equitable as well as of a legal interest or title, see *Fleece v. O'Rear*, 83 Ind. 200; *Dwenger v. Branigan*, 95 Ind. 221; *Ortman v. Plummer*, 52 Mich. 76, 17 N. W. 703, per Campbell, J.; *Poe v. Paxton*, 26 W. Va. 607; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47.

ing. It is practically impossible to formulate any general rules representing the doctrine as established throughout the whole country.² The subjects to be considered in the further treatment are: 1. When the lien is discharged or waived; 2. Against whom it avails; and 3. In favor of whom it avails.

§ 1252. How Discharged or Waived.—It is a generally settled rule that the lien, if otherwise existing, is not waived or destroyed by the grantor's giving a receipt in full for the purchase price, or by a recital to that effect in the deed, nor by the grantee's giving his own personal security—his bond, note, bill—for the price.¹ If, however, the grantee's own bond, note, or other promise is given, not as a *security* for the price, but as a *substitute* for or in *novation* of the

² The decisions of each state court must be separately examined, in order to obtain any accurate results; and for this reason I have collected and arranged the most important cases according to the order of the states in preceding notes. In *Fisk v. Potter*, 2 Abb. App. 138, 2 Keyes, 64, Mr. Justice Potter described the lien as follows, and his description is not overdrawn: "Its existence depends upon and is controlled by no well-settled rules; but on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established, and if so, whether it is not made to yield to higher or superior equities in some other person; whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity; or whether by the acts or omissions to act, or by the neglect of the party claiming such lien to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands."

¹ Some of the English cases seem to go further, and to hold that the mere personal security of a *third* person does not discharge the lien: *Grant v. Mills*, 2 Ves. & B. 306; *Winter v. Lord Anson*, 3 Russ. 488; 1 Sim. & St. 434; *Mackreth v. Symmons*, 15 Ves. 329; *Tardiffe v. Scrughan*, cited 1 Brown Ch. 422; *Hughes v. Kearney*, 1 Schoales & L. 132; *Clarke v. Royle*, 3 Sim. 499; *Matthew v. Bowler*, 6 Hare, 110; *Collins v. Collins*, 31 Beav. 346; 1 Lead. Cas. Eq., 4th Am. ed., 464, 465. Receipt in full or acknowledgment of

(g) Quoted in *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72; *Frame v. Sliter*, 29 Ore. 121, 45 Pac. 290, 54 Am. St. Rep. 781, 34 L. R. A. 690; and cited to the same effect in *Par-*

rish v. Hastings, 102 Ala. 414, 14 South. 783, 48 Am. St. Rep. 50.

(a) This section is cited in *Kelly v. Karsner*, 81 Ala. 500, 2 South. 164; *Brisco v. Minah Consol. Min. Co.*, 82 Fed. 952.

purchase price, so that no *debt for the price* any longer exists, the lien is destroyed, and *a fortiori* this result follows where the bond, or note, or engagement of a third person is thus given.^{2g} The complementary doctrine is also

payment in the deed:^b *Ogden v. Thornton*, 30 N. J. Eq. 569; *Simpson v. McAllister*, 56 Ala. 228; *Bankhead v. Owen*, 60 Ala. 457; *Shorter v. Frazer*, 64 Ala. 74; *Holman v. Patterson's Heirs*, 29 Ark. 357; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Dodge v. Evans*, 43 Miss. 570. A judgment recovered for the debt:^c *Graves v. Coutant*, 31 N. J. Eq. 763; *Ball v. Hill*, 48 Tex. 634; *Waldrom v. Zacharie*, 54 Tex. 503. The grantee's own note, bill, etc.:^d *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Dibrell v. Smith*, 49 Tex. 474; *Irvin v. Garner*, 50 Tex. 48; *Madden v. Barnes*, 45 Wis. 135; 30 Am. Rep. 703; *Moore v. Worthy*, 56 Ala. 163 (note of husband and wife on deed to the wife); *Davenport v. Murray*, 68 Mo. 198 (same); *Lavender v. Abbott*, 30 Ark. 172; *Corlies v. Howland*, 26 N. J. Eq. 311; *Nichols v. Glover*, 41 Ind. 24; *Brown v. Porter*, 2 Mich. N. P. 12. In Alabama the lien remains and may be enforced, although the debt is barred by the statute of limitations:^e *Flinn v. Barber*, 61 Ala. 530; *Bizzell v. Nix*, 60 Ala. 281; 31 Am. Rep. 38; *Chapman v. Lee*, 64 Ala. 483; *Shorter v. Frazer*, 64 Ala. 74; *contra*,^f *Linthicum v. Tapscott*, 28 Ark. 267. See also, as further illustrations of the text, *White v. Williams*, 1 Paige, 502; *Garson v. Green*, 1 Johns. Ch. 308; *Warren v. Fenn*, 28 Barb. 333; *Vandoren v. Todd*, 3 N. J. Eq. 397; *Brinkerhoff v. Vansciven*, 4 N. J. Eq. 251; *Thornton v. Knox's Ex'r*, 6 B. Mon. 74; *Denny v. Steakly*, 2 Heisk. 156; *Aldridge v. Dunn*, 7 Blackf. 249; 41 Am. Dec. 224; *Tobey v. McAllister*, 9 Wis. 463; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153.

² The sure criterion is the question whether any indebtedness *for the purchase price* any longer exists. If such debt has been discharged, the grantor thereby shows an intention to rely wholly upon the personal undertaking

(b) *Receipt in full or acknowledgment of payment in the deed.*—*Thompson v. Corrie*, 57 Md. 197; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; but such acknowledgment is, of course, *prima facie* evidence of payment: *Kelly v. Karsner*, 81 Ala. 500, 2 South. 164.

(c) *Judgment recovered for the debt.*—But this operates as a waiver in California: *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198. The lien is not waived, however, by the filing of a claim against the grantee's estate: *Selna v. Selna*, 125 Cal. 357, 58 Pac. 16, 73 Am. St. Rep. 47.

(d) *The grantee's own note, bill, etc.*—*Dance v. Dance*, 56 Md. 433; *Lyon v. Clark*, (Mich.) 94 N. W. 4; *Maroney v. Boyle*, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821.

(e) See, also, *Hood v. Hammond*, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159; *Ware v. Curry*, 67 Ala. 274.

(f) That the lien does not remain when the debt is barred by the statute of limitations, see *Johnson v. Dyer*, 19 Tex. Civ. App. 602, 47 S. W. 727.

(g) The text is cited in *Williams v. McCarty*, 74 Ala. 295. See, also, *Acton v. Waddington*, 46 N. J. Eq.

generally settled, that the acceptance of distinct independent security for the purchase price, other than the grantee's own personal undertaking, destroys or discharges the lien, unless the continued existence of the lien is agreed upon by the parties. While this doctrine is generally accepted, there is much conflict of opinion in its application to particular conditions of fact.³ The securities which ordinarily produce this effect are, the grantee's mortgage on the very

which he has accepted, in place of the original debt and the lien by which it would have been secured: 1 Lead. Cas. Eq., 4th Am. ed., 466-470; Parrott v. Sweetland, 3 Mylne & K. 655; Buckland v. Pocknell, 13 Sim. 406; Dixon v. Gayfere, 21 Beav. 118; 1 De Gex & J. 655; Dyke v. Rendall, 2 De Gex, M. & G. 209; Keith v. Wolf, 5 Bush, 646; Thames v. Caldwell, 60 Ala. 644 (draft of a third person taken in payment); Moshier v. Meek, 80 Ill. 79 (notes of grantee taken under such circumstances as to show that there really was no debt).

³ The parties may undoubtedly agree that the lien shall exist, notwithstanding any security taken for its payment:¹ Fonda v. Jones, 42 Miss. 792; 2 Am. Rep. 669; Durette v. Briggs, 47 Mo. 356; Sanders v. McAfee, 41 Ga. 684. Some cases hold that, even in the absence of any such express agreement, the acceptance of independent security is not conclusive; that it merely raises a *prima facie* presumption of an intention to give up the lien, and that this presumption may be overcome and the lien established:² Mayes v. Hendry, 33 Ark. 240; Stroud v. Pace, 35 Ark. 100; Lavender v. Abbott, 30 Ark. 172; De Forest v. Holum, 38 Wis. 516; Fonda v. Jones, 42 Miss. 792; 2 Am. Rep. 669; Sanders v. McAfee, 41 Ga. 684; Irvine v. Muse, 10 Heisk. 477. The weight of authority, however, seems to be in plain accordance with the statement of the text, that such security *ipso facto* destroys the lien, unless such effect is prevented by agreement.

16, 18 Atl. 356; Cummings v. Moore, 61 Miss. 184 (substituting note of a subgrantee is not necessarily a novation); Boyd v. Jackson, 82 Ind. 525 (same); but that the mere taking of a new note does not waive the lien, see Joiner v. Perkins, 59 Tex. 300; Slaughter v. Owens, 60 Tex. 668; Walker v. Struve, 70 Ala. 167; Upland Land Co. v. Ginn, 144 Ind. 434, 43 N. E. 443, 55 Am. St. Rep. 181 (taking two new notes, one in favor of grantor and one in favor of third person, in place of one old, does not waive the lien); Reeder v. Nay, 95 Ind. 164; nor does the giving of a

mortgage to the grantor deprive him of his priority over an intervening mortgagee: Jones v. Davis, 121 Ala. 348, 25 South. 789.

(¹) Hood v. Hammond, 128 Ala. 569, 30 South. 540, 86 Am. St. Rep. 159; Boyer v. Austin, 75 Mo. 81; Briscoe v. Callahan, 77 Mo. 134; Cresap v. Manor, 63 Tex. 485.

(²) See, also, Tedder v. Steele, 70 Ala. 347; Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 17 Am. St. Rep. 57; Gnash v. George, 58 Iowa 492, 12 N. W. 546; Hunt v. Marsh, 80 Mo. 396; Jarman v. Farley, 7 Lea 141; Slaughter v. Owens, 60 Tex. 668.

land conveyed; his mortgage on other land; the note, bill, bond, or undertaking of a third person; the note or bill of the grantee indorsed or guaranteed by a third person, and the like; but the decisions are not unanimous.⁴ Finally,

⁴ *The general doctrine:*³ *Mackreth v. Symmons*, 15 Ves. 329; *Nairn v. Prowse*, 6 Ves. 752, 760 (mortgage on other land); *Bond v. Kent*, 2 Vern. 281; *Hughes v. Kearney*, 1 Schoales & L. 132, 135; 1 Lead. Cas. Eq. 471, 472; *Anderson v. Donnell*, 66 Ind. 150; *Clark v. Stilson*, 36 Mich. 482; *Perry v. Grant*, 10 R. I. 334; *Walker v. Carroll*, 65 Ala. 61; *Brown v. Gilman*, 4 Wheat. 255, 290; 4 L. ed. 564; *Fish v. Howland*, 1 Paige, 20, 30. *Mortgage by the grantee:* According to the general current of decisions, a mortgage by the grantee on the land conveyed or on other land destroys the lien:^k *Tinsley v. Tinsley*, 52 Iowa, 14; *Stuart v. Harrison*, 52 Iowa, 511; *Escher v. Simmons*, 54 Iowa, 269; *Neal v. Speigle*, 33 Ark. 63; *Gaylord v. Knapp*, 15 Hun, 87; *Pease v. Kelly*, 3 Or. 417; *Wells v. Harter*, 56 Cal. 342; *Camden v. Vail*, 23 Cal. 633; *Richards v. McPherson*, 74 Ind. 158; *Little v. Brown*, 2 Leigh, 353; *Young v. Wood*, 11 B. Mon. 123; *Johnson v. Sugg*, 13 Smedes & M. 346. It seems, however, to be the settled rule in Texas that a mortgage by the grantee on the premises conveyed does not defeat the grantor's lien: *Burgess v. Millican*, 50 Tex. 397; *Wasson v. Davis*, 34 Tex. 159; *De Bruhl v. Maas*, 54 Tex. 464; and there are decisions in some other states which either hold the same, or that the lien was not defeated by the mortgage, under the particular circumstances:^l *Armstrong v. Ross*, 20 N. J. Eq. 109; *De Forest v. Holum*, 38 Wis. 516; *Anketel v. Converse*, 17 Ohio St. 11; 91 Am. Dec. 115; *Boos v. Ewing*, 17 Ohio, 500; 49 Am. Dec. 478; *Linville v. Savage*, 58 Mo. 248; *Morris v. Pate*, 31 Mo. 315. If for any reason, however, the mortgage is void, the lien is not defeated; as where it was given by a married woman, and was therefore a nullity: *Kent v. Gerhard*, 12 R. I. 92; 34 Am. Rep. 612; *Martin v. Cauble*, 72 Ind. 67;^m or where it was forged:ⁿ *Fouch v. Wil-*

(d) *General doctrine.*—*Kyle v. Belenger*, 79 Ala. 516; *McKeown v. Collins*, 38 Fla. 276, 21 South. 103; *Ilett v. Collins*, 103 Ill. 74; *Masters v. Templeton*, 92 Ind. 447; *Hunt v. Marsh*, 80 Mo. 396; *Maroney v. Boyle*, 141 N. Y. 462, 36 N. E. 511, 38 Am. St. Rep. 821; *Dietrich v. Folk*, 40 Ohio St. 635.

(k) *Mortgage by the grantee.*—*Walker v. Struve*, 70 Ala. 167; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272. See, also, *Chicago, etc., Land Co. v. Peck*, 112 Ill. 408, 451; *Orrick v. Durham*, 79 Mo. 174 (mortgage for a portion of the pur-

chase-money waives the lien for the remainder); *Ryhiner v. Frank*, 105 Ill. 326; *McClellan v. Coffin*, 93 Ind. 456; *Masters v. Templeton*, 92 Ind. 447 (mortgage on other land of grantees).

(l) Lien not defeated by mortgage by grantee: *Jones v. Davis*, 121 Ala. 348, 25 South. 789.

(m) *Mortgage void.*—See, however, *Jackson v. Stanley*, 87 Ala. 270, 6 South. 193.

(n) Or where the taking of the additional security is induced by fraud: *Thomas v. Bridges*, 73 Mo. 530; *Gnash v. George*, 58 Iowa 492, 12 N. W.

after the lien has risen against the grantee, it may be waived as against third persons by the laches or affirmative acts of the grantor himself. In other words, the grantor

son, 60 Ind. 64; 28 Am. Rep. 651; the decision in *Camden v. Vail*, 23 Cal. 633, is opposed to these cases, but seems to be unsupported in this respect either by principle or by authority. It is an altogether different case when the mortgage, being valid, merely turns out to be an insufficient security.^o *Undertakings of third persons*: It is generally held by the American courts that his acceptance of the bond, note, bill, or other personal undertaking of a third person, or the note or bill of the grantee with the indorsement or guaranty of a third person defeats the lien:^p *Hazeltin v. Moore*, 21 Hun, 355; *Vail v. Foster*, 4 N. Y. 312; *Stevens v. Rainwater*, 4 Mo. App. 292; *Durette v. Briggs*, 47 Mo. 356; *Durham v. Heirs of Daugherty*, 30 La. Ann., pt. 2, 1255; *Haskell v. Scott*, 56 Ind. 564; *Carrico v. Farmers' etc. Bank*, 33 Md. 235 (grantee's note with indorser); *McDonigal v. Plummer*, 30 Md. 422; *Campbell v. Henry*, 45 Miss. 326; *Sanders v. McAfee*, 41 Ga. 684; *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; when land is really bought by the husband, but by his direction the conveyance is made to his wife, it is held that the acceptance of his note for the price does not destroy the lien: *Moore v. Worthy*, 56 Ala. 163; *Davenport v. Murray*, 68 Mo. 198; ^q but, *per contra*, see *Andrus v. Coleman*, 82 Ill. 26; 25 Am. Rep. 289. The decisions on the general rule are not uniform, and it has been held that personal security of a third person does not defeat the lien:^r *Stroud v. Pace*, 35 Ark. 100 (grantee's note secured by a third person); *McClure v. Harris*, 12 B. Mon. 261; *Tiernan v. Thurman*, 14 B. Mon. 224; *Burrus v. Roulhac's Adm'x*, 2 Bush, 39. As to notes given by subgrantees and the lien against them, see *Wasson v. Davis*, 34 Tex. 159; *Gordon v. Manning*, 44 Miss. 756;

546; *Brown v. Byam*, 65 Iowa 374, 21 N. W. 684; *Himes v. Langley*, 85 Ind. 77.

(^o) *Valid mortgage, insufficient security*.—In such case the lien is waived: *Kendrick v. Eggleston*, 56 Iowa 128, 41 Am. Rep. 90, 8 N. W. 786; *Akers v. Luse*, 56 Iowa 346, 9 N. W. 303.

A *pledge* of shares of stock is also presumptively a waiver: *Jackson v. Stanley*, 87 Ala. 270, 6 South. 193.

(^p) *Undertakings of third persons*.—*Rice v. Rice*, 36 Fed. 858 (note with indorsement); *Walker v. Struve*, 70 Ala. 167; *Donegan's Admr. v. Hentz*, 70 Ala. 437 (bill of exchange with indorsers); *Springfield, etc., R. R. Co. v. Stewart*, 51 Ark. 285, 10 S. W. 767;

Christy v. McKee, 94 Mo. 241, 6 S. W. 656; *Jobe v. Chedister*, 5 Lea 346.

(^q) *Land bought by husband but conveyance made to wife*.—See, also, *Hunt v. Marsh*, 80 Mo. 396; *Williams v. Crow*, 84 Mo. 298; see, also, *Parker v. McBee*, 61 Miss. 134 (no waiver from fact that the note was signed also by the husband of the grantee); *Crampton v. Prince*, 83 Ala. 246, 3 South. 519; 3 Am. St. Rep. 718; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273; *Jackson v. Stanley*, 87 Ala. 270, 6 South. 193; *Davis v. Smith*, 88 Ala. 596, 7 South. 159; *Bakes v. Gilbert*, 93 Ind. 70.

(^r) *Personal security of third person does not defeat lien*.—*Loomis v. D. & St. P. R. R. Co.*, 17 Fed. 301, 3 McCrary 301 (grantee's accepted draft).

may, by his negligence or other acts, postpone his lien, or estop himself from asserting it against third persons who have acquired title under the grantee.⁵

§ 1253. *Against Whom the Lien Avails.*—The grantor's lien once arising, and not waived by any act or default of his, avails against the grantee himself, his heirs, devisees, and other immediate successors in interest.^{1 a} It also avails against all subsequent purchasers and encumbrancers of the land under the grantee who are not *bona fide* purchasers for a valuable consideration and without notice.² It does

Wood v. Sullens, 44 Ala. 686; Burgess v. Greene, 64 Ala. 509; McLaurie v. Thomas, 39 Ill. 291; Effinger v. Ralston, 21 Gratt. 430.

⁵ *Laches.*—Where the grantor delivered the deed with a receipt of payment in full indorsed thereon to the grantee, and the grantee, by depositing the deed as security, obtained a loan from a person who had no notice of the grantor's rights, the grantor's lien was held postponed to the equitable mortgage of the lender: Rice v. Rice, 2 Drew. 73; the grantor, by aiding and encouraging the grantee to sell the land as though it was free from encumbrance, and failing to disclose his own lien, may estop himself from setting it up as against such purchaser: Henson v. Westcott, 82 Ill. 224; Reily v. Miami etc. Co., 5 Ohio, 333; Atkinson v. Lindsey, 39 Ind. 296; Thompson v. Dawson, 3 Head, 384; Burns v. Taylor, 23 Ala. 255; also, when there is no such concealment, the grantor, by joining with the grantee in mortgaging or conveying the land, or in otherwise dealing with it, may waive his original lien against the parties who thus obtain interests under the grantee: Tinsley v. Tinsley, 52 Iowa, 14 (joining in a mortgage on the land); Burgess v. Greene, 64 Ala. 509.

¹ Mackreth v. Symmons, 15 Ves. 329; Simpson v. McAllister, 56 Ala. 228; Bankhead v. Owen, 60 Ala. 457; Shorter v. Frazer, 64 Ala. 74; Walton v. Hargroves, 42 Miss. 18; 97 Am. Dec. 429; against grantee's heirs: Bayley v. Greenleaf, 7 Wheat. 46; 4 L. ed. 393; Warner v. Van Alstyne, 3 Paige, 513; Shirley v. Sugar Ref. Co., 2 Edw. Ch. 505; against his widow's dower:^b Fisher v. Johnson, 5 Ind. 492; and against her homestead right: McHendry v. Reilly, 13 Cal. 75.^c

² The lien prevails, therefore, against mere volunteers, purchasers, or encumbrancers not paying value, although without notice, and all purchasers and encumbrancers with notice who have paid value:^d 1 Lead. Cas. Eq.

(a) This section is cited in Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

(b) *Against dower right.*—See, also, Sarver v. Clarkson, 156 Ind. 316, 59 N. E. 933, and cases cited.

(c) The lien prevails against a homestead declared on the land by the

grantee: Brown v. Ennis, 69 Ark. 123, 61 S. W. 379, 86 Am. St. Rep. 171, and note, pp. 174–182, Am. St. Rep.

(d) See, also, Mitchell v. Dawson, 23 W. Va. 86; Poindexter v. Rawlings, 106 Tenn. 97, 82 Am. St. Rep. 869, 59 S. W. 766.

not prevail against a subsequent *bona fide* purchaser or mortgagee of the land for a valuable consideration and without notice of the grantee's equity.³ Whether the

477-481; *Graves v. Coutant*, 31 N. J. Eq. 763; *Simpson v. McAllister*, 56 Ala. 228; *Bankhead v. Owen*, 60 Ala. 457; *Gordon v. Bell*, 50 Ala. 213; *Shorter v. Frazer*, 64 Ala. 74; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Magruder v. Peter*, 11 Gill & J. 217. Volunteers: *Grant v. Mills*, 2 Ves. & B. 306; *Frail v. Ellis*, 16 Beav. 350; *Tucker v. Hadley*, 52 Miss. 414; *McLain v. Thompson*, 52 Miss. 418; *Pylant v. Reeves*, 53 Ala. 132; 25 Am. Rep. 605; *Carver v. Eads*, 65 Ala. 190 (deed to wife where husband was the real purchaser); *Higgins v. Kendall*, 73 Ind. 522 (a subsequent grantee who did not pay until after receiving notice). Purchasers with notice: *Hughes v. Kearney*, 1 Schoales & L. 132; *Norris v. Chambers*, 29 Beav. 246; *Mast v. Raper*, 81 N. C. 330; *Whetsel v. Roberts*, 31 Ohio St. 503; *Swan v. Benson*, 31 Ark. 728 (knowledge that part of the original purchase-money remains unpaid is a sufficient notice).

³ *Cator v. Earl of Pembroke*, 1 Brown Ch. 302; *Bayley v. Greenleaf*, 7 Wheat. 46; 4 L. ed. 393; *Dagger v. Taylor*, 60 Ala. 504 (a subgrantee); *Burgess v. Greene*, 64 Ala. 509 (same); *Thurman v. Stoddard*, 63 Ala. 336; *Shorter v. Frazer*, 64 Ala. 74; *Simpson v. McAllister*, 56 Ala. 228; *Bankhead v. Owen*, 60 Ala. 457; *Gordon v. Bell*, 50 Ala. 213; *Russell v. Dodson*, 6 Baxt. 16; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Higgins v. Kendall*, 73 Ind. 522; as to what constitutes notice by recitals in deed, by possession, etc., see *ante*, vol. 2, §§ 626, 628. Where a legal lien, by mortgage or otherwise, on the land, or a part thereof, is created at the same time as the grantor's equitable lien, such legal lien has the preference: *Robinson v. McWhirter*, 52 Tex. 201; *Dugger v. Tayloe*, 60 Ala. 504; *Fisk v. Potter*, 2 Abb. App. 138. The premises subject to the lien in the hands of the original grantee, A, being conveyed to a second grantee, B, who is a *bona fide* pur-

(e) *Purchasers with notice*.—See, also, *Butterfield v. Okie*, 36 N. J. Eq. 482; *Mitchell v. Dawson*, 23 W. Va. 86; *Chapman v. Liggett*, 41 Ark. 292; *Stephens v. Shannon*, 43 Ark. 464; *Hooper v. Strahan*, 71 Ala. 75; *Woodall v. Kelly*, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57; *Craft v. Russell*, 67 Ala. 9; *Strohm v. Good*, 113 Ind. 93, 14 N. E. 901; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Petry v. Ambroscher*, 100 Ind. 510; *Beal v. Harrington*, 116 Ill. 113, 4 N. E. 664; *Thomas v. Bridges*, 73 Mo. 530; *Orrick v. Dunham*, 79 Mo. 174 (an unrecorded deed which was essential to the purchaser's claim of title showed by its recitals

that purchase-money had not been paid); *Dickinson v. Worthington*, 10 Fed. 860 (recitals in the order of court authorizing the sale); *Exchange Bank v. Stone*, 80 Ky. 109 (assignee in bankruptcy of grantee is a volunteer); *Lyon v. Clark*, (Mich.) 94 N. W. 4 (same). The lien is not defeated by a conveyance to a purchaser after suit has been brought, although such conveyance was made in pursuance of a contract made before: *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. 201, 37 L. ed. 109.

(f) See, also, *First Nat. Bank v. Tompkins*, 57 Fed. 20, 6 C. C. A. 237; *Dance v. Dance*, 56 Md. 433; *Trap-hagen v. Hand*, 36 N. J. Eq. 384.

grantor's lien is or is not superior to that of subsequent judgments recovered against the grantee is a question upon which the American decisions are in direct conflict; nor is it possible by any interpretation to reconcile their opposing views. On principle, however, — and especially when considered in connection with the universal system of registry, — it seems to me clear that the subsequent judgment liens are entitled to precedence.^{4 h}

chaser without notice, if the purchase-money due from B to A is still unpaid, the original grantor's lien may, it seems, be enforced against it as a fund substituted in place of the land: *Lench v. Lench*, 10 Ves. 511.¶

⁴ Of course, it is assumed in this statement that the judgment creditors have no notice of the grantor's prior lien; if they have notice, they are governed by the general rule which applies to all subsequent encumbrancers with notice. The divergent and often uncertain conclusions reached by text-writers, and the conflicting decisions of the courts, upon this question, are undoubtedly due in great measure to the method, which has unfortunately prevailed, of describing and treating the *grantor's* lien upon conveyance and the *vendor's* lien upon a mere agreement to convey, in the same terms by the same formula. Two interests which are essentially unlike in their nature and in many of their incidents are thus confounded, and dealt with as one and the same. The radical difference between these two so-called "liens," *on principle*, appears in the clearest manner with regard to their respective effects upon subsequent judgments. The *vendor* under a land contract retains the legal title and estate; the vendee, although admitted to possession, has only an *equitable* interest. If the contract is not recorded, the records show the legal estate in the vendor; if the contract is recorded, the record still shows that the vendee's interest is wholly equitable. In no case, therefore, can a judgment creditor be misled by the records to suppose that the vendee has obtained the legal title. The judgment recovered against the vendee is then a lien upon a mere equitable interest, obtained under such circumstances that the judgment creditor must have notice of the legal title and estate being vested in another person. This legal title and estate of the vendor should, therefore, prevail against the subsequent judgment lien upon the equitable interest of the vendee, and the judgment creditor is not and cannot be prejudiced thereby. In fact, it is a complete misuse of legal terms to call the interest of the vendor, *as against such third persons claiming under the vendee*, a lien, when it is the full legal estate. Between the *vendor and the vendee* themselves, for the purpose of working out the purely equitable conception as to the effects of an agreement to convey, the vendor's interest is properly called a lien *in equity*; but when the *legal* rights of third persons

(g) See *Taylor v. Callaway*, 7 Tex. Civ. App. 461, 27 S. W. 934, quoting the last sentence of the author's note, and holding that the relief against

the substituted fund can be had only on proper pleading.

(h) This portion of the text is quoted in *Cutler v. Ammon*, 65 Iowa 281, 21 N. W. 604.

§ 1254. In Favor of Whom the Lien Avails.*—In England the prevailing opinion regards the lien not as merely personal to the grantor, but as an interest in land of which

intervene, they should not be interfered with or sacrificed to such special nomenclature. The condition of the grantor's lien is radically different. The grantee holds the full legal title and estate, and he appears by the records to be the legal owner. The grantor's interest is purely an equitable lien, secret, undisclosed by the records. A judgment creditor of the grantee has a right to regard him as the complete owner in reliance upon the records; he has no knowledge, and ordinarily no means of knowledge, of the grantor's secret equitable lien. The judgment against the grantee is a *legal* lien upon the legal estate in his hands. It is not the case of two successive *equitable* liens of the same nature, where priority of time gives precedence. It is true that a prior equitable *estate* may sometimes prevail against a subsequent *legal* lien by judgment; but this doctrine is confined by the strong tendency of American decisions to true equitable estates. The grantor's interest is in no sense an equitable *estate*; it is a mere lien, not *essentially* of a higher nature than that of a judgment, while that of the judgment possesses the superiority of being legal. The doctrine that between a prior *equitable* interest and a subsequent *legal* interest of equal character, the legal will prevail, seems to be controlling. In my opinion, it is plain from this analysis, *on principle*, that the prior grantor's equitable lien must succumb to the subsequent legal lien of the judgment against the legal estate of the grantee, when the judgment is recovered for a valuable consideration and without notice. Among the great number of cases, the following illustrate the foregoing conclusion that the grantor's lien does not prevail against such judgment:¹ *Allen v. Loring*, 34 Iowa, 499; *Dawson v. Girard L. Ins. Co.*, 27 Minn. 411; *Bayley v. Greenleaf*, 7 Wheat. 46; *Cook v. Banker*, 50 N. Y. 655; *Robinson v. Williams*, 22 N. Y. 380; *Hulett v. Whipple*, 58 Barb. 224; *Taylor v. Baldwin*, 10 Barb. 626; *Cook v. Kraft*, 3 Lans. 512; *Johnson v. Cawthorn*, 1 Dev. & B. Eq. 32; 27 Am. Dec. 250; *Webb v. Robinson*, 14 Ga. 216; *Roberts v. Rose*, 2 Humph. 145, 147; *Gann v. Chester*, 5 Yerg. 205. On the same ground, the lien is held not to prevail against attaching creditors of the grantee without notice: *Allen v. Loring*, *supra*; *Porter v. Dubuque*, 20 Iowa, 440; *Adams v. Buchanan*, 49 Mo. 64.

On the other hand, the following cases give the grantor's lien the precedence: *Lamberton v. Van Voorhis*, 15 Hun, 336; *Tucker v. Hadley*, 52 Miss. 414 (against a purchaser at execution sale); *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429; *Parker v. Kelly*, 10 Smedes & M. 184; *Thompson v. McGill*, Freem. (Miss.) 401; *Lewis v. Caperton's Ex'r*, 8 Gratt. 148; *Aldridge v. Dunn*, 7 Blackf. 249; 41 Am. Dec. 224.²

(1) *Cutler v. Ammon*, 65 Iowa 281, 21 N. W. 604.

(2) See, also, *Dickerson v. Carroll*, 76 Ala. 377 (notice of the grantor's lien received by the judgment creditor before he obtains an order of sale de-

feats the statutory priority of the judgment lien); *Lissa v. Posey*, 64 Miss. 352, 1 South. 500 (against a purchaser at execution sale); *Bowman v. Faw*, 5 Lea 472.

(a) This section is cited in Ham-

other parties may avail themselves by subrogation or marshaling, as legatees or judgment creditors of the grantor, or by direct assignment. In this country the strong tendency of the court has been, for reasons difficult to be understood, to treat the lien as strictly personal to the grantor, and as incapable of being transferred, either by direct assignment or by equitable subrogation. It may, of course, be enforced by the grantor himself, and by his heirs or immediate successors.¹ In England it may be enforced by an assignee, and an assignment of the debt, it seems, carries also the lien.² The English doctrine is followed in a portion of the states, but in most of them the lien is held personal to the grantor, and not assignable.³ By this

¹ By his heirs: *Lavender v. Abbott*, 30 Ark. 172. Devisee: *Tiernan v. Beam*, 2 Ohio, 383; 15 Am. Dec. 557.

² *Dryden v. Frost*, 3 Mylne & C. 670; *Lacey v. Ingle*, 2 Phill. Ch. 413; *Rayne v. Baker*, 1 Giff. 241.

³ In the following states it cannot be transferred by assignment nor by subrogation:—

Arkansas: *Shall v. Biscoe*, 18 Ark. 142, 162; *Williams v. Christian*, 23 Ark. 255; *Hutton v. Moore*, 26 Ark. 382, 396; *Jones v. Doss*, 27 Ark. 518; *Carlton v. Buckner*, 28 Ark. 66.^b But an assignment as collateral security is permitted: *Blevins v. Rogers*, 32 Ark. 258; *Crawley v. Riggs*, 24 Ark. 563; *Carlton v. Buckner*, *supra*.^c

California: *Baum v. Grigsby*, 21 Cal. 172; 81 Am. Dec. 153; *Williams v. Young*, 21 Cal. 227; *Ross v. Heintzen*, 36 Cal. 313.^d

Georgia: *Wellborn v. Williams*, 9 Ga. 86; 52 Am. Dec. 427; *Webb v. Robinson*, 14 Ga. 216.

Illinois: *Small v. Stagg*, 95 Ill. 39; *Wing v. Goodman*, 75 Ill. 159; *Moshier v. Meek*, 80 Ill. 79; *Carpenter v. Mitchell*, 54 Ill. 126.^e

mond v. Peyton, 34 Minn. 529, 27 N. W. 72; *First Nat. Bank v. Salem C. F. M. Co.*, 39 Fed. 89; *Cate v. Cate*, 87 Tenn. 41, 9 S. W. 231; *Brisco v. Minah Consol. Min. Co.*, 82 Fed. 952.

(b) *Arkansas*.—But see *Rodman v. Sanders*, 44 Ark. 504 (one who pays the debt at the request of the debtor-vendee, and with the latter's consent retains the note and deed, and thus manifests an intention to keep the lien alive, is subrogated thereto).

(c) *Arkansas*.—Assignment as col-

lateral security permitted: *Chapman v. Leggett*, 41 Ark. 292.

(d) *California*.—*Avery v. Clark*, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272. But if the grantor is obliged to take up the note by reason of its non-payment, the lien is revived: *Bancroft v. Cosby*, 74 Cal. 583, 16 Pac. 504.

(e) *Illinois*.—*Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007.

theory, an assignment of the debt, either with or without an express assignment of the lien, does not carry the lien so that it may be enforced by or on behalf of the assignee. Where an express assignment is thus forbidden, it necessarily follows that no equitable assignment by subrogation is possible. Notwithstanding this weight of authority, the restrictive rule seems to rest on no ground of principle.

Maryland: *Dixon v. Dixon*, 1 Md. Ch. 220; *Iglehart v. Armiger*, 1 Bland, 519.

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Mississippi: *Rutland v. Brister*, 53 Miss. 683; *Pitts v. Parker*, 44 Miss. 247; *Lindsey v. Bates*, 42 Miss. 397 (but if grantor is compelled to take up the note assigned, the lien revives in his favor); *Stratton v. Gold*, 40 Miss. 778; see *Perkins v. Gibson*, 51 Miss. 699; 24 Am. Rep. 644.¶

Missouri: *Pearl v. Hervey*, 70 Mo. 160; *Adams v. Cowherd*, 30 Mo. 458.¶

New York: *White v. Williams*, 1 Paige, 502; and see *Smith v. Smith*, 9 Abb. Pr., N. S., 420.

Ohio: *Brush v. Kinsley*, 14 Ohio, 20; *Horton v. Horner*, 14 Ohio, 437.

‡

Tennessee: *Durant v. Davis*, 10 Heisk. 522; *Tharpe v. Dunlap*, 4 Heisk. 674.

In the following states the lien may be assigned with the debt:—

Alabama.—A transfer of the debt carries the lien: *Simpson v. McAllister*, 56 Ala. 228; *Wells v. Morrow*, 38 Ala. 125; *White v. Stover*, 10 Ala. 441;§ but if the grantor assigns the notes for the debt “without recourse,” or in any other manner which cuts off all his own liability thereon, the lien is held not to pass: *Bankhead v. Owen*, 60 Ala. 457; *Barnett v. Risser’s Ex’rs*, 63 Ala. 347; *Walker v. Carroll*, 65 Ala. 61.¶

(¶) *Minnesota.*—*Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72.

(§) *Mississippi.*—*Parker v. McBee*, 61 Miss. 134 (if the grantor held title as trustee, he does not waive the lien by indorsing the note in blank and delivering it to his *cestui que trust* for collection). But by the Code of 1880, sec. 1124, the rule is changed, and the assignment of the claim for purchase-money carries with it the lien: *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485.

(¶) *Missouri.*—In *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493, however, it was held that the lien is assignable, and passes with the pur-

chase-money note. See, also, *Williams v. Baker*, 100 Mo. App. 284, 73 S. W. 339.

(¶) *Oregon.*—*First Nat. Bank v. Salem C. F. M. Co.*, 39 Fed. 89.

(¶) *Alabama.*—See, also, *Wilkinson v. May*, 69 Ala. 33.

(¶) *Alabama.*—And a transfer by delivery merely of the note did not pass the lien: *Prickett v. Sibert*, 71 Ala. 194; *Preston v. Ellington*, 74 Ala. 133; *Daily’s Admr. v. Reid*, 74 Ala. 415; *Weaver v. Brown*, 87 Ala. 533, 6 South. 354; but these last two rules are now changed by statute: Code, sec. 1764; *Davis v. Smith*, 88 Ala. 596, 7 South. 159. The trans-

§ 1255. **Grantor's Lien by Reservation.**—In several of the states the practice has become quite common of reserving a lien, as security to the grantor for the unpaid purchase price, by means of an express clause or stipulation in the deed of conveyance. Such a reservation creates a specific lien which in its essential nature more resembles the ordinary purchase-money mortgage given back by the grantee, than the implied equitable lien of the grantor heretofore described; for since it is contained in and recorded with the deed, it becomes notice to and takes precedence of all subsequent purchasers and encumbrancers holding under or deriving title through the same conveyance; and it generally has the same priority among other outstanding encum-

Indiana: Nichols v. Glover, 41 Ind. 24; Johns v. Sewell, 33 Ind. 1; Wiseman v. Hutchinson, 20 Ind. 40; Kern v. Hazlerigg, 11 Ind. 443; 71 Am. Dec. 360.¹

Kentucky: Broadwell v. King, 3 B. Mon. 449; Honore's Ex'r v. Bakewell, 6 B. Mon. 67; 43 Am. Dec. 147; Ripperdon v. Cozine, 8 B. Mon. 465.

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Texas: De Bruhl v. Maas, 54 Tex. 464; White v. Downs, 40 Tex. 225; Watt v. White, 33 Tex. 421.^o

Whenever, by an arrangement between the parties, a note for the purchase price is given by the grantee to a third person instead of to the grantor, such person is generally held entitled to enforce the lien: Perkins v. Gibson, 51 Miss. 699; 24 Am. Rep. 644; Nichols v. Glover, 41 Ind. 24; Latham v. Staples, 46 Ala. 462; Campbell v. Roach, 45 Ala. 667; Hamilton v. Gilbert, 2 Heisk. 680; Mitchell v. Butt, 45 Ga. 162; Francis v. Wells, 2 Col. 660.

feree, however, must be a *purchaser* of the note, in order to obtain the right to enforce the lien: Jones v. Lockard, 89 Ala. 575, 8 South. 103.

(1) *Indiana.*—Otis v. Gregory, 111 Ind. 504, 13 N. E. 39 (subrogation); Lowry v. Smith, 97 Ind. 466; Upland Land Co. v. Ginn, 144 Ind. 434, 43 N. E. 443, 55 Am. St. Rep. 181.

(m) *Mississippi.*—A transfer of the debt carries the lien: Code 1880, sec. 1124; Louisiana Nat. Bank v. Knapp, 61 Miss. 485.

(n) *Missouri.*—Sloan v. Campbell, 71 Mo. 387, 36 Am. Rep. 493; Wil-

liams v. Baker, 100 Mo. App. 284, 73 S. W. 339.

(o) *Texas.*—Brooks v. Young, 60 Tex. 32; Ouroy v. Saunders, 77 Tex. 278, 13 S. W. 1030 (subrogation); Hicks v. Morris, 57 Tex. 658.

(p) *Tysen v. Wabash R'y Co.*, 15 Fed. 763, 11 Biss. 510; Woodall v. Kelly, 85 Ala. 368, 5 South. 164, 7 Am. St. Rep. 57; Mize v. Barnes, 78 Ky. 506; Louisiana Nat. Bank v. Knapp, 61 Miss. 485; Johnson v. Townsend, 77 Tex. 639, 14 S. W. 233; Joiner v. Perkins, 59 Tex. 300.

branches which is accorded to the purchase-money mortgage.^{1 a}

§ 1256. **What Creates a Lien by Reservation.**—The provision which shall thus create a lien by reservation may be of various forms; but it must be something more than a recital that a specified amount of the purchase price remains unpaid. It must show the amount of the purchase-money due which is to be secured by the lien, and must in some manner express an intent that the payment of such amount is to be charged upon the land,—that the land is conveyed subject to a definite charge for the payment of the sum.¹

§ 1255, ¹ It appears, in a previous note, that the state statutes which have abolished the ordinary equitable grantor's lien have excepted from their operation this lien arising from reservation. It is not unusual in some states for the grantee to give notes for the unpaid price, which notes are specifically described in the deed and made liens on the land conveyed for their respective amounts, so that their holder has a virtual mortgage on the land, good against all subsequent grantees, mortgagees, judgment creditors, etc.:^b *King v. Young Men's Ass'n*, 1 Woods, 386; *Heist v. Baker*, 49 Pa. St. 9; *Stratton v. Gold*, 40 Miss. 778, 781; *Davis v. Hamilton*, 50 Miss. 213; *Pugh v. Holt*, 27 Miss. 461; *Caldwell v. Fraim*, 32 Tex. 310; *White v. Downs*, 40 Tex. 225; *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 Ill. 34; *Carr v. Holbrook*, 1 Mo. 240; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Talieferro v. Barnett*, 37 Ark. 511; *Campbell v. Rankin*, 28 Ark. 401; *Cordova v. Hood*, 17 Wall. 1; *Kausler v. Ford*, 47 Miss. 289; *Moore v. Lackey*, 53 Miss. 85; *Blaisdell v. Smith*, 3 Ill. App. 150; *Osborne v. Royer*, 1 Lea, 217; *Collins v. Richart*, 14 Bush, 621; *Carr v. Thompson*, 67 Mo. 472.

§ 1256, ¹ *Heist v. Baker*, 49 Pa. St. 9, holds that a provision in a deed of land, "to have and to hold the same under and subject, nevertheless, to the payment" of a certain sum at the death of the grantee, constitutes a valid lien on the land against all subsequent owners, etc.^a In *Pugh v. Holt*, 27 Miss. 461, a stipulation that the title shall not vest in the grantee until the purchase price specified is paid was held to create such a specific lien. In *Carr v. Hol-*

§ 1255, (a) This section is cited in *Dowdy v. Blake*, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88; *Bank v. Johnson*, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736.

§ 1255, (b) *Kirk v. Williams*, 24 Fed. 437; *Sidwell v. Wheaton*, 114 Ill. 267, 2 N. E. 183. It seems that one who has contracted, in the ordinary manner, to sell land has a right to

reserve such lien in the deed, although the reservation was not contracted for: *Findley v. Armstrong*, 23 W. Va. 113. At any rate, a lien so reserved cannot be questioned by a third party: *Morehead v. Horner*, 30 W. Va. 548, 4 S. E. 448.

§ 1256, (a) *Eichelberger v. Gitt*, 104 Pa. St. 64; *Ransom v. Brown*, 63 Tex. 188.

§ 1257. **Essential Nature of This Lien.**—This peculiar species of lien differs essentially from that which equity raises by implication in favor of the grantor, since it is based upon and created by express contract. It is in all essential elements a mortgage. The deed is made to em-

brook, 1 Mo. 240, a clause that the deed shall be absolute upon the payment of certain notes described, but in default of their payment shall be void, produced the same effect. *Harvey v. Kelly*, 41 Miss. 490, 93 Am. Dec. 267, goes further, and holds that such kind of lien is not confined to the payment of a certain sum of money due, but may be made to secure the performance of any obligation agreed upon by the parties,—for example, to secure an agreement to pay by delivering certain articles. If this decision is followed, the scope of the lien will be much enlarged, and the difference between it and the implied grantor's (vendor's) lien will be much more pronounced. The recital in a deed that "said land and improvements are held bound for the payment of said two notes" creates a valid lien on the land: *Talieferro v. Barnett*, 37 Ark. 511; where a deed recited that two thirds of the purchase-money had been paid, and then reserved a lien for *all* unpaid purchase-money, but in fact only one third had been paid, a lien as between the grantor and the grantee is created for the whole of the two thirds actually remaining unpaid: *Ledford v. Smith*, 6 Bush, 129; as against subsequent grantees or mortgagees who had only the constructive notice arising from the record and recitals of the deed itself, the lien would certainly not extend beyond the one third. Where a lien has been properly reserved as security for payment of notes, the substitution of a new note in place of one originally given does not disturb the lien: *Kausler v. Ford*, 47 Miss. 289. Whatever words distinctly convey the idea that the grantor retains or reserves a lien on the land creates an express lien by reservation:^b *More v. Lackey*, 53 Miss. 85. Two partners, W. and Z., sold their interest to the third, Y.; W. received from Y. cash in full for his share; Z. received notes payable at different times for his; the deed from the two contained the following: "And the said Z. hereby retains a lien on the property hereby conveyed as security for the payment of the above-recited notes received in payment of his interest; the said W. has been paid up in full for his interest." Held, that the lien thus reserved extended to the entire property conveyed by both grantors, and was not confined to that portion of it originally belonging to Z.: *Patton v. Hoge*, 22 Gratt. 443. A deed describing notes given for the purchase price, and stating "to have and to hold on the payment of the notes heretofore stated," creates a lien by reservation: *Blaisdell v. Smith*, 3 Ill. App. 150. And see also *Carr v. Thompkins*, 67 Mo. 472; *Pillow v. Helm*, 7 Baxt. 545; *Hobson v. Edwards*, 57 Miss. 128 (stipulation in the note); *Osborne v. Royer*, 1 Lea, 217 (same); *French v. Dickey*, 3 Tenn. Ch. 302 (substitution of a new note); *Dingley v. Bank of Ventura*, 57 Cal. 467; *Baker v. Compton*, 52 Tex. 252.^c

(b) Thus, the words "This grant is made upon the express condition that A. R. D. shall pay unto H. D. and H. R. D. the sum of two hundred dollars annually," were held sufficient in

Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736.

(c) See, also, *Kyle v. Bellenger*, 79 Ala. 516.

body an informal mortgage or defeasance, and is thus prevented from being absolute so long as the price remains unpaid.^a The lien is made a matter of record, is thus a constructive notice to all subsequent dealers with the land, and it is in fact governed by the rules which regulate the effect of an ordinary mortgage.¹ It is in fact an American mode of realizing the purely equitable conception of a mortgage stripped of all its legal forms and features.

¹ In *King v. Young Men's Ass'n*, 1 Woods, 386, Mr. Justice Bradley thus describes it: "The reservation of the vendor's [grantor's] lien in the deed of conveyance is equal to a mortgage taken for the purchase-money contemporaneously with the deed, and nothing more. The purchaser [grantee] has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase-money." The use of the term "equity of redemption" here is unfortunate. The grantee takes and holds the *legal* title and estate encumbered with the lien; *his* title is not equitable. The learned judge introduces the legal notions of mortgage with which he is familiar, but which certainly have no place in connection with this lien, which is the equitable notion of the mortgage stripped of all its legal environment. In *White v. Downs*, 40 Tex. 225, Gray, J., thus contrasts the ordinary "vendor's lien" with the grantor's lien by reservation: "The vendor's [grantor's] lien, properly understood, is not in all respects the same as the express lien often reserved in deeds of conveyance for payment of purchase-money, nor as strict mortgages or deeds of trust for it, nor yet as the security held by a vendor who has only given a bond for the title. These are often confounded with the vendor's lien, because security of the purchase-money is common to all of them. But the vendor's lien arises wholly from inference or implication, which is invisible and cannot be recorded; the others are from express contract, visible to all, and may be recorded. All of the same consequences do not, therefore, necessarily result as to assignees or holders of the debt secured by the vendor's lien, nor as to purchasers of the land liable to it, as between the original parties and privies, which do often occur in the cases of express lien by contract."^b See also, to the same general effect, that this lien is one by express contract resembling that by a mortgage: *Robinson v. Woodson*, 33 Ark. 307; *Collins v. Richart*, 14 Bush, 621 (is a lien on the land, and not merely on the rents and profits); *Peters v. Clements*, 46 Tex. 114; *Masterson v. Cohen*, 46 Tex. 520; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Coles v.*

(a) This section of the text is cited in *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468.

(b) Later Texas cases have taken a peculiar view of this lien, apparently treating the deed reserving the lien as the equivalent of a contract to convey, and the lien as similar to the "vendor's lien" described in §§ 1260-

1262, *infra*. The vendor has the "superior title," and the grantee only an equitable title: *Hale v. Baker*, 60 Tex. 217, and cases cited; *Abernethy v. Bass*, 9 Tex. Civ. App. 239, 29 S. W. 398 (effect of conveyance of this title by vendor to a third party; *White v. Cole*, 9 Tex. Civ. App. 277, 29 S. W. 1148 (same)).

§ 1258. Operation and Effect of This Lien.—It follows as a necessary consequence that when such a lien is expressly reserved in the deed, the grantee's title is, in a certain sense, imperfect until the price is paid; or, to speak more accurately, the title is encumbered, and all persons holding or claiming under or through the deed are affected with notice of the lien, and their rights are necessarily subordinate to it.^{1a} On principle, the lien by reservation

Withers, 33 Gratt. 186; Taliefferro v. Barnett, 37 Ark. 511.^c As further illustrations of its resemblance to a mortgage, and its difference from the purely equitable lien of the grantor: it is not defeated nor waived by the grantor's taking other security: Carpenter v. Mitchell, 54 Ill. 126; it can be assigned, and passes by a transfer of the note given for the price which it secures:^d Carpenter v. Mitchell; Markoe v. Andras, 67 Ill. 34; it is foreclosed in equity, like a mortgage, and the right of redemption after foreclosure sale, given in case of mortgage by the law of some states, applies also to it: Markoe v. Andras.

¹ See, in this connection, as to the notice given to subsequent grantees, purchasers, encumbrancers, etc., by recitals and like provisions contained in the title deeds from, under, or through which they claim, *ante*, vol. 2, §§ 626, 628, and cases cited in the notes: Stratton v. Gold, 40 Miss. 778; Thompson v. Heffner's Ex'rs, 11 Bush, 353; Collins v. Richart, 14 Bush, 621; Roosevelt v. Davis, 49 Tex. 463; Peters v. Clements, 46 Tex. 114; Caldwell v. Fraim, 32 Tex. 310; Masterson v. Cohen, 46 Tex. 520; Moore v. Lackey, 53 Miss. 85; Cordova v. Hood, 17 Wall. 1 (binds subsequent grantees, etc.); Ledford v. Smith, 6 Bush, 129 (between the grantor and the grantee; see facts *ante*, in note under § 1256); Dingley v. Bank of Ventura, 57 Cal. 467; Taliefferro v. Barnett, 37 Ark. 511. The lien is a security for the debt, and not merely for the bond or note or other instrument by which the debt is evidenced; a surrender and cancellation of a bond given for the debt does not, therefore, necessarily extinguish the lien itself: Coles v. Withers, 33 Gratt. 186. For the same reason, a subsequent change in the form of the instrument by which the debt is evidenced, as a substitution of a new note in place of the original one, and the like, does not affect the lien: Kausler v. Ford, 47 Miss. 289; French v. Dickey, 3 Tenn. Ch. 302.^b

It has been held that the lien takes precedence over a prior judgment against the grantee: See Parsons v. Hoyt, 24 Iowa, 154.^c This is strictly

§ 1257, (c) Kirk v. Williams, 24 Fed. 437; Eichelberger v. Gitt, 104 Pa. St. 64; Bank of Bristol v. Bradley, 15 Lea 279; Gordon v. Rixey, 76 Va. 694.

§ 1257, (d) See *infra*, § 1259.

§ 1258, (a) The text is cited in Warford v. Hankins, 150 Ind. 483, 50 N. E. 468. See, also, Sidwell v. Wheaton, 114 Ill. 267, 2 N. E. 183;

Eichelberger v. Gitt, 104 Pa. St. 64; Bank v. Bradley, 15 Lea 279; Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234.

§ 1258, (b) See, also, Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 29 Am. St. Rep. 800, 13 S. E. 49.

§ 1258, (c) Priority over judgment against grantee: See, also, Dingus v. Minneapolis Imp. Co., 98 Va. 739, 37 S. E. 353.

should give the grantor the same rights of priority over other general encumbrancers which are held by the mortgagee in a purchase-money mortgage.

§ 1259. **The Grantor's Dealing with the Lien — Waiver — Assignment.**— The grantor's powers of dealing with the lien by reservation are much more extensive than those over the equitable lien heretofore described. His acts which would destroy the implied equitable lien, such as taking other security on land from the grantee, or taking notes of third persons as security; and the like, do not thus affect the existence and validity of the express lien.¹ The grantor may of course waive his lien; whether he does so is a matter of intention, which must appear either expressly or by acts directly inconsistent with its existence and indicating a clear intent to waive.^{2b} The doctrine is estab-

lished with well-settled principle. The doctrine is clearly established that a purchase-money mortgage prevails against the general lien of a prior judgment, and that it prevents the attachment of many other liens upon the premises which might otherwise have affected them: See *ante*, vol. 2, § 725, note. Since the grantor's lien by reservation for the purchase price is tantamount to a purchase-money mortgage given back by the grantee, the same results should necessarily follow from it. In fact, the notice of the *lien* embodied in the deed itself is more complete and efficacious than the notice created by the record of a mortgage or the docket of a judgment.

¹ The reasons why the purely equitable lien should be defeated by the acceptance of independent security have no application whatever to the lien by reservation: *Carr v. Thompson*, 67 Mo. 472; *Strickland v. Summerville*, 55 Mo. 164; *Adams v. Cowherd*, 30 Mo. 458; *Price v. Lauve*, 49 Tex. 74 (taking a trust deed on other lands as security for the price does not affect the lien); *Carpenter v. Mitchell*, 54 Ill. 126; *McCaslin v. State*, 44 Ind. 151; *Lusk v. Hopper*, 3 Bush, 179; *Lewis v. Pusey*, 8 Bush, 615; *Fogg v. Rogers*, 2 Cold. 290; *Hines v. Perkins*, 2 Heisk. 395; *Magruder v. Peter*, 11 Gill & J. 217; *Schwarz v. Stein*, 29 Md. 112, 119; *Hurley v. Hollyday*, 35 Md. 469; *Knisely v. Williams*, 3 Gratt. 265; 46 Am. Dec. 193; *Hatcher's Adm'r v. Hatcher's Ex'rs*, 1 Rand. 53; *Ludington v. Gabbert*, 5 W. Va. 330; *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209; *Bradford v. Harper*, 25 Ala. 337; *Bozeman v. Ivey*, 49 Ala. 75.^a

² *Coles v. Withers*, 33 Gratt. 186; *Butler v. Williams*, 5 Heisk. 241; *French v. Dickey*, 3 Tenn. Ch. 302.

(a) See, also, *Dowdy v. Blake*, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88 (judgment on the debt not a waiver); *Bank v. Bradley*, 15 Lea 279

(same); *Byrns v. Woodward*, 10 Lea 444.

(b) *Byrns v. Woodward*, 10 Lea 444; *Frazier v. Hendren*, 80 Va. 265.

lished by the great preponderance of authority, that this lien is not personal to the grantor, but may be transferred; that it passes by an assignment of the note, bond, or other evidence of debt given for the purchase price, and may be enforced by the assignee.^{3c} When notes given for installments of the purchase price are secured by a lien reserved in the deed, and these notes are transferable, the lien or *quasi* mortgage acquires some of the elements of negotiability.⁴ This lien is enforced in equity by a suit and relief similar in all respects to those for the foreclosure of a mortgage.⁵

³ *Carpenter v. Mitchell*, 54 Ill. 126; *Markoe v. Andras*, 67 Ill. 34; *Hobson v. Edwards*, 57 Miss. 128; *Osborne v. Royer*, 1 Lea, 217; *Blaisdell v. Smith*, 3 Ill. App. 150; *Moore v. Lackey*, 53 Miss. 85; *Kausler v. Ford*, 47 Miss. 289; *Campbell v. Rankin*, 28 Ark. 401; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Talieferro v. Barnett*, 37 Ark. 511; but see *Pillow v. Helm*, 7 Baxt. 545.

Where a lien was reserved in the deed as security for several notes, and these notes have been assigned to different persons, and the holder of one note brought a suit in equity making the grantor, the grantee, and the holders of all the other notes parties, and asked that the holders should respectively be subrogated to the rights of the grantor, the court held that the rule that the assignment of a note secured by a lien reserved in the deed does not transfer the lien to the assignee, and does not enable him to enforce the lien by a suit in his own right against the grantee, did not apply, and the relief asked was granted: *Campbell v. Rankin*, 28 Ark. 401. In *Robinson v. Woodson*, 33 Ark. 307, it is held that a lien by reservation is transferred to the grantee by a second deed acknowledging payment, when no payment had in fact been made, and that under this second deed the grantor has the ordinary equitable lien as if the first one had not been made; and in *Summers v. Kilgus*, 14 Bush, 449, it is held that a grantor may release the lien by reservation, although he has previously assigned a note secured by such lien to a third person. It seems difficult to reconcile this decision with those which sustain the assignability of the lien and the rights of the assignee to enforce it.

⁴ Where several notes are thus secured by a lien of reservation, the whole seems to be analogous to a mortgage given to secure several notes. If the notes are transferred to different persons, the right of the holders to participate in and enforce the lien would seem to depend upon the same rules which apply to notes secured by a mortgage: See *ante*, §§ 1201-1203.

⁵ *Markoe v. Andras*, 67 Ill. 34; *Gaston v. White*, 46 Mo. 486; *King v. Young Men's Ass'n*, 1 Woods, 386; *Fed. Cas. No. 7,811*. .

(c) *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Morris v. Ham*, 47 Ark. 293, 1 S. W. 519; *Dowdy v. Blake*, 50 Ark. 205, 6 S. W. 897, 7

Am. St. Rep. 88; *Smith v. Butler*, (Ark.) 80 S. W. 580; *Gordon v. Rixey*, 76 Va. 694.

SECTION VI.

THE VENDOR'S LIEN AND THE VENDEE'S LIEN ON CONTRACT FOR SALE AND PURCHASE.

ANALYSIS.

§§ 1260-1262. Vendor's lien under contract of sale.

§ 1260. General doctrine; vendor's lien and grantor's lien distinguished.

§ 1261. Essential nature and effects; vendor's interest determined by doctrine of equitable conversion.

§ 1262. How enforced.

§ 1263. Vendee's lien for purchase-money paid.

§ 1260. Vendor's Lien under Contract of Sale.— It has been said, in English and American decisions, that the vendor's lien may arise before conveyance as well as after; and the interest or right of the vendor under an ordinary contract for the sale of land, or a bond conditioned to sell and convey, or whatever may be the form of the agreement, has been called a vendor's lien, and treated in the same manner as the equitable lien arising in favor of the grantor upon an actual conveyance of the land where the purchase price in whole or in part is left unpaid.^{1 a} This is an unnecessary and an incorrect use of terms; it confounds legal no-

¹ Smith v. Hibbard, 2 Dick. 730; Smith v. Evans, 28 Beav. 59; Whitehurst v. Yandall, 7 Baxt. 228; Bizzell v. Nix, 60 Ala. 281; 31 Am. Rep. 38; Johnson v. Nunnerly, 30 Ark. 153; Haughwout v. Murphy, 22 N. J. Eq. 531; Hall v. Jones, 21 Md. 439; Yancey v. Mauck, 15 Gratt. 300; Neel v. Clay, 48 Ala. 252; Servis v. Beatty, 32 Miss. 52; English v. Russell, 1 Hemp. 35; Amory v. Reilly, 9 Ind. 490; Stevens v. Chadwick, 10 Kan. 406; 15 Am. Rep. 348; Smith v. Rowland, 13 Kan. 245; Hill v. Grigsby, 32 Cal. 55. See also, as examples of cases when the lien exists,^b In re Patent Carriage Co., L. R.

(a) As instance of such confusion, see the opinion in Johnson v. McKinnon, (Fla.) 34 South. 272.

(b) See, also, Williams v. Simmons, 79 Ga. 649, 7 S. E. 133; Walker v. Kee, 16 S. C. 76; Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912, 19 S. E. 623.

Land tortiously taken under eminent domain power.— A vendor's lien, securing the owner's damages, has

been recognized in such circumstances: Florida Southern R. R. Co. v. Hill, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566 (citing, among other cases, Walker v. Ware, etc., Ry. Co., 12 Jur. 18; Kittell v. Missisquoi R. R. Co., 56 Vt. 96; Organ v. Memphis, etc., R. R. Co., 51 Ark. 235, 11 S. W. 96); Southern Ry. Co. v. Gregg, 101 Va. 308, 43 S. E. 570.

tions which are essentially different. There is a plain distinction between the lien of the grantor after a conveyance, and the interest of the vendor before conveyance. The former is not a legal estate, but is a mere equitable charge on the land; it is not even, in strictness, an equitable lien until declared and established by judicial decree.² In the latter, although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, yet the vendor retains the *legal title*, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure, — namely, by paying the price according to the terms of the contract.⁴ To call this complete legal title a lien, is cer-

2 Eq. 349; *Lycett v. Stafford etc.* R'y, L. R. 13 Eq. 261; *Earl St. Germans v. Crystal Palace R'y*, L. R. 11 Eq. 568; *Wing v. Tottenham etc.* R'y, L. R. 3 Ch. 740; *Morgan v. Swansea etc.* Authority, L. R. 9 Ch. Div. 582; *Nives v. Nives*, L. R. 15 Ch. Div. 649; *Fry v. Prewett*, 56 Miss. 783; *Cotten v. McGehee*, 54 Miss. 510; *Prentice v. Nutter*, 25 Minn. 484; *Johnson v. Godden*, 33 Ark. 600; *Martin v. O'Bannon*, 35 Ark. 62; *Stephenson v. Rice*, 12 W. Va. 575; *Day v. Hale*, 22 Gratt. 146; *Vail v. Drexel*, 9 Ill. App. 439. Cases in which no lien existed: *Dixon v. Gayfere*, 1 De Gex & J. 655; *Att'y-Gen. v. Sittingbourne etc.* R'y, L. R. 1 Eq. 636; *Earl of Jersey v. Briton etc. Dock Co.*, L. R. 7 Eq. 409; *Prentice v. Nutter*, 25 Minn. 484; *Weare v. Linnell*, 29 Mich. 224; *Willis v. Searcy*, 49 Ala. 222; *Willard v. Reas*, 26 Wis. 540.^c

² Although the right of the grantor is called a lien, yet, as will be more fully shown in the subsequent chapters on remedies, it is rather the potentiality of a lien; it cannot be enforced until the legal remedies against the grantee have been exhausted or are unavailing, and it only acquires its character of a specific encumbrance by the commencement of a suit to enforce it. In *Gilman v. Brown*, 1 Mason, 191, Fed. Cas. No. 5,441, Mr. Justice Story said: "It is, in short, a right which has no existence until it is established by the decree of a court in the particular case." In *Hutton v. Moore*, 26 Ark. 382, the court said: "His lien is an individual equity, of no force until declared by a court of equity"; and see *Campbell v. Rankin*, 28 Ark. 401, 406; *Moore v. Anders*, 14 Ark. 628, 634; 60 Am. Dec. 551.

(c) *Sykes v. Betts*, 87 Ala. 537, 6 South. 428; *Johnson v. McKinnon*, (Fla.) 34 South. 272; *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292.

(d) The text is cited in *Johnson v. Peterson*, 90 Minn. 503, 97 N. W. 384,

holding that prior to completion of the contract by payment of the purchase-money the vendee's possession cannot become adverse to the vendor's legal title.

tainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee cannot defeat it by any act or transfer even to or with a *bona fide* purchaser.^{3e}

³ This true nature of the vendor's interest is fully recognized by numerous decisions even while they use the ordinary term of "vendor's lien" in designating that interest. In some of the cases, however, the essential distinction between the grantor's and the vendor's position seems to have been overlooked. The recent case of *Vail v. Drexel*, 9 Ill. App. 439, presents the doctrine in a very clear, correct, and instructive manner, while using the accustomed phraseology: "Under an agreement for the sale of land, the vendor has an equitable lien on the property for unpaid purchase-money. In equity the vendee is considered the owner. The lien of the vendor is *in rem*, and he may resort to equity in the first instance to enforce it, without first resorting to a suit at law to recover the amount due." See also *McCaslin v. State*, 44 Ind. 151; *Moore v. Anders*, 14 Ark. 628, 634; 60 Am. Dec. 551; *Hutton v. Moore*, 26 Ark. 382; *Pitts v. Parker*, 44 Miss. 247; *Wells v. Smith*, 44 Miss. 296; *Driver v. Hudspeth*, 16 Ala. 348; *Reese v. Burts*, 39 Ga. 565; *Hines v. Perkins*, 2 Heisk. 395; *Sparks v. Hess*, 15 Cal. 186, 194, per Field, J.; *Church v. Smith*, 39 Wis. 492, 496, per Lyon, J. The exact positions of the vendor and vendee have been described by most eminent English judges in recent cases, and their opinions are very instructive. In *McCreight v. Foster*, L. R. 5 Ch. 604, 610, Lord Hatherley said: "It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does in a certain sense exist between vendor and purchaser; that is to say, when a man agrees to sell his estate, he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed, but not before." This case *sub nom.* *Shaw v. Foster*, L. R. 5 H. L. 321, was decided on appeal by the house of lords, and all of the law lords delivered opinions. Lord Chelmsford said (p. 333): "According to the well-known rule in equity, when the contract for sale was signed by the parties, Sir W. Foster [the vendor] became a trustee of the estate for Pooley [the vendee],

(e) The text is quoted in *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761. Text and note are cited in *Florida Southern R. R. Co. v. Hill*, 40 Fla. 1, 74 Am. St. Rep. 124, 23 South. 566. See, also, *Lowery v. Peterson*, 75 Ala. 109; *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146 (vendor's relation similar to that of mortgagee; may restrain waste by vendee); *Beattie v. Dickinson*, 39 Ark. 205 (lien superior to equity of any

claimant under vendee); *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; *Roby v. Bismarck Nat. Bank*, 4 N. Dak. 156, 59 N. W. 719, 50 Am. St. Rep. 633; *McCrellis v. Cole*, (R. I.) 55 Atl. 196 (vendor has mortgagee's rights as respects fixtures); *White v. Blakemore*, 8 Lea (Tenn.) 49; *Poe v. Paxton*, 26 W. Va. 607; *Evans v. Johnson*, 39 W. Va. 299, 45 Am. St. Rep. 912, 19 S. E. 623, 23 L. R. A. 737.

§ 1261. **Essential Nature and Effects.**—In fact, the position of the vendor prior to conveyance is defined and determined by the doctrine of equitable conversion, rather than by that of mere equitable lien. He holds the legal title as security for the performance of the vendee's obligation, and as trust-

and Pooley a trustee of the purchase-money for Sir W. Foster." Lord Cairns said (p. 338): "Under these circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor was a trustee of this property for the purchaser; the purchaser was the real beneficial owner, in the eye of a court of equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee,—he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as a vendor of the property." That interest, Sir George Jessel says, in a subsequent case, is synonymous with the ordinary term, the "vendor's lien" or charge. Lord O'Hagan said (p. 349): "By the contract of sale the vendor, in the view of the court of equity, disposes of his right over the estate, and on the execution of the contract he becomes *constructively* a trustee for the vendee, who is thereupon, on the other side, bound by a trust for the payment of the purchase-money." Lord Hatherley said (p. 356): "The moment that a contract for sale and purchase is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a *constructive* trustee for the vendee. *It is but a constructive trust.*" In *Rose v. Watson*, 10 H. L. Cas. 672, 678, Lord Westbury said: "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is *in equity* transferred by that contract." In *Wall v. Bright*, 1 Jacob & W. 494, 508, the master of rolls said: "The vendor is not a *mere* trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey." These extracts show that the ablest judges have found it very difficult to formulate a statement which should exactly reconcile the idea of the vendor having merely a lien with the notion of his being a trustee. In the recent case of *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499, 506, 507, Sir George Jessel, M. R., states the effect of a contract for the sale of land as follows: "It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other

tee for the vendee, subject to such performance, and that title may be conveyed or devised, and will descend to his heirs. In equity, his real interest is personal estate; he becomes by equitable conversion the owner of the purchase-money, of which the vendee is his trustee, and this claim for the purchase-money passes on his death to his executors or administrators. On the other hand, the vendee becomes, by conversion, the real beneficial, although equitable, owner

words, the position of the vendor is something between what has been called a naked or bare trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate, and a charge upon the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose,—that is to say, he has the right to say to the mortgagor, ‘Either pay me within a limited time, or you lose your estate,’ and in default of payment he becomes absolute owner of it. So although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, ‘Either pay me the purchase-money or lose the estate.’ Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity; and if the time expires without the money being paid, the contract is canceled by the decree or judgment of the court, and the vendor becomes again the owner of the estate [i. e., equitable as well as legal owner]. But that, as it appears to me, is a totally different thing from the contract being canceled, because there was some equitable ground for setting it aside.” The judge goes on to discuss the meaning of “valid contract” for the sale of land, when such contract is valid and binding, and then proceeds: “Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser. If it is a house that is sold, and the house is burned down, the purchaser loses the house. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he willfully damages or injures it, he is liable to the purchaser; and *more* than that, he is liable if he does not take reasonable care of it.¹ So far he is treated in all respects as a trustee, subject, of course,

(¹) This passage is quoted in *Johnson v. McKinnon*, (Fla.) 34 South. 272.

of the land; his interest under the contract is, in equity, real estate, and descends to his heirs. The so-called lien of the vendor is only another mode of expressing his equitable interest thus arising from the doctrine of conversion; and so far as it has any distinctive signification, it simply means his right of enforcing his claim for the purchase-money against or out of the vendee's equitable estate by means of a suit in equity.^{1 a}

to his right to be paid the purchase money, and his right to enforce his security against the estate." See also *Morgan v. Swansea etc. Authority*, L. R. 9 Ch. Div. 582, 584. To these admirable expositions nothing need be added by way of comment. They show that the notion of the vendor's lien is simply another mode of expressing the settled doctrine of conversion wrought by a contract for the sale of land. In equity the vendee is regarded as the real beneficial owner, even though he has not paid the purchase price; the vendor holds the legal estate as trustee, and when the terms of the contract are complied with, he is bound to convey. Until those terms are complied with, the legal title remains in the vendor as his security; or, as it is otherwise expressed, he has a lien upon the vendee's equitable estate as security for payment of the purchase-money according to the terms of the agreement. Practically, this lien consists in the vendor's right to enforce payment of the price, by a suit in equity against the vendee's equitable estate in the land, instead of by means of an ordinary action at law to recover the debt. In England the vendor's equitable remedy consists in a suit in the nature of a strict foreclosure, by which the vendee is decreed to pay the price within a limited time, and in default of such payment the contract is canceled, the vendee's equitable estate is foreclosed, and the vendor's legal estate becomes again absolute. In the United States the same mode of enforcing the lien by a suit in the nature of a strict foreclosure is pursued. Another mode seems to be recognized, at least in some of the states, by which the vendee's equitable estate under the contract is sold in pursuance of a judicial decree. Such a sale would operate as an assignment of the vendee's rights under the contract, and would not be a cancellation of the contract itself.

¹ See *ante*, vol. 1, §§ 368, 372, and cases cited; also cases in last preceding note; *Lewis v. Hawkins*, 23 Wall. 119; *Lingan v. Henderson*, 1 Bland, 236; *Tuck v. Calvert*, 33 Md. 209; *Richards v. Fisher*, 8 W. Va. 55; *Hadley v. Nash*, 69 N. C. 162; *Harvill v. Lowe*, 47 Ga. 214; *Scroggins v. Hoadley*, 56 Ga. 165; *Relfe v. Relfe*, 34 Ala. 500, 504; 73 Am. Dec. 467; *Shinn v. Taylor*, 29 Ark. 523; *Lewis v. Boskins*, 27 Ark. 61; *Holman v. Patterson's Heirs*, 29

(a) The text is cited in *Abbott v. Moldestad*, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227; *White v. Cole*, 9 Tex. Civ. App. 277, 29 S. W. 1148. §§ 1261-1263 are cited in *Schenck v. Wicks*, (Utah) 65 Pac. 732. As to enforcement of the lien by fore-

closure, see, also, *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. ed. 1141; *Moser v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146; *Walker v. Crawford*, 70 Ala. 567; *Wells v. Francis*, 7 Colo. 396, 4 Pac. 49; *Johnson v. McKinnon*, (Fla.) 34

§ 1262. **How Enforced.**—The equity action to enforce the so-called lien is simply an action to compel the vendee to make payment of the purchase price within a specified time,

Ark. 357; Cochran v. Wimberly, 44 Miss. 503; Money v. Dorsey, 7 Smedes & M. 15, 22; Taylor v. Eckford, 11 Smedes & M. 21; Roberts v. Francis, 2 Heisk. 127; Carter v. Sims, 2 Heisk. 166; Cleveland v. Martin, 2 Head, 128; Sitz v. Deihl, 55 Mo. 17; Seitz v. Union Pac. R'y, 16 Kan. 133; Smith v. Moore, 26 Ill. 392; Greene v. Cook, 29 Ill. 186; Grove v. Miles, 58 Ill. 338; 71 Ill. 376; Button v. Schroyer, 5 Wis. 598; Merritt v. Judd, 14 Cal. 59; Purdy v. Bullard, 41 Cal. 444.

The following recent cases illustrate some particular points decided with respect to this lien: *Waiver*: It is not, in general, waived by the taking of other security for the purchase price, whether personal or on land; in this respect it differs from the "grantor's lien": Sehorn v. McWhirter, 6 Baxt. 311, 313; Warren v. Branch, 15 W. Va. 21; Bozeman v. Ivey, 49 Ala. 75; McCaslin v. State, 44 Ind. 151; Day v. Hale, 22 Gratt. 146;^b but see Hollis v. Hollis, 4 Baxt. 524. If the vendee has fully performed all of the contract on his part, he is, of course, entitled to a conveyance, even though the purchase price remains partly unpaid; and this, it seems, is what some of the cases mean by "waiving the lien."^c *Priority*: On principle, the vendor's right should have priority over subsequent judgments recovered against the vendee, irrespective of the question of notice, since he retains the legal title; his position in this respect is entirely different from that of the grantor: Grubbs v. Wisors, 32 Gratt. 127; Shipe v. Repass, 28 Gratt. 716; Wooten v. Bellinger, 17 Fla. 289; Paris Exch. Bank v. Beard, 49 Tex. 358; Jones v. Sackett, 36 Mich. 192.^d *Assignment*: When notes are given for the price, and these notes are assigned, the lien passes, and may be enforced by the assignee: Martin v. O'Bannon, 35 Ark. 62;^e but the assignee obtains no higher rights: he takes subject to defenses; and if the lien had been otherwise destroyed, he cannot enforce it: McMillen v. Rose, 54 Iowa, 522.

South. 272 (vendor's right to enforce the lien lost by his neglect of the premises); Schwartz v. Woodruff, (Mich.) 93 N. W. 1067; Keith v. Albrecht, 89 Minn. 247, 99 Am. St. Rep. 566, 94 N. W. 677 (if vendor has declared a homestead, non-exempt portion must be resorted to first); White v. Blakemore, 8 Lea (Tenn.) 49; Wollenberg v. Rose, 41 Oreg. 314, 68 Pac. 804; In re Clark, 118 Fed. 358 (as to enforcement of the lien under the Pennsylvania practice); Superior Cons. Land Co. v. Nichols, 81 Wis. 656, 51 N. W. 878 (strict foreclosure).

(^b) See, also, Robinson v. Appleton,

124 Ill. 276, 15 N. E. 761; Rogers v. Blum, 56 Tex. 1; Mansfield v. Dame-ron, 42 W. Va. 794, 57 Am. St. Rep. 884, 26 S. E. 527.

(^c) See, also, Sykes v. Betts, 87 Ala. 537, 6 South. 428 (where the consideration is uncertain, as on a sale of real and personal property for a gross sum, no presumption that the retention of the legal title is for the purpose of security); Alexander v. Hooks, 84 Ala. 605, 4 South. 417 (same).

(^d) See, also, § 721, notes.

(^e) See, also, Lowery v. Peterson, 75 Ala. 109 (assignment by delivery passes the lien); Gessner v. Palma-

or else be barred of all rights under the contract,—that is, an action to foreclose the contract. In actions at law to recover the purchase price, it is the uniform rule that the vendor must allege and show that he has tendered a conveyance in pursuance of the terms of the contract. Whether such tender of a deed is a prerequisite to the vendor's maintaining his suit in equity, is a question upon which the American decisions are in direct conflict, and the authorities do not seem to preponderate decidedly in favor of either view.¹

¹The following cases hold that no tender of a deed by the vendor is necessary: *Freeson v. Bissell*, 63 N. Y. 168 (but compare *Thomson v. Smith*, 63 N. Y. 301); *Church v. Smith*, 39 Wis. 492; *De Forest v. Holum*, 38 Wis. 516; *McKenzie v. Baldrige*, 49 Ala. 564. *Per contra*, such a tender is necessary: *Cole v. Wright*, 50 Ind. 296; *McCaslin v. State*, 44 Ind. 151; *Turner v. Lassiter*, 27 Ark. 662; *Wakefield v. Johnson*, 26 Ark. 506; *Klyce v. Broyles*, 37 Miss. 524; and the same rule is stated in *Sugden on Vendors*. In *Thomson v. Smith*, 63 N. Y. 301, it was held that the administrators or executors of a deceased vendor could not maintain the action without alleging a tender, or that they are ready, willing, and able to give a deed, unless the person vested with the title, the heir or devisee, is also made a party to the suit so as to be bound by the judgment. The case was distinguished on these facts from *Freeson v. Bissell*, *supra*. It is not necessary that the vendor should first exhaust his legal or other remedies: *Vail v. Drexel*, 9 Ill. App. 439; *McCaslin v. State*, *supra*; *Sehorn v. McWhirter*, 6 Baxt. 311, 313. Where a note for purchase-money has been assigned, the assignee may not only enforce the lien against the vendee, but may have appropriate relief against the vendor-assignor: *Church v. Smith*, 39 Wis. 492; as to enforcement of plaintiff's judgment against rents due the vendee, etc., see *Seat v. Knight*, 3 Tenn. Ch. 262; for remedy by judicial sale as in the ordinary foreclosure of a mortgage, see *Bruce v. Tilson*, 25 N. Y. 194.

teer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187; *Murphree v. Countiss*, 58 Miss. 712 (not defeated in hands of assignee by vendee's subsequent reception of a deed from the vendor); *Russell v. Kirkbride*, 62 Tex. 455; *National Bank of Commerce v. Lock*, 17 Wash. 528, 61 Am. St. Rep. 923, 50 Pac. 478. As to subrogation, see *Beattie v. Dickinson*, 39 Ark. 205. That a conveyance of the legal title to a third party, without an assignment of the claim for purchase-money, does not pass the lien,

see *Schenck v. Wicks*, 23 Utah 576, 65 Pac. 732. In Georgia, there is a rule that where the vendor transfers the purchase-money notes, without recourse against himself, this operates as a payment of the purchase-money, the vendee's equity becomes "complete," and the vendor ceases to hold any interest in the land, while the transferee is a mere unsecured creditor of the vendee: *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292, and cases cited.

§ 1263. **The Vendee's Lien.**—The lien of the vendee under a contract for purchase of land for the purchase-money paid by him before a conveyance is the exact counterpart of the grantor's—or, as it is commonly called, the vendor's—lien, described in the last section but one. In the latter case, the legal title has been conveyed to the grantee, and yet the grantor retains an equitable lien upon the land as security for the purchase price agreed to be paid. In the former case, the legal title remains in the vendor, who has simply agreed to convey, while the vendee, although having as yet acquired no legal interest in the land by virtue of the contract, does obtain a lien upon it as security for the purchase-money he has paid, and for the performance of the vendor's obligation to convey.¹ In England, there-

¹ The lien exists, of course, only where the vendor is unable or refuses to perform his contract so that the vendee can recover back the purchase-money paid. It does not arise where the contract is illegal, nor where the vendee himself is in default by abandoning the contract: *Cator v. Earl of Pembroke*, 1 Brown Ch. 301; *Wythes v. Lee*, 3 Drew. 396, 406; *Ewing v. Osbaldiston*, 2 Mylne & C. 53, 88; *Dinn v. Grant*, 5 De Gex & S. 451; *Rose v. Watson*, 10 H. L. Cas. 672; *Turner v. Marriott*, L. R. 3 Eq. 744; *Torrance v. Bolton*, L. R. 14 Eq. 124; *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101; 5 Eq. 485; *Lane v. Ludlow*, 2 Paine, 591; *Chase v. Peck*, 21 N. Y. 581; *Clark v. Jacobs*, 56 How. Pr. 519; *Wright v. Dufield*, 2 Baxt. 218; *Flinn v. Barber*, 64 Ala. 193; *Stewart v. Wood*, 63 Mo. 252; *Cooper v. Merritt*, 30 Ark. 686; *Shirley v. Shirley*, 7 Blackf. 452; *Brown v. East*, 5 Mon. 405, 407; *Wickman v. Robinson*, 14 Wis. 493; 80 Am. Dec. 789; *Anderson v. Spencer*, 51 Miss. 869; *Hughes v. Hatchett*, 55 Ala. 539.^a The lien prevails against a subsequent grantee or mortgagee of the vendor with notice: *Rose v. Watson*; *Clark v. Jacobs*; *Stewart v. Wood*.^b The Civil Code of California adopts this lien: "Sec. 3050: One who pays to the owner any part of the price of real property, under an agreement for the

(^a) The lien exists, not merely where the contract is determined by reason of the default of the vendor, but wherever it is determined without any default on the vendee's part: *Whitbread & Co., Lim. v. Watt*, [1902] 1 Ch. 835, affirming [1901] 1 Ch. 911 (lien exists where vendee, in exercise of a power conferred by the contract, rescinded on the happening of a certain event). In general, see *Felkner*

v. Tighe, 39 Ark. 357; *Stults v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190, 14 N. E. 230; *Coleman v. Floyd*, 131 Ind. 330, 31 N. E. 75; *Cleveland v. Bergen Bldg. & Imp. Co.*, (N. J. Eq.) 55 Atl. 117, citing the text; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. ed. 383.

(^b) *Whitbread & Co., Lim. v. Watt*, [1902] 1 Ch. 835, affirming [1901] 1 Ch. 911.

fore, and in the American states where the grantor's lien has been adopted, the vendee's lien upon the lands contracted to be sold as a security for so much of the purchase price as he has paid prior to a conveyance, and for the performance by the vendor of his obligation, exists to the same extent against the same classes of persons, and governed by the same rules, as the corresponding lien of the grantor. The lien only arises, of course, when the vendor is in some default for not completing the contract according to its terms, and the vendee is not in default so as to prevent him from recovering the purchase-money paid.

SECTION VII.

ARISING FROM A DEPOSIT OF TITLE DEEDS.

ANALYSIS.

- § 1264. The English doctrine.
- § 1265. The doctrine in the United States.
- § 1266. Distinction suggested as a conclusion from American cases.
- § 1267. How this lien is enforced.

§ 1264. **English Doctrine.**— It is a well-settled doctrine of the English equity that a deposit of title deeds as a security for the payment of money, without any agreement, either verbal or written, to give a mortgage, creates an equitable lien, or, as it is ordinarily called, an equitable mortgage, on the estate of the debtor of which the deeds constitute in whole or in part the title. The exact significance and effect of the transaction is, that the debtor thereby contracts that his estate in the land shall be liable for the debt, and that he will execute such mortgage or conveyance as may be necessary to convey the estate to the creditor as security for the payment. The lien thus created is good between the

sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration."

parties, and as against all subsequent purchasers or encumbrancers of the depositor who are affected with notice of the transaction, and all persons holding under him as volunteers.¹

¹ *Russel v. Russel*, 1 Brown Ch. 269; 1 Lead. Cas. Eq., 4th Am. ed., 931; *Pye v. Daubuz*, 2 Dick. 759; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Wright*, 19 Ves. 255; *Ex parte Hooper*, 1 Mer. 7; *Ex parte Kensington*, 2 Ves. & B. 79; *Parker v. Housefield*, 2 Mylne & K. 419; *Pryce v. Bury*, 2 Drew. 41, 42; *Lacon v. Allen*, 3 Drew. 579; *Whitbread v. Jordan*, 1 Younge & C. 303; *National Bank of Australia v. Cherry*, L. R. 3 P. C. 299. A deposit once made may be extended so as to include further advances in pursuance of a subsequent parol agreement: *Ex parte Kensington*, 2 Ves. & B. 79, 84; *Ex parte Langston*, 17 Ves. 227; *Baynard v. Woolley*, 20 Beav. 583.

English judges have explained the doctrine in different modes, sometimes referring it wholly to precedent, as in *Lacon v. Allen*, 3 Drew. 579, 582, per Kindersley, V. C.; and sometimes endeavoring to find a basis of principle for it, as in *Keys v. Williams*, 3 Younge & C. 55, 61, per Lord Abinger. As a matter of fact, the doctrine rests upon the peculiar law and practice of England with reference to conveyancing, and to the use of deeds as evidence of ownership. There is no general system of registration; the possession of deeds is an evidence of ownership; they or their abstracts are exhibited to the intended purchaser for examination in every negotiation for a sale; they are delivered to the grantee almost as a matter of course in all transfers of the fee; no transfer can safely be made without them; and no one is supposed to have a right to their possession unless he has some claim upon the land or estate which they represent. Whenever a supposed owner offers his estate for sale or mortgage, he must produce his title deeds, and their absence from his possession, when demanded, inevitably casts a suspicion on his title, and puts the other party upon an inquiry.^a The doctrine, therefore, has some natural basis of fact in England, and does not produce the difficulties in its actual operation which it would necessarily cause in this country, where the records of deeds, and not the deeds themselves, are the real evidence and security of title and ownership. A prior equitable lien created by a deposit of title deeds is superior to all subsequent claims of mere volunteers, and of parties acquiring rights under the depositor with actual or constructive notice of the lien. The important points which arise in practice are generally connected with this matter of priority, and involve the question as to what constitutes notice to a subsequent mortgagee or other encumbrancer. This subject has already been discussed, and the conclusions of the latest English cases given *ante*, in § 612. As the same conditions of fact do not arise in this country, and the rules are valuable here only by analogy, it does not seem necessary to go into any further examination of the numerous English decisions. The following cases illus-

(a) The author's note is cited to this effect in *Kelly v. Lehigh Min. & Mfg. Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511, holding that in this

country the vendee is not, as a matter of law, entitled to his vendor's muni-ments of title.

§ 1265. *The Doctrine in the United States.*— The basis of fact which exists in England, as described in the foot-note, is not found in our law or our practice; and as the doctrine is opposed to all our modes of treating real estate, and especially to our system of registry, it was inevitable that the doctrine of an equitable lien, resulting from a mere deposit of title deeds with a creditor, should not meet with any general and practical acceptance throughout the United States. Under our system of recording, there is no necessity for the production, nor even for the preservation, of the original title deed; owners look to the records as furnishing the real evidence of title, and as exhibiting the true condition of all interests in and claims upon the land which could affect the rights of purchasers or encumbrancers; and to the records all parties go, as a matter of course, even in preference to the original deeds.¹ In fact, no presumption or inference would, in general, be raised from the mere possession of title deeds by a stranger. It follows that in several of the states, where the question has been judicially examined, the doctrine has been distinctly repudiated or not adopted, as being wholly inconsistent with our statutory system of registry and methods of conveyancing.^{2 a} - In a

treat these questions: *Turner v. Letts*, 7 De Gex, M. & G. 243; *Roberts v. Croft*, 2 De Gex & J. 1; *Perry Herrick v. Attwood*, 2 De Gex & J. 21; *Layard v. Maud*, L. R. 4 Eq. 397; *Newton v. Newton*, L. R. 6 Eq. 135; 4 Ch. 143; *Thorpe v. Holdsworth*, L. R. 7 Eq. 139; *Briggs v. Jones*, L. R. 10 Eq. 92; *In re Durham etc. Soc.*, L. R. 12 Eq. 516; *Maxfield v. Burton*, L. R. 17 Eq. 15; *Waldy v. Gray*, L. R. 20 Eq. 238; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; *Dixon v. Muckleston*, L. R. 8 Ch. 155; *Burton v. Gray*, L. R. 8 Ch. 932; *Ex parte Holthausen*, L. R. 9 Ch. 722; *In re Trethowan*, L. R. 5 Ch. Div. 559; *Keate v. Phillips*, L. R. 18 Ch. Div. 560; *In re Morgan*, L. R. 18 Ch. Div. 93.

¹ See *Probasco v. Johnson*, 2 Disn. 96, 98.

² *Bicknell v. Bicknell*, 31 Vt. 498; *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Thomas's Appeal*, 30 Pa. St. 378; *Edwards's Ex'rs v. Trumbull*, 50 Pa. St. 509; *Bowers v. Oyster*, 3 Penr. & W. 239; *Probasco v. Johnson*, 2 Disn. 96; *Bloom v. Noggle*, 4 Ohio St. 45, 56; *Vanmeter v. McFaddin*, 8 B. Mon. 435,

(a) See, also, *Bloomfield State Bank v. Miller*, 55 Nebr. 243, 70 Am. St. Rep. 381, 75 N. W. 569, 44 L. R. A. 387, reviewing the cases, and arguing

with much force for the repudiation of the doctrine: *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 678; *Kelly v. Le-*

few cases, however, the English doctrine has been recognized, treated as a subsisting rule of equity jurisprudence, and acted upon. It cannot be affirmed, in my opinion, notwithstanding these decisions, that the rule has been firmly established in either one of the states where the decisions were made; their authority is hardly sufficient to be considered as having finally settled the question in accordance with their views.³

438; Meador v. Meador, 3 Heisk. 562; Gothard v. Flynn, 25 Miss. 58; but compare, *per contra*, Williams v. Stratton, 10 Smedes & M. 418.

³ Hackett v. Reynolds, 4 R. I. 512; Rockwell v. Hobby, 2 Sand. Ch. 9; Griffin v. Griffin, 18 N. J. Eq. 104; Welsh v. Usher, 2 Hill Eq. 167, 170; 29 Am. Dec. 63, per Harper, J.; Williams v. Stratton, 10 Smedes & M. 418, 426; Mowry v. Wood, 12 Wis. 413; Jarvis v. Dutcher, 16 Wis. 307; First Nat. Bank v. Caldwell, 4 Dill. 314; Fed. Cas. No. 4,798. In Rockwell v. Hobby, *supra*, the decision was by the assistant vice-chancellor, who said: "In absence of all other proof, the evidence of an advance of money, and the finding of the deeds of the borrower in the possession of the lender, is held to establish an equitable mortgage. In the case before me, the deed went into the possession of the testator [the creditor] for some purpose. None is specifically proved; but there is an advance of money proved,—an advance which went to discharge a mortgage given in truth for a part of the purchase-money of the land described in that deed. The only inference is, that the deed was deposited as a security for such advance." This is the decision of an inferior local equity court, but of an undoubtedly able judge; and although it has been frequently cited by text-writers, it certainly cannot be regarded as having finally established the full English doctrine as a part of the law in New York. The same is true of Welsh v. Usher, *supra*, in which Harper, J., admitted the doctrine as existing, but this can hardly establish the rule for South Carolina. In Griffin v. Griffin, *supra*, the chancellor of New Jersey went somewhat further, and said that "courts of equity in England and in this country have for many years recognized the validity of an equitable mortgage by the deposit of title deeds by a debtor with his creditor as security for the repayment of a debt, and have held that the mere fact that a creditor was in possession of the title deeds raised the presumption that they were deposited as a security for the debt, and created an equitable mortgage." It should be observed that this decision was made with reference to New York law. Hackett v. Reynolds, *supra*, goes to the full length of holding that the deposit of title deeds creates an equitable lien or mortgage as between the original parties and other persons subject to their equities, and that the courts will establish this lien, and enforce a sale of the depositor's interest and also of the interest of third persons who are

high Min. & Mfg. Co., 98 Va. 405, 81 Am. St. Rep. 376, 36 S. E. 511 (vendee is not, as a matter of law, entitled to his vendor's muniments of title);

Hutzler v. Phillips, 26 S. C. 136, 4 Am. St. Rep. 687, and note, 1 S. E. 502; Lehman v. Collins, 69 Ala. 127.

§ 1266. *Distinction Suggested.*— From a comparison of these decisions I venture to suggest a distinction which may partially reconcile the American cases, and may furnish a rule which would perhaps be accepted as correct in nearly all the states. In the first place, a deposit of title deeds with the creditor as security for an indebtedness, even without any accompanying express agreement, certainly means *something*; it is not a mere empty form; it creates some right both at law and in equity. It is a pledge of *the deeds themselves*, valid between the parties. The depositor cannot recover the instruments in a legal action until he has paid the debt; and a court of equity will give him no relief until he has done equity to his creditor by discharging the obligation which the deposit was intended to secure. What is thus a pledge of the deeds themselves at law might be regarded in equity as a lien upon the land described in the deeds. It would be carrying out the evident intention of the parties, and would be in complete harmony with our established system of titles, of conveyancing, and of registration, to permit the mere deposit of title deeds as security, without further express agreement, to create an equitable lien on the land, valid and enforceable between the original parties, as against the debtor himself. To this extent the lien created by the deposit might be admitted in all the states.¹ * On the other hand, such a lien operating against third persons, as grantees or encumbrancers, even those who have dealt concerning the property with actual notice of the deposit, is an entirely different matter, and is plainly irreconcilable with our methods of conveyancing and system of recording, and does not constitute a doctrine of

subject to the lien. In *Williams v. Stratton*, 10 Smedes & M. 418, 426, the question was fully discussed, and the English doctrine admitted to exist, although not applied to the facts of the case. This admission has, however, been overruled in the subsequent case of *Gothard v. Flynn*, 25 Miss. 58.

¹ *Griffin v. Griffin*, 18 N. J. Eq. 104. It is probable that most of the American cases which sanction the doctrine do not intend to go further than this limited operation of the rule.

(a) See, also, *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494.

American equity as it is administered in nearly all of the states. In the second place, another distinction is important to be noticed. The theory of an equitable lien resulting from a deposit of title deeds assumes a simple deposit as security without any express agreement in writing; and, as we have seen, the English equity *implies* an agreement to give a mortgage. If the deposit should be accompanied by a written agreement expressly stipulating that the debt should be secured by or be a charge on the land described in the deeds, or that the transaction should amount to such a security or charge, this agreement would, under the principles of equity prevailing throughout the entire country, constitute an equitable lien on the land itself.^{2 b} In fact, such an agreement would create a lien independent of any deposit, since it would fall within the general doctrines heretofore stated concerning equitable liens arising from executory contracts.³

§ 1267. **How Enforced.**—If the lien exists in any of the states, its proper mode of enforcement seems to be by a suit in equity and a decree for the sale of the land subjected to it, although in England the ordinary remedy is by a suit for a strict foreclosure cutting off the right of redemption.¹

² Luch's Appeal, 44 Pa. St. 519; Edwards's Ex'rs v. Trumbull, 50 Pa. St. 509.

³ See *ante*, §§ 1235, 1237.

¹ Hackett v. Reynolds, 4 R. I. 512; Mowry v. Wood, 12 Wis. 413; Jarvis v. Dutcher, 16 Wis. 307. The English remedy proceeds upon the notion that the deposit is, in effect, an agreement to give an ordinary legal mortgage; the relief, therefore, is the same as that ordinarily given in case of a legal mortgage: Backhouse v. Charlton, L. R. 8 Ch. Div. 444; Carter v. Wake, L. R. 4 Ch. Div. 605; James v. James, L. R. 16 Eq. 153; Pryce v. Bury, L. R. 16 Eq. 153, note.

(b) The text is cited to this effect in Higgins v. Manson, 126 Cal. 467, 77 Am St. Rep. 192, 58 Pac. 907; Stewart v. McLaughlin, 11 Colo. 458, 18 Pac. 619. Thus, there is an enforceable lien where the assignee of a mortgage, who has purchased at a sale under power in the mortgage but has not received a conveyance, de-

livers the certificate of sale and the note and mortgage as security for a loan made to him; but this lien arises from express contract, not from the delivery of the title papers: Woodruff v. Adair, 131 Ala. 530, 32 South. 515. See, also, Martin v. Bowen, 51 N. J. Eq. 252, 26 Atl. 823.

SECTION VIII.

VARIOUS STATUTORY LIENS.

ANALYSIS.

§ 1268. General nature and tendency of American legislation on this subject; various examples.

§ 1269. How such liens are enforced.

§ 1268. **General Nature of American Legislation on This Subject.**—In addition to the foregoing liens which belong to the general equity jurisprudence, the legislation of many states has created or allowed a variety of other liens, the enforcement of which often comes within the equity jurisdiction, and has thus enlarged its scope as administered throughout a large portion of our country. This legislation differs so much in its details that I shall not attempt to give any circumstantial description of it, nor any abstract of the statutes themselves. The liens are sometimes charged upon real estate and sometimes upon chattels. Their general object is the protection of those who, by their labor, services, skill, or materials furnished, have enhanced the value of the specific property, which thus becomes subject to the lien as security for their compensation. The most familiar instance, which may be taken as the type of the whole class, is that known as the “mechanic’s lien,” found under some form in nearly every state.^{1 a}

¹ It has been the policy in many states to protect in this manner those employed in their peculiar local industries. In the Northwestern states, where lumbering is an important industry, a lien on logs is given to those engaged in “booming,” or in cutting trees, and on lumber, to those engaged in sawing. In the mining states and territories of the Pacific coast, a system of liens exists on mines, mining-sites, and mineral products, in favor of those engaged in working, “prospecting,” or “locating” them. In Southern states, a lien on the plantations, or products thereof, is given to those who

(a) The text is cited in *Hibernia cashire Fire Ins. Co.*, 138 Cal. 257, 71 Sav. & Loan Soc. v. *London & Lan-* Pac. 334.

§ 1269. **How Enforced.**—Many of these liens are enforced by purely legal actions, and their effect resembles that produced by a legal attachment, enabling the lienor to retain or recover possession of the thing, and to sell it at execution sale upon the judgment. Others are enforced by special proceedings authorized and regulated by statute. These two classes have no equitable character, and do not come within the scope of equity jurisdiction. In some of the states, however, these liens, especially those charged upon real estate, as mechanics' liens, mining liens, and the like, are enforced by ordinary equitable actions, resulting in a decree for a sale and distribution of the proceeds, identical in all their features with suits for the foreclosure of mortgages by judicial sale.^{1 a} It is true that these liens, being

by their materials or services aid in raising crops. There is also a strong tendency, especially in the Western states, to protect all artisans, workmen, laborers, etc., by such liens.

¹ Winslow v. Urquhart, 39 Wis. 260 (on logs); Ogg v. Tate, 52 Ind. 159 (mechanics); Ball v. Vason, 56 Ga. 264 (crops and land); Watson v. Columbia Bridge Co., 13 S. C. 433 (mechanics); Gaskill v. Davis, 63 Ga. 645 (same); Lawton v. Case, 73 Ind. 60; Cummins v. Halsted, 26 Minn. 151; Willer v. Bergenthal, 50 Wis. 474; 7 N. W. 352 (action is equitable); Spink v. McCall, 52 Iowa, 432; 3 N. W. 471; Phillips v. Gilbert, 101 U. S. 721; 25 L. ed. 833; Burroughs v. Tostevan, 75 N. Y. 567; Kealing v. Voss, 61 Ind. 466. These cases are cited merely as illustrations of actions, equitable in their nature, for the enforcement of such liens.

(a) The text is cited in *De La Vergne, etc., Co. v. Montgomery Brewing Co.*, 46 Fed. 829 (action is equitable); *Hibernia Sav. & Loan Soc. v. London & Lancashire Fire Ins. Co.*, 138 Cal. 257, 71 Pac. 334. See, also, *Davis v. Alvord*, 94 U. S. 545, 24 L. ed. 283 (mechanics' lien); *Gilchrist v. Helena Co.*, 58 Fed. 708 (labor lien on railroad; where statute provides no method of enforcing lien, remedy is in equity); *Santa Cruz Rock Pav. Co. v. Bowie*, 104 Cal. 286, 37 Pac. 934 (street assessment lien); *Dobbins v. Colorado & S. Ry. Co.*, (Colo. App.) 75 Pac. 156 (tax lien on rail-

road established in equity, in absence of statutory provision for its enforcement); *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318, 26 N. E. 157 (mechanics' lien); *Frost v. Clark*, 82 Iowa 298, 48 N. W. 82 (mechanics' lien); *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 152 N. Y. 584, 46 N. E. 956 (mechanics' lien); *Fischer-Hansen v. Brooklyn Heights R. Co.*, 173 N. Y. 492, 66 N. E. 395 (attorney's lien on cause of action); *Washington Iron Works v. Jensen*, 3 Wash. St. 584, 28 Pac. 1019 (statutory lien on vessel).

created by statute, are *legal* in their essential nature, rather than equitable; but so far as they are enforced by equitable actions, they have added a peculiar element to the equity *jurisdiction* in several states. It is no part of my design to discuss the rules governing the existence, scope, and operation of such statutory liens; and the general reference is made to them in order to complete a survey of the liens which belong to equity jurisprudence or may fall under the equity jurisdiction.

CHAPTER EIGHTH.

ESTATES AND INTERESTS ARISING FROM
ASSIGNMENTS.

SECTION I.

ASSIGNMENTS OF THINGS IN ACTION.

ANALYSIS.

- § 1270. Original doctrines at law and in equity.
- § 1271. *Rationale* of the equitable doctrine.
- § 1272. Assignment of things in action at common law.
- § 1273. The same; under statutory legislation.
- § 1274. Interpretation of this legislation as contained in the reformed procedure.
- § 1275. What things in action are or are not thus *legally* assignable.
- § 1276. Assignments forbidden by public policy.
- § 1277. The equitable jurisdiction; under the reformed procedure.
- § 1278. The equitable jurisdiction; under the common-law procedure.
- § 1279. Incidents of an assignment.

§ 1270. Original Doctrines at Law and in Equity.^a— By the ancient common law, things in action, expectancies, possibilities, and the like were not assignable; an assignee thereof acquired no right which was recognized by a court of law, for the act of assignment was regarded as against public policy, if not actually illegal. Lord Coke states this doctrine as one of the peculiar excellencies of the system which he called the “perfection of human wisdom,” but which was at his day in many respects semi-barbarous.¹ The court of chancery from an early day rejected this rule

¹ Lampet's Case, 10 Coke, 46 b, 48 a: “The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers; for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice!”

(a) Sections 1270–1285 are cited in The Elmbank, 72 Fed. 610.

as narrow and even absurd. Acting upon the principle that a man may bind himself to do anything not impossible, and that he ought to perform his obligations when not illegal, equity has always held that the assignment of a thing in action for a valuable consideration should be enforced;² and has also given effect to assignments of every kind of future and contingent interests and possibilities in real or personal property, when made upon a valuable consideration.^{3 b} As soon as the assigned expectancy or pos-

² *Row v. Dawson*, 1 Ves. Sr. 331; 2 Lead. Cas. Eq., 4th Am. ed., 153; *Wright v. Wright*, 1 Ves. Sr. 409, 411; *Squib v. Wyn*, 1 P. Wms. 378, 381.

³ *Warmstrey v. Lady Tanfield*, 1 Ch. Rep. 29; 2 Lead. Cas. Eq. 1530; *Goring v. Bickerstaff*, 1 Ch. Cas. 4, 8; *Jewson v. Moulson*, 2 Atk. 417, 421; *Wright v. Wright*, 1 Ves. Sr. 409, 411; *Spragg v. Binkes*, 5 Ves. 583, 588; *Stokes v. Holden*, 1 Keen, 145, 152, 153; *Hobson v. Trevor*, 2 P. Wms. 191 (the mere expectancy of an heir at law); *Bennett v. Cooper*, 9 Beav. 252 (the possible interest which a person may take under the will of another who is still living); *Lindsay v. Gibbs*, 22 Beav. 522 (non-existing property to be acquired at a future time,—e. g., the expected cargo of a ship). The opinion of Lord Hardwicke in *Wright v. Wright*, *supra*, is a leading exposition of this equity doctrine. The interest assigned was a possibility under an executory devise. Lord Hardwicke said: "It is now established in this court that a *chose in action* may be assigned for valuable consideration; and this [the expectancy which was the subject-matter of the suit] may be released as a *chose in action* may; and then why may it not be put into such a shape as to be disposed of to a stranger, or to make him [the assignor] trustee for a stranger? This court admits the contingent interest of terms for years to be assigned for valuable consideration, though the law does not; and further permits them to be disposed of by will, as in *Wind v. Jekyl*, 1 P. Wms. 572. . . . But this is said to be a contingent interest or possibility of inheritance, and there is no case of making that good; as to which there is no difference in the reason of the thing between that and the allowing of an assignment of a possibility of a personal thing or chattel real. The *Trevor's Case*, 2 P. Wms. 191, goes a great way. There was an agreement on marriage to settle all such lands as should come by descent or otherwise from his father, which this court carried into execution, notwithstanding an expectancy of an heir at law in the life of his ancestor is less than a possibility. In that case it was made good by way of agreement for valuable consideration. Then how does an assignment differ from it? An assignment always operates by way of agreement or contract, amounting, in the consideration of this court, to this, that one agrees with another to transfer and

(b) A voluntary assignment of an expectancy will not be enforced in equity, even though under seal: In re *Ellenborough*, [1903] 1 Ch. 697;

Meek v. Kettlewell, 1 Hare 464, 1 Phillips' Ch. 342; In re *Tilt*, 74 L. T. 163.

sibility has fallen into possession, the assignment will be enforced.⁴

§ 1271. *Rationale of the Equitable Doctrine.*^a—It followed, therefore, that the assignee of an ordinary thing in action—a debt or demand arising out of contract—acquired at once an equitable ownership therein, as far as it is possible to predicate *property* or *ownership* of such a species of right, while the assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable *property right* over those proceeds as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership or property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event. Equity permitted the creation and transfer of such an ownership, while the original common law rejected every such notion. At an early day this species of equitable ownership arising from assignments prohibited by the common law was the occasion of an extensive branch of the equity jurisdiction. This former condition has, however, been greatly modified, and the special jurisdiction based upon it has become very much diminished.

§ 1272. *Assignment of Things in Action at Common Law.*—The *essential* validity of the assignments of legal things in action, and the equitable ownership of the assignees thereunder, had long been recognized by the law courts, which permitted the assignee suing in the name of the as-

make good that right or interest, and, like any other agreement, the court will cause it to be specifically performed (not leaving the assignee to his action for damages for a breach), when the assignor is in a condition to transfer the property, or to cause it to be transferred, to the assignee."

⁴ *Holroyd v. Marshall*, 10 H. L. Cas. 191.

(a) This section is cited in *Weller Hampton*, 98 Ky. 166, 32 S. W. 406, *v. Jersey City, H. & P. St. Ry. Co.*, 56 Am. St. Rep. 335, 33 L. R. A. 266. (N. J. Eq.) 57 Atl. 730; *McCall v.*

signor to have entire control of the action and the judgment, and treated him as the only person having an immediate interest in the recovery.¹ In all ordinary cases, therefore, of assignment of legal things in action—debts, and the like—the assignee had a complete and easy remedy at law, and the necessity of a resort to equity had ceased.^{2 a}

§ 1273. *The Same. Under Statutory Legislation.*—Statutes both in England and in the United States have gone much further, and, by allowing the assignee of things in action to sue at law in his own name, have made his interest or ownership to be legal, and no longer equitable. The earliest English statutes were confined to policies of insurance, permitting them to be legally assigned, so that the assignee could sue at law in his own name.¹ Finally, by the supreme court of judicature act, it was provided that debts and all other legal things in action may be assigned at law, if the assignment is in writing and absolute, and not by way of charge only.² The legislation in many of the American states is much broader in its effects, though less specific in its language. In all the states and territories which have adopted the reformed procedure, abolishing the distinction between legal and equitable actions, and introducing one

§ 1272, ¹ The assignee was protected by the court from any interference with the action by the assignor in whose name as plaintiff on the record it was prosecuted; and after notice of the assignment to the debtor, any release to him by the assignor, or payment by him to the assignor, or other matter of discharge between them, was no defense to the action. In fact, the assignee's equitable interest was perfect, even in a court of law, except that he could not sue in his own name. See an account of the law on this subject by Buller, J., in *Master v. Miller*, 4 Term. Rep. 320, 340, 341; *Westoby v. Day*, 2 El. & B. 605, 624; *Edwards v. Parkhurst*, 21 Vt. 472; *Conway v. Cutting*, 51 N. H. 407; *Garland v. Harrington*, 51 N. H. 409; *Briggs v. Dorr*, 19 Johns. 95; *Raymond v. Squire*, 11 Johns. 47; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; 1 Am. Dec. 93.

§ 1272, ² *Hammond v. Messenger*, 9 Sim. 327; *Keys v. Williams*, 3 Younge & C. 462, 466, 467.

§ 1273, 130 & 31 Vict., c. 144; 31 & 32 Vict., c. 86.

§ 1273, 236 & 37 Vict., c. 66, sec. 25, § 6.

(a) See *Hayes v. Berdan*, 47 N. J. Andrews, 106 U. S. 678, 1 Sup. Ct. Eq. 567, 21 Atl. 339; *Hayward v.* 544, 27 L. ed. 271.

civil action for all purposes, it is provided that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in this statute."³

§ 1274. *Interpretation of This Legislation in the Reformed Procedure.*—It is the settled interpretation of this provision in all the commonwealths where the reformed procedure prevails, that whenever a thing in action is assignable, the assignee thereof must sue upon it in his own name; and if the thing in action is itself legal, his right and interest under the assignment have been made legal. The provision itself does not render any thing in action assignable; it does not affect in any way the quality of assignability; it simply acts upon things in action which are assignable, and if they are legal in their nature, and if the assignment is one which would have been recognized in a court of law by permitting the assignee to sue in the name of the assignor, then the interest of the assignee is legal.^{1 a}

³ The exceptions referred to embrace suits by executors, administrators, trustees of an express trust, and persons in whose names contracts are made for the benefit of others. See the following codes of procedure and practice acts: New York, sec. 111 (449 of new code); Indiana, sec. 3; Kansas, sec. 26; Minnesota, sec. 26; Missouri, art. 1, sec. 2; Wisconsin, c. 122, sec. 12; Oregon, secs. 27, 379; Nevada, sec. 4; Kentucky, sec. 30; Washington, sec. 4; Montana, sec. 4; Ohio, sec. 25; California, sec. 367; Iowa, sec. 2543; Nebraska, sec. 29; Wyoming, sec. 22; Idaho, sec. 4; Dakota, sec. 74; Colorado, sec. 3; South Carolina, sec. 134; North Carolina, sec. 55. There are also special statutes in some of the states authorizing and regulating the assignment of things in action; e. g., Cal. Civ. Code, secs. 953, 954, 1427, 1428, 1457, 1458.

¹ See Pomeroy on Remedies, secs. 125–138, where the authorities sustaining the above conclusions are fully examined: *Devlin v. The Mayor*, 63 N. Y. 8; *Hardin v. Helton*, 50 Ind. 319; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542. If the thing in action is a claim purely equitable in its nature, or if the assignment is one which courts of equity alone recognized,—as, for example, an order given upon a particular fund, or an assignment of a part of a single demand,—then the assignee's interest is still equitable. A note or bill payable to order may be transferred without indorsement, and the transferee will obtain a good equitable title; such transfer is an

(a) Right of assignee to sue in his own name.—*Manley v. Park*, (Kan.) 75 Pac. 557; *Howe v. Mittelberg*, 96 Mo. App. 490, 70 S. W. 397. In *Sullivan v. Visconti*, (N. J. Eq.) 53 Atl.

598, it was held that the effect of the New Jersey statute is to permit a suit in the name of the assignee, although such procedure is not mandatory.

§ 1275. What Things in Action are or are not thus Assignable.— It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are, in general, thus assignable; all which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable.^a The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract express or implied, with certain well-defined exceptions;^b and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs, whereby an estate, real or personal, is injured, diminished, or damaged. The second class embraces all torts to the person or character, where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only *direct* injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a

equitable assignment:^b *Van Riper v. Baldwin*, 19 Hun, 344; *Hutchinson v. Simon*, 57 Miss. 628; *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532; and see *ante*, cases in note under § 1148.

§ 1274, (b) *Bell v. Moon*, 79 Va. 341. Likewise, a non-negotiable note may be equitably assigned by delivery: *Johnson v. Hibbard*, 27 Utah 342, 75 Pac. 737.

§ 1275, (a) Quoted in *Weller v. Jersey City, H. & P. St. Ry. Co.*, (N. J. Eq.) 57 Atl. 730. The distinction between the two classes of contracts is stated in *Poling v. Condon-Lane Boom & Lumber Co.*, (W. Va.) 47 S. E. 279.

§ 1275, (b) *Contracts held assignable*.— See the following very recent examples: *Houssels v. Jacobs*, 178 Mo. 579, 77 S. W. 857; *Detroit, etc.*,

Ry. Co. v. Common Council, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589 (contract right to immunity from municipal taxation); *Frels v. Little Black Farmers' Mut. Ins. Co.*, (Wis.) 98 N. W. 522 (fire insurance policy after adjustment of loss); *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, 55 Atl. 191 (life insurance policy to one having no insurable interest); *State v. Tomlinson*, 16 Ind. App. 602, 45 N. E. 1116, 59 Am. St. Rep. 335 (life insurance policy); *Jarvis v. Binkley*, 206 Ill. 541, 69 N. E. 582.

medical practitioner, contrary to his implied undertaking, and the like;^{1 c} and also those contracts, *so long as they are executory*, which stipulate solely for the special *personal* services, skill, or knowledge of a contracting party.^{2 d}

¹ *Zabriskie v. Smith*, 13 N. Y. 322, 333; 64 Am. Dec. 551; per Denio, J.; *Chamberlain v. Williamson*, 2 Mylne & S. 408; *Meech v. Stoner*, 19 N. Y. 26, 29, per Comstock, J.; *Wade v. Kalbfleisch*, 58 N. Y. 282; 17 Am. Rep. 250; *Smith v. Sherman*, 4 Cush. 408; *Rice v. Stone*, 1 Allen, 566; *Lattimore v. Simmons*, 13 Serg. & R. 183, 186.

² The whole subject is examined at length, with full analyses of the cases arising under the reformed procedure, in *Pomeroy on Remedies*, secs. 144-153, and cases cited; *Devlin v. The Mayor*, 63 N. Y. 8; *Wheelock v. Lee*, 64 N. Y. 242; *Hoyt v. Thompson*, 5 N. Y. 320, 347; *Haight v. Hayt*, 19 N. Y. 464, 467; *Byxbie v. Wood*, 24 N. Y. 607, 611; *Graves v. Spier*, 58 Barb. 349, 386; *Butler v. New York etc. R. R.*, 22 N. Y. 110, 112; *Bank of California v. Collins*, 5 Hun, 209; *Weire v. Davenport*, 11 Iowa, 49, 52; 77 Am. Dec. 132; *Tyson v. McGuineas*, 25 Wis. 656. In *Devlin v. The Mayor*, *supra*, a contract with the city of New York for cleaning the streets during a certain period for a certain price was held to be assignable by the contractor; and that the assignee could maintain an action for a breach by the city after the assignment, viz., its refusal to allow the assignee to fulfill the contract. Per Allen, J. (pp. 15, 16): "If the service to be rendered is not necessarily *personal*, and such as can only, and with due regard to the interests of the parties and the rights of the adverse party, be rendered by the original contractor, and the latter has not disqualified himself from performance," the contract is assignable. The following special rules illustrate the general conclusions of the text: A cause of action for fraudulent representations concerning the value of certain property survives: *Garland v. Harrington*, 51 N. H. 409; *Conway v. Cutting*, 51 N. H. 407; *Edwards v. Parkhurst*, 21 Vt. 472; *Rice v. Stone*, 1 Allen, 566; *Zabriskie v. Smith*, 13 N. Y. 322, 333; 64 Am. Dec. 551; *Byxbie v. Wood*, 24 N. Y. 607, 611; *Bond v. Smith*, 4 Hun, 48; *Grant v. Ludlow's Adm'r*, 8 Ohio St. 1, 37; *Beckham v. Drake*, 8 Mees. & W. 846; 9 Mees. & W. 79; 11 Mees. & W. 315. The right to recover compensation under a contract which is still executory, and which depends upon the fulfillment of its stipulations by the assignor or by the assignee, may be assigned: *Brackett v. Blake*, 7 Met. 335; 41 Am. Dec. 442; *Hawley v. Bristol*, 39 Conn. 26; *Field v. The Mayor*, 6 N. Y. 179; 57 Am. Dec. 435; *Devlin v. The Mayor*, 63 N. Y. 8; *Parsons v. Woodward*, 22 N. J. L. 196; *Philadelphia v. Lockhardt*, 73 Pa. St. 211;

(c) *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833. A right of action for personal injuries is not assignable even though by statute it survives to the executors or administrators: So held in *Weller v. Jersey City*, H. & P. St. Ry. Co., (N. J. Eq.) 57 Atl. 730.

(d) *Griffith v. Tower Pub. Co.*,

[1897] 1 Ch. 21 (agreement between author and publisher); *Hole v. Bradbury*, 12 Ch. Div. 886; *Tifton, T. & G. Ry. Co. v. Bedgood*, 116 Ga. 945, 43 S. E. 257; *Linn County Abstract Co. v. Beechley*, (Iowa) 99 N. W. 702; *Swarts v. Narragansett Electric Lighting Co.*, (R. I.) 59 Atl. 111 (though the contract purports to be

§ 1276. **Assignments Forbidden by Public Policy.**^a— While large classes of things in action are thus assignable even at law, there are certain species, belonging to a class otherwise assignable, the assignment of which, either at law or

St. Louis v. Clemens, 42 Mo. 69; Cochran v. Collins, 29 Cal. 129. This is no less true, although by the terms of the contract, under which the compensation is still to be earned at the time of the assignment, the assignor is not bound to remain in the service, and may be dismissed before the service is rendered and the compensation is earned; of course, in such cases, the assignee must show that he has actually rendered the service and earned the compensation: Taylor v. Lynch, 5 Gray, 49; Hartley v. Tapley, 2 Gray, 565; Wallace v. Heywood etc. Co., 16 Gray, 209; Emery v. Lawrence, 8 Cush. 151; Tripp v. Brownell, 12 Cush. 376; Boylen v. Leonard, 2 Allen, 407; Garland v. Harrington, 51 N. H. 409; Augur v. N. Y. Belting etc. Co., 39 Conn. 536; Field v. The Mayor, 6 N. Y. 179; 57 Am. Dec. 435. An assignment of the right to compensation under a contract with a municipal corporation, if the work is actually performed, is not invalidated by the fact that the contract was informal, and might have been repudiated by the city: Wetmore v. San Francisco, 44 Cal. 294; Philadelphia v. Lockhardt, 73 Pa. St. 211; Brackett v. Blake, 7 Met. 335; 41 Am. Dec. 442. In all the cases cited in support of the three preceding propositions, it will be observed that at the time of the assignment there was *an existing contract*, and although the agreement might be conditional, and perhaps capable of being rescinded, or the assignor might not be bound by its terms to go on and perform it, yet, as a matter of fact, the contract *was* performed and the compensation earned after the assignment, either by the assignor who had merely transferred his right to the compensation, or by the assignee himself who had done the services undertaken to be done by the assignor. The capacity of assigning compensation to be earned is not carried so far as to permit a party to assign (at law) a contract which has not yet been entered into, or the right to compensation for services which he has not yet in any manner stipulated to perform. For example, a person cannot assign compensation which he expects to earn from an employer with whom he has not yet made any agreement, and into whose service he has not yet entered: Mulhall v. Quinn, 1 Gray, 105, 107; 61 Am. Dec. 414, per Shaw, C. J.; Farnsworth v. Jackson, 32 Me. 419; Jermyn v. Moffitt, 75 Pa. St. 399; Skipper v. Stokes, 42 Ala. 255; 94 Am. Dec. 646. How far such an assignment would be effectual in equity is considered in a subsequent section: While the right to compensation may thus be assigned even before it is earned, the right of the other party to the personal services of the one agreeing to render them, it is said, cannot be transferred; for a person cannot be compelled to perform *personal* services on behalf of a different employer from the one to whom he has promised: Bethlehem v. Annis, 40 N. H. 34; 77 Am. Dec. 700; Davenport v. Gentry's Adm'r, 9 B. Mon. 427, 429. Also, where a person has entered into a contract involving a personal

between the parties and "their respective . . . assigns").

(e) See §§ 1283, 1289 note.

(a) This section is cited in Weller v. Jersey City, H. & P. St. Ry. Co., (N. J. Eq.) 57 Atl. 730.

in equity, is prohibited from motives of public policy. Thus in England, those emoluments which are paid by the government to certain officials, which are the rewards for past and future public services, and which are at the same time regarded as honorary, or badges of dignity, cannot be assigned.^{1 b} Also, an assignment which violates the policy of the law against champerty or maintenance, as operating merely to procure or promote litigation, will not be permitted by a court of equity, even though it may not amount strictly to the criminal offense of champerty or main-

trust or confidence in himself, and stipulating to use his own personal skill, knowledge, etc., he cannot, while the agreement is still executory, by assignment substitute another in his place, in order to perform the service, without the consent of the other contracting party. After the contract has been executed by himself he can assign the right to recover compensation: *Flanders v. Lamphear*, 9 N. H. 201; *Bethlehem v. Annis*, 40 N. H. 34, 40; 77 Am. Dec. 700; *Burger v. Rice*, 3 Ind. 125; *Lansden v. McCarthy*, 45 Mo. 106; *Stevens v. Benning*, 6 De Gex, M. & G. 223. For limitations on this doctrine, see *Devlin v. The Mayor*, *supra*.

¹ Among the instances are the commissions, pay, and half-pay of military and naval officers: *Collyer v. Fallon*, Turn. & R. 459; *Calisher v. Forbes*, L. R. 7 Ch. 109; *Addison v. Cox*, L. R. 8 Ch. 76; *Davis v. Duke of Marlborough*, 1 Swanst. 79; *Priddy v. Rose*, 3 Mer. 86, 102; *McCarthy v. Goold*, 1 Ball & B. 387; *Stone v. Lidderdale*, 2 Anstr. 533; the salaries of judges and of certain other officials: *Arbuthnot v. Norton*, 5 Moore P. C. C. 219; *Greenfell v. Dean of Windsor*, 2 Beav. 544, 549; *Tunstall v. Boothby*, 10 Sim. 542; *Cooper v. Rielly*, 2 Sim. 560. There are motives of public policy affecting the English law very different from any which belong to our republican institutions. I doubt much whether the law of this country, from considerations of public policy, prohibits the assignment of any official salary, public emolument, pension, and the like, unless such prohibition arises from statute. The notion that salaries, official emoluments, or even pensions, are merely *honorary* in the sense of the English law, is entirely foreign to our institutions. Statutes have made certain official and public emoluments personal to their recipients, and have forbidden their assignment, but I think the American law goes no further:^c

(b) An assignment of the salary of a chaplain in a workhouse is not against public policy. In order that the assignment shall be voidable, the office must be public, and "the public must be interested not only in the performance from time to time of the duties of the office, but also in the fit state of preparation of the

party having to perform them": *In re Mirams*, [1891] 1 Q. B. 594.

(c) The English rule was followed as to assignments of future emoluments in *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Schloss v. Hewlett*, 81 Ala. 266, 1 South. 263; *Shannon v. Bruner*, 36 Fed. 147, on the ground of "the necessity of

tenance.² For this reason, the assignment of a mere right of action to procure a transaction to be set aside on the ground of fraud is not permitted.^{3 a}

§ 1277. The Equitable Jurisdiction — Reformed Procedure.— The following conclusions as to the equitable jurisdiction may be drawn from the foregoing analysis. In England, and in all of the American states which have adopted the reformed procedure, the direct, absolute, or what may be called legal, assignment of legal things in action which are assignable confers on the assignee a purely legal interest, and he can only sue in his own name by a civil action which is to all intents *legal* in its character; so that under these circumstances there is no occasion for the equitable jurisdiction. Where the thing in action assigned is an equitable demand, and where the assignment of even a legal demand is equitable, or such as the courts of law under the former

See *Wanless v. United States*, 6 Ct. of Cl. 123; *Bates v. United States*, 4 Ct. of Cl. 569; *Burke v. United States*, 13 Ct. of Cl. 231; *Spofford v. Kirk*, 97 U. S. 484; 24 L. ed. 1032; *Billings v. O'Brien*, 45 How. Pr. 392; 14 Abb. Pr., N. S., 238; *Heirs of Emerson v. Hall*, 13 Pet. 409.

² *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Strange v. Brennan*, 15 Sim. 346; *Knight v. Bowyer*, 2 De Gex & J. 421; *Hilton v. Woods*, L. R. 4 Eq. 432; *Dorwin v. Smith*, 35 Vt. 69; *Thurston v. Percival*, 1 Pick. 415; *Arden v. Patterson*, 5 Johns. Ch. 44; *Thalimer v. Brinkerhoff*, 20 Johns. 386; *Slade v. Rhodes*, 2 Dev. & B. Eq. 24; *Coquillard's Adm'r v. Bearss*, 21 Ind. 479; 83 Am. Dec. 362; *Martin v. Veeder*, 20 Wis. 466.

³ *Powell v. Knowler*, 5 Atk. 224, 226; *Prosser v. Edmonds*, 1 Younge

securing the efficiency of the public service, by seeing to it that the funds for its maintenance should be received by those who are to perform the work, at such periods as the law had appointed for their payment." See, also, *National Bank v. Fink*, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833; *State v. Williamson*, 118 Mo. 146, 23 S. W. 1054, 40 Am. St. Rep. 358; *Holt v. Thurman*, 111 Ky. 84, 63 S. W. 280, 98 Am. St. Rep. 398, citing many cases. It has been held, however, that an agreement by a public officer that his sal-

ary when earned shall become assets of a partnership of which he is a member is not against public policy: *McGregor v. McGregor*, 130 Mich. 505, 90 N. W. 284, 97 Am. St. Rep. 492.

(d) This section is cited to this effect in *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302; *Sanborn v. Doe*, 92 Cal. 152, 23 Pac. 105, 27 Am. St. Rep. 101. See, also, *Whitney v. Kelley*, 94 Cal. 146, 28 Am. St. Rep. 106, 29 Pac. 624; *Annis v. Butterfield*, (Me.) 58 Atl. 898.

system did not recognize, it might be supposed that the interest of the assignee would be equitable, and that the suit upon it would be within the equitable jurisdiction. But even in these cases the assignee must sue in his own name; and if the remedy is merely a pecuniary judgment, and no accounting is necessary, the action would, in all its elements and features, be legal rather than equitable. If, however, an accounting were necessary, or if the demand were of such a nature that the recovery would depend upon the application of equitable doctrines, the civil action of the assignee would undoubtedly be equitable, and the equitable jurisdiction of the court would be invoked.¹

§ 1278. The Equitable Jurisdiction — Common-law Procedure.—In those states which retain the two jurisdictions and systems of procedure, whether each is administered by a separate tribunal or both are conferred upon the same court, the jurisdiction at law is complete with respect to

& C. 481; *De Hoghton v. Money*, L. R. 2 Ch. 164, 169; *Hill v. Boyle*, L. R. 4 Eq. 260; *Milwaukee etc. R. R. v. Milwaukee etc. R. R.*, 20 Wis. 174, 183; 88 Am. Dec. 740.

¹ This conclusion follows from the abolition of the distinctive actions at law and suits in equity. If, for example, a person having a particular fund or amount due him in the hands of A should give his creditor, B, an order on A for the whole or for any definite part of the fund, this order would operate as an equitable, and not a legal, assignment. The assignee, B, must bring an action against A in his own name. As this action would be brought for the recovery of a certain sum of money, as it would involve no accounting, and as the recovery would depend upon no equitable doctrines *except the equitable character of the assignment*, I have no doubt that the action would be, in effect, legal, and governed by the rules applicable to legal actions; as, for example, it would be triable by a jury. In fact, most of the codes of procedure, in prescribing what classes of actions are necessarily triable by a jury, include all those merely for the recovery of money, without any distinction between those based upon an equitable and those upon a legal demand or cause of action. It is obvious, however, that there may be many cases of assignment where the demand being wholly equitable, the action by the assignee would fall within the equitable jurisdiction, and depend upon equitable principles. It is undoubtedly growing more and more difficult to draw a clear line between the legal and the equitable jurisdictions in the states where the new procedure prevails; the constant tendency is towards a commingling of the two. This result would be not only harmless, but even beneficial, if in all such cases the doctrines of equity were uniformly allowed to control and to govern the decisions; but, unfortunately for the proper

the class of assignments first above described,—the legal transfer of a legal thing in action. If the assignee is still compelled to sue in the name of his assignor, or if, as in some states, he is permitted to sue in his own name, in either case the legal remedy is adequate, and there is no ground left for the jurisdiction of equity. It is now the settled rule that a court of equity will not take jurisdiction of a suit by an assignee of a legal thing in action, whenever he may obtain ample remedy by an action at law in the name of his assignor.^{1 a} With respect, however, to assignments of the kinds secondly described above, the transfer

administration of justice, it is in this very class of cases that a tendency appears to follow legal doctrines alone, and to ignore or overlook the rules of equity.

¹ This rule was fully settled in England while the former systems of courts and jurisdictions still existed: *Hammond v. Messenger*, 9 Sim. 327, 332; *Rose v. Clarke*, 1 Younge & C. Ch. 534; *Keys v. Williams*, 3 Younge & C. 462, 466, 467. In *Hammond v. Messenger*, Shadwell, V. C., said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become assignee of the debt. I admit that if special circumstances are stated, and it is represented that notwithstanding the right which the party has obtained to sue in the name of the creditor the creditor will interfere and prevent the exercise of that right, this court will interfere for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff, especially in a case where the act done by the creditor is done in collusion with the debtor." This same rule had been established in this country prior to the change in the procedure: *Ontario Bank v. Mumford*, 2 Barb. Ch. 596, 615; see quotation from the opinion of Walworth, C., *ante*, § 281, note. The recent case of *Walker v. Brooks*, 125 Mass. 241, also expressly holds that equity will not assume jurisdiction merely because the assignee cannot sue at law in his own name, but will do so where the assignor refuses to allow his name to be used: See also *Hagar v. Buck*, 44 Vt. 285, 290; 8 Am. Rep. 368; *Chicago etc. R'y v. Nichols*, 57 Ill. 464; *Carter v. United Ins. Co.*, 1 Johns. Ch. 463; *Field v. Maghee*, 5 Paige, 539; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583; *Adair v. Winchester*, 7 Gill & J. 114; *Moseley v. Boush*, 4 Rand. 392; *Lenox v. Roberts*, 2 Wheat.

(a) *Hayward v. Andrews*, 106 U. S. 279, 27 L. ed. 484; *Smith v. Bourbon* 672, 1 Sup. Ct. 544, 27 L. ed. 271; *Co.*, 127 U. S. 105, 8 Sup. Ct. 1043, *New York Guaranty Co. v. Memphis* 32 L. ed. 73. *Water Co.*, 107 U. S. 205, 2 Sup. Ct.

of purely equitable demands, or the purely equitable assignment of legal demands, the jurisdiction over the things in action so assigned at the suit of the assignee continues to be exclusively equitable. As the law does not admit in the one case the existence of a legal right or demand, and in the other the existence of a valid transfer, courts of law can have no jurisdiction to entertain actions in which a recovery must be based upon the legal validity of the demand or of the assignment. The ancient jurisdiction of equity over the assignment of things in action has been reduced to these somewhat narrow limits.

§ 1279. Incidents of an Assignment.— It is a familiar doctrine that the assignee of a thing in action, unless it be negotiable, takes it subject to existing equities. It is also the settled rule in England that the assignee must give notice to the debtor party or legal holder of the fund, in order to establish and secure his right of priority over other assignees of the same demand; but this rule has not been generally adopted by the American courts. These matters have already been discussed in a previous chapter upon priorities.¹

373; 4 L. ed. 264. As illustrations of assignments purely equitable, the transfer of notes or bills payable to order, but not indorsed, see last note under § 1274.

¹ As to notice given to the debtor, see vol. 2, §§ 694-702; as to assignments being subject to equities in favor of the debtor, see vol. 2, §§ 703-706; equities in favor of third persons: Ibid., §§ 707-715. When the assignor holds collateral securities of the debt transferred, the assignment will sometimes carry such securities, and entitle the assignee to their benefit: See *Pattison v. Hull*, 9 Cow. 747; *Foster v. Fox*, 4 Watts & S. 92; *Cathcart's Appeal*, 13 Pa. St. 416; *Hurt v. Wilson*, 38 Cal. 263; a guaranty of the demand assigned: *Craig v. Parkis* 40 N. Y. 181; 100 Am. Dec. 469; but upon the question whether and when a guaranty will pass by an assignment of the principal debt, the decisions seem to be conflicting. The rule generally prevails in this country, as has been shown, that a grantor's lien will not pass by an assignment of the claim for unpaid purchase-money: See *ante*, § 1254.

SECTION II.

EQUITABLE ASSIGNMENT OF A FUND BY ORDER OR OTHERWISE.

ANALYSIS.

- § 1280. The general doctrine; its requisites, scope, operation, and effects.
- § 1281. Notice to the creditor-assignee, essential.
- § 1282. A *mere* mandate to a depositary or agent, is not an equitable assignment, but is revocable; an appropriation is necessary.
- § 1283. Funds not yet in existence.
- § 1284. Operation of bills of exchange and checks.

§ 1280. The General Doctrine — Its Requisites, Scope, Operation, and Effects.—It is an ancient doctrine of the common law that no action of contract can be maintained unless there is privity of contract between the plaintiff and the defendant.¹ It follows that if B is indebted to A, or has in his hands a fund belonging to A, and A assigns such debt or fund to C, or gives him an order for it upon B, C can maintain no action at law against B to recover the amount, unless B has assented to the appropriation and promised to pay the money; and the action in such case will not be based upon any property or interest in the fund acquired by C through the assignment or order, but upon B's express or implied promise. The doctrine of equity is very different. Equity recognizes an interest in the fund, in the nature of an equitable property, obtained through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer.² It is an established doctrine that an equitable

¹ This extremely technical rule has undoubtedly yielded somewhat to the influence of equitable notions, so that in most of the states an action at law may be maintained by A upon a promise made for his benefit to B, from whom alone the consideration moves; but this is opposed to the original theories of the common law.

² Some cases and books speak of the interest as merely an equitable lien or charge. That it is more than a lien, and is an equitable *property*, is plain from the remedy allowed. An equitable lien is never enforced by a suit

assignment of a specific fund in the hands of a third person creates an equitable property in such fund. If, therefore, A has a specific fund in the hands of B, or in other words, B, as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A, and if A agrees with C that the money shall be paid to C, or assigns it to C, or gives to C an order upon B for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee, C, and it is not necessary that B should consent or promise to hold it for or pay it to such assignee.^{3 a} In order that the

to obtain possession, much less dominion over the thing: the remedy is, at most, a sale of the thing, so that its proceeds may be applied upon the obligation secured. In this case, however, the assignee recovers possession and dominion of the fund as his own. The only equitable feature of the transaction is, in fact, the *mode of transfer*.

³ The doctrine, in its full scope and with its principal limitation, is so clearly and accurately stated by Rapallo, J., in the recent case of *Brill v. Tuttle*, 81 N. Y. 454, 457, 37 Am. Rep. 315, that I shall quote the passage: "There can be no doubt as to the rule that when, for a valuable consideration from the payee, an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund as it accrues to the payment of the order, and to no other purpose, and the payee may, by action, compel such application. It is equally well established that if a draft be drawn generally upon the drawee, to be paid by him in the first instance on the credit of the drawer, and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action

(a) This section is cited in *Harris County v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *The Elmbank*, 72 Fed. 610; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *Bank of Harlem v. City of Bayonne*, 48 N. J. Eq. (3 Dick.) 246, 21 Atl. 478 (consent of debtor is not necessary); *Columbia Finance & Trust Co. v. First Nat. Bank*, (Ky.)

76 S. W. 157; *Rivers v. A. & C. Wright & Co.*, 117 Ga. 81, 43 S. E. 499; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596; *Preston v. Russell*, 71 Vt. 151, 44 Atl. 115 (acceptance by debtor not necessary); *McDaniel v. Maxwell*, 21 Oreg. 202, 27 Pac. 952, 28 Am. St. Rep. 740. Sections 1280-1283 are cited in *Leopold v. Weeks*, 96 Md. 280, 53 Atl. 937; *Cameron v. Boeger*, 200 Ill. 84, 65

doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt, actually existing or to become so *in futuro*, upon which the assignment may

thereon against the drawee unless he duly accepts. In all cases, therefore, in which a particular fund to accrue *in futuro* is designated in the draft, and the language is ambiguous, the turning-point is, whether it was the intention of the parties that the payment should be made only out of the designated fund, when or as it should accrue, or whether the direction to the drawee to pay was intended to be absolute, and the fund was mentioned only as a source of reimbursement, or an instruction as to book-keeping": Row v. Dawson, 1 Ves. Sr. 331; 2 Lead. Cas. Eq., 4th Am. ed., 1531, 1562-1565, 1641-1660; Rodick v. Gandell, 1 De Gex, M. & G. 763; Ex parte Imbert, 1 De Gex & J. 152; Jones v. Farrell, 1 De Gex & J. 208; Gurnell v. Gardner, 9 Jur., N. S., 1220; 4 Giff. 626; Burn v. Carvalho, 4 Mylne & C. 690, 702; Watson v. Duke of Wellington, 1 Russ. & M. 602, 605; Ex parte South, 3 Swanst. 392; Lett v. Morris, 4 Sim. 607; Yeates v. Groves, 1 Ves. 280; Adams v. Claxton, 6 Ves. 226, 230; Lepard v. Vernon, 2 Ves. & B. 51; Ex parte Alderson, 1 Madd. 53; Collyer v. Fallon, Turn. & R. 459, 475; Priddy v. Rose, 3 Mer. 86, 102; Diplock v. Hammond, 5 De Gex, M. & G. 320; Myers v. United etc. Co., 7 De Gex, M. & G. 112; McGowan v. Smith, 26 L. J., N. S., (Ch.) 8; Ex parte North Western Bank, L. R. 15 Eq. 69; Ex parte Cooper, L. R. 20 Eq. 762; Ex parte Montagu, L. R. 1 Ch. Div. 554; Ex parte Garrard, L. R. 5 Ch. Div. 61; McLellan v. Walker, 26 Me. 114; Legro v. Staples, 16 Me. 252; Robbins v. Bacon, 3 Me. 346; Conway v. Cutting, 51 N. H. 407; Blin v. Pierce, 20 Vt. 25; Cutts v. Perkins, 12 Mass. 206; Kingman v. Perkins, 105 Mass. 111; Taylor v. Lynch, 5 Gray, 49; Ehrichs v. De Mill, 75 N. Y. 370; Risley v. Smith, 64 N. Y. 576; Munger v. Shannon, 61 N. Y. 251; Alger v. Scott, 54 N. Y. 14; Parker v. Syracuse, 31 N. Y. 376; Lowery v. Steward, 25 N. Y. 239; 82 Am. Dec. 346; Lewis v. Berry, 64 Barb. 593; Hall v. Buffalo, 2 Abb. App. 301; Clark v. Mauran, 3 Paige, 373; Richardson v. Rust, 9 Paige, 243; Morton v. Naylor, 1 Hill, 583; Luff v. Pope, 5 Hill, 413; Phillips v. Stagg, 2 Edw. Ch. 108; Superintendent etc. v. Heath, 15 N. J. Eq. 22; Caldwell v. Hartupee, 70 Pa. St. 74; Lightner's Appeal, 82 Pa. St. 301; Chase v. Petroleum Bank, 66 Pa. St. 169; Patten v. Wilson, 34 Pa. St. 299; Nesmith v. Drum, 8 Watts & J. 9; 42

N. E. 690, 93 Am. St. Rep. 165. See in support of the text, Webb v. Smith, 30 Ch. Div. 192; County of Des Moines v. Hinkley, 62 Iowa 637, 17 N. W. 915; Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269; Brokaw v. Brokaw, 41 N. J. Eq. 215, 4 Atl. 66; Shannon v. Hoboken, 37 N. J. Eq. 123; Bradley v. Berns, 51 N. J. Eq. 437, 26 Atl. 908 (consent of debtor unnecessary); Lauer v. Dunn,

115 N. Y. 408, 22 N. E. 270; Lee v. Robinson, 15 R. I. 369, 5 Atl. 290; Shenandoah Valley R. R. Co. v. Miller, 80 Va. 821; Mack Mfg. Co. v. Wm. A. Smoot & Co., (Va.) 47 S. E. 859. As to the necessity of a consideration to support the assignment, see Tallman v. Hoey, 89 N. Y. 537. The assignment need not be in writing: Howe v. Howe, 97 Me. 422, 54 Atl. 908.

operate, and the agreement, direction for payment, or order, must be, in effect, an assignment of that fund or of some definite portion of it.^b The sure criterion is, whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness payable by him at all events, or whether it creates an obligation only to make payment out of the particular designated fund.^c

Am. Dec. 260; Gibson v. Finley, 4 Md. Ch. 75; U. S. Bank v. Huth, 4 B. Mon. 423; Newby v. Hill, 2 Met. (Ky.) 530; McWilliams v. Webb, 32 Iowa, 577; Walker v. Mauro, 18 Mo. 564; Wheatley v. Strobe, 12 Cal. 92, 98; 73 Am. Dec. 522; Spain v. Hamilton, 1 Wall. 604; Tiernan v. Jackson, 5 Pet. 580, 598; Mandeville v. Welch, 5 Wheat. 277, 286; and see also Papineau v. Naumkeag etc. Co., 126 Mass. 372; Adams v. Willimantic etc. Co., 46 Conn. 320; Bower v. Hadden etc. Co., 30 N. J. Eq. 171; Whitehead v. Fitzpatrick, 58 Ga. 348; Kahnweiler v. Anderson, 78 N. C. 133; Hydraulic etc. Co. v. Saville, 1 Mo. App. 96; Farmers' etc. Bank v. Kansas etc. Co., 3 Dill. 287; Belden v. Meeker, 47 N. Y. 307; Danklessen v. Braynard, 3 Daly, 183; Clafin v. Kimball, 52 Vt. 6.

⁴ Ex parte Carruthers, 3 De Gex & S. 570; Malcolm v. Scott, 3 Hare, 39; Kelley v. Mayor etc., 4 Hill, 263; Brill v. Tuttle, 81 N. Y. 454, 457; 37 Am. Rep. 515. In Shaver v. Western U. Tel. Co., 57 N. Y. 459, 464, a clerk in the employ of the company, with the knowledge and assent of the president of the company, gave the plaintiff, for value, the following written order: "Treasurer Western Union Telegraph Company, please pay to D. L. N. fifty dollars, monthly, commencing at, etc., until three hundred dollars is paid, and charge the same to my salary account." He was all the time working at a monthly salary exceeding fifty dollars. The order was presented to the treasurer and filed by him, but was countermanded by the drawer before any payment had been made upon it. The holder sued the company, claiming that the order was an equitable assignment. The commission of appeals held that it did not operate as such an assignment, because it did not direct the payment "to be made out of any designated fund or particular source." The correctness of this decision, *upon the ground thus taken*, may well be doubted. It seems to carry the rule stated in the text beyond its true meaning as established by numerous cases. The fund drawn on seems to be specifically designated without resorting to extrinsic circumstances. The authority of this decision *on this point*, though not expressly overruled, was, I think, completely shaken by the later case of Brill v. Tuttle, *supra*. The decision was cited by counsel and relied upon as absolutely controlling; Rapallo, J., commenting upon it, said (p. 460): "The order was drawn in pursuance of a previous special arrangement known to the payee, *whereby the drawer was authorized to revoke it*, and this was a controlling cir-

(b) Quoted in Harlow v. Bartlett, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346.

(c) Quoted in McDaniel v. Maxwell, 21 Oreg. 202, 27 Pac. 952, 28

Am. St. Rep. 740; Leonard v. Marshall, 82 Fed. 396. See, also, Percival v. Dunn, 29 Ch. Div. 128; Goringe v. Irwell, etc. Works, 34 Ch. Div. 128.

The agreement, direction, or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned; the same doctrine applies to an equitable assignment of any definite part of a particular fund.^{5e} The doctrine that the equitable assignee obtains,

cumstance. Lott, Com., in delivering the opinion, says: 'Notice was thereby given to the party who advanced money on the faith of the order, that it was not to be considered an absolute assignment, but that it was taken subject to the right of the drawer to revoke it. . . . Any and every person taking it took it subject to the exercise of that right.' The order was revoked by the drawer, *and whatever else may have been said is unimportant*, as this was the point upon which the case turned." This criticism, I think, destroys the authority of *Shaver v. Western U. Tel. Co.*, upon the point under discussion. It seems also to conflict with *Lowery v. Steward*, *Parker v. Syracuse*, *Alger v. Scott*, and *Ehrichs v. De Mill*, cited in the previous note. See also *Hutter v. Ellwanger*, 4 Lans. 8; *Lunt v. Bank of North America*, 49 Barb. 221.

⁵ *Watson v. Duke of Wellington*, 1 Russ. & M. 602, 605; *Lett v. Morris*, 4 Sim. 607; *Smith v. Everett*, 4 Brown Ch. 64; *Morton v. Naylor*, 1 Hill, 583; *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423; *Superintendent etc. v. Heath*, 15 N. J. Eq. 22; *Risley v. Phoenix Bank*, 11 Hun, 484; *Etheridge v. Vernoy*, 74 N. C. 800; *Lapping v. Duffy*, 47 Ind. 51; *Gardner v. Smith*, 5 Heisk. 256; *Raines v. United States*, 11 Ct. of Cl. 648 (void from uncertainty). Some American courts seem to have been troubled with the common-law rule which forbids the assignment of a part of a debt, but the reasons for this rule at law have no application whatever in equity. The main reason for the legal rule is, that the debtor should not be harassed with several different suits to recover parts of one single obligation. In equity no such consequence could result. If parts of a demand are assigned to different persons, the rights of all the assignees must be settled in one suit; in a suit by any one assignee, not only the debtor and the assignor, but all the other assignees, must be made parties, so that the one decree may determine the duty of the debtor towards each claimant. There is no greater nor more unnecessary source of error than the importing legal notions as to parties and actions into the discussion of equitable doctrines: See *Mandeville v. Welch*, 5 Wheat. 277, 286; 5 L. ed. 87; *Palmer v. Merrill*, 6 Cush. 282, 287; 52 Am. Dec. 782, per Shaw, C. J.; *Bullard v. Randall*, 1 Gray, 605; 61 Am. Dec. 433; *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; *Hopkins v. Beebe*, 26 Pa. St. 85, 88; *Moore v. Gravelot*, 3 Ill. App. 442; *Burnett v. Crandall*, 63

(e) *The Elmbank*, 72 Fed. 610; *Rivers v. A. & C. Wright & Co.*, 117 Ga. 81, 43 S. E. 499; *Columbia Finance & Trust Co. v. First Nat. Bank*, 25 Ky. Law Rep. 561, 76 S. W. 157; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122; *Avery v. Popper*, 92 Tex.

337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849; *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; *Stillson v. Stevens*, (Tex. Civ. App.) 23 S. W. 322; *Campbell v. J. E. Grant Co.*, (Tex. Civ. App.) 82 S. W. 794; *Smith v. Bates Mach. Co.*, 182 Ill. 166, 55 N. E. 69.

not simply a right of action against the depositary, mandatary, or debtor, but an equitable property in the fund itself, is carried out into all of its legitimate consequences. Thus the assignee may not only recover the money from the original depositary, the drawee, but may pursue it or its proceeds under any change of form, *as long as it can be certainly identified*, into the hands of third persons who have acquired possession of it from the depositary as volunteers, or with notice of the assignee's prior right. The fund in this respect resembles a fund impressed with a trust.

§ 1281. Notice to the Creditor-Assignee Essential.— Although, whenever a debtor, in the manner above described, makes to his creditor an equitable assignment of a specific fund or debt in the hands of or owing by a third person, the assent of such *third person* is not requisite to the effect of the transfer in equity, yet the assignment, appropriation, direction, or order is not absolute, but may be revoked by the debtor-assignor at any time before the *creditor-assignee* has been notified of it, and has expressly or impliedly assented thereto. In such a case notice to and assent by the *creditor-assignee* are essential to an absolute assignment.^{1 a}

Mo. 410; Lindsay v. Price, 33 Tex. 280. The leading case of *Mandeville v. Welch* was an action at law, and this is true of several other cases in which a similar ruling has been made. It will also be noticed that some of these decisions were by courts not possessing a full equity jurisdiction. There is, in fact, no doubt that, *on principle*, an assignment of a definite part of a fund or demand is valid in equity, whether the assignment be direct or in the form of an order.^f See opinion in *Grain v. Aldrich*, *supra*.

^{1 2} Scott v. Porcher, 3 Mer. 652; Wallwyn v. Coutts, 3 Mer. 707, 708; 3 Sim. 14; Acton v. Woodgate, 2 Mylne & K. 492; Garrard v. Lord Lauderdale, 2 Russ. & M. 451; Morrell v. Wootten, 16 Beav. 197; Glegg v. Rees, L. R. 7 Ch. 71; and see cases in next note.

(^f) See, also, cases reviewed in James v. Newton, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122; National Exchange Bank v. McLoon, 73 Me. 498, 40 Am. Rep. 388; Harris County v. Campbell, 68 Tex. 22, 3 S. W. 243, 2

Am. St. Rep. 467 (citing the text); Phillips v. Edsall, 127 Ill. 535, 20 N. E. 801.

(a) Brockmeyer v. National Bank, 40 Kan. 744, 21 Pac. 300.

§ 1282. A Mere Mandate to an Agent or Depositary is not an Assignment, but is Revocable.—In all cases, even when the assignee was not a creditor of the assignor, the order must be delivered to the intended payee, or he must be notified of it by the drawer's procurement, in order that it may operate as an equitable assignment. A mere letter, communication, or other mandate to the agent, depositary, or debtor, directing him to pay the fund to a designated person, will not of itself operate as an assignment, but it may be withdrawn or revoked at any time before the arrangement is completed, by information given to the intended payee by or on behalf of the drawer.^{1 a} What shall

¹ Burn v. Carvalho, 7 Sim. 109; 4 Mylne & C. 690; Carvalho v. Burn, 4 Barn. & Adol. 382; 1 Ad. & E. 883. This case will illustrate the difference between the rules of law and of equity on this subject. One Fortunato had goods in the hands of Rego in a foreign port; he wrote to Burn that he would direct Rego to deliver the goods to an agent of Burn to pay a certain liability of his to Burn; soon after, he sent an order or letter to Rego, directing him to deliver the goods as above stated to Burn's agent. F. committed an act of bankruptcy before his letter reached R., and the goods were not delivered by R. to B.'s agent until after F. had been adjudicated a bankrupt. The assignee in bankruptcy then brought an action of trover against B. for the value of the goods, and obtained judgment on the ground that B. had acquired no title to nor lien on the goods previous to the bankruptcy, and his taking possession of them was an unlawful conversion. Burn thereupon filed a bill in chancery; and the court of chancery held that he had obtained an equitable ownership by the equitable assignment resulting from F.'s order of direction to R. and the letter to B. notifying him of the disposition thus made, and the judgment at law was therefore enjoined. The chancellor said: "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of *so much of the funds*. In Row v. Dawson, Lord Hardwicke says: 'It is a credit on the fund, and must amount to an assignment of *so much of the debt*; and though the law does not admit of an assignment of a chose in action, this court does, and any words will do, no particular words being necessary thereto'; and in Yeates v. Groves, Lord Thurlow says: 'This is nothing but a direction by a man to pay *part of his money* to another for a valuable consideration. If he could transfer, he had done it; and it being his own money, he could transfer.' In Ex parte South, Lord Eldon says: 'It has been decided in bankruptcy that if a creditor give an order on his debtor to pay a sum of money in discharge of his debt [i. e., the debt owing by the drawer to the payee], and that order is shown to the debtor [the drawee],

(a) Andrews v. Frierson, 134 Ala. 626, 33 South. 6.

amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language, construed in the light of the surrounding circumstances.^b For example, while it is not essential to the existence of an equitable assignment of a fund that the debtor, agent, or depositary should be *expressly* directed to pay over the money to the assignee, the absence of such a direction may tend to show an intention not to transfer a present interest in the fund, but that the arrangement is wholly executory and prospective.²

§ 1283. Doctrine Extends to a Fund not yet in Existence.—The equitable doctrine with respect to the assignment of property to be acquired in future is extended to this species of equitable transfer. The fund need not be actually in being; if it exists potentially,—that is, if it will in due

it binds him. On the other hand, this doctrine has been brought into doubt by some decisions in the courts of law which require that the party receiving the order [the drawee] should in some way enter into a contract. That has been the course of their decisions, but is certainly not the doctrine of this court. In *Fitzgerald v. Stewart*, 2 Russ. & M. 457, and *Lett v. Morris*, the same rule was acted upon, and in *Watson v. Duke of Wellington*, Sir J. Leach thus defines an equitable assignment: ‘In order to constitute an equitable assignment, there must be an engagement to pay out of a particular fund.’ Upon this principle it is that assignments of future freight and of non-existing but expected funds have been enforced in equity; but this case is far within the limits of the principle; for here there is an existing fund in an agent’s hands, and there is a distinct contract to discharge the liability out of that fund, and to give directions for that purpose. I think, therefore, that the letters of the 4th and 9th of April amounted to an equitable assignment of the fund in the hands of Rego.” See also, as further examples of incomplete directions not amounting to assignments, *Malcolm v. Scott*, 3 Macn. & G. 29; *Ex parte Shellard*, L. R. 17 Eq. 109; *Tooth v. Hallett*, L. R. 4 Ch. 242; *Ex parte Hall*, L. R. 10 Ch. Div. 615; *White v. Coleman*, 127 Mass. 34; *McEwen v. Brewster*, 17 Hun, 223.

² See *Rodick v. Gandell*, 1 De Gex, M. & G. 763, 778. G. & B., a firm of contractors, were indebted to a bank, and promised it that an amount due them from a railway company should be appropriated in payment of this debt. They then requested the solicitors of the railway company to carry out this arrangement. Although the solicitors notified the bank of this request or instruction, and some partial payments were made to it, the chancellor held that the arrangement did not amount to an equitable assignment.

(b) Quoted in *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

course of things arise from a contract or arrangement already made or entered into when the order is given,—the order will operate as an equitable assignment of such fund as soon as it is acquired, and will create an interest in it which a court of equity will enforce.^{1 a}

¹ For example, an order for the proceeds of goods which are about to be sold by an agent of the drawer under an arrangement already made; an order by an employee upon the employer whom he has agreed to serve, directing payment of future wages to be earned; an order by a contractor for future payments to become due, and the like. The fund in all such cases is particular and definite, although only potential: *Dickinson v. Marrow*, 14 Mees. & W. 713; *Brill v. Tuttle*, 81 N. Y. 454, 457; 37 Am. Rep. 515, and cases cited; *Garland v. Harrington*, 51 N. H. 409; *Tripp v. Brownell*, 12 Cush. 376; *Taylor v. Lynch*, 5 Gray, 49; *Macomber v. Doane*, 2 Allen, 541; *St. Johns v. Charles*, 105 Mass. 262; *Augur v. New York Belting etc. Co.*, 39 Conn. 536; *Hawley v. Bristol*, 39 Conn. 26; *Harrop v. Landers etc. Co.*, 45 Conn. 561; *Ruple v. Bindley*, 91 Pa. St. 296; *Brooks v. Hatch*, 6 Leigh, 534. In the following cases, such transaction was held not operative as an equitable assignment. In most instances the decision was placed upon the special circumstances. The New York cases which seem to hold as a general doctrine that such assignments are never operative are clearly overruled by the recent case of *Brill v. Tuttle*, *supra*; *Ex parte Shellard*, L. R. 17 Eq. 109; *Tooth v. Hallett*, L. R. 4 Ch. 242; *Papineau v. Naumkeag etc. Co.*, 126 Mass. 372; *Lightbody v. Smith*, 125 Mass. 51; *White v. Coleman*, 130 Mass. 316; *Adams v. Willimantic etc. Co.*, 46 Conn. 320; *Brill v. Tuttle*, 15 Hun, 289 (reversed); *Hutter v. Ellwanger*, 4 Lans. 9; *Schreyer v. Mayor*, 8 Jones & S. 255.

Such a claim for a future fund, wages, proceeds, etc., is in the nature of a possibility coupled with an interest, and in some states is assignable even at law: See next section III.

The order on a future fund which thus operates as an equitable assignment should be carefully distinguished from a *mere promise* to appropriate an existing or future fund in discharge of an obligation, or a mere promise to give an order on a fund, and the like. The English courts hold that not only a present appropriation by order of a particular fund operates as an equitable assignment, but also a *promise* or *executory agreement* to apply a fund in discharge of an obligation has the same effect in equity: *Rodick v. Gandell*, 1 De Gex, M. & G. 763, per Lord Truro; *Riccard v. Prichard*, 1 Kay & J. 277; and in *Thomson v. Simpson*, L. R. 5 Ch. 659, Lord Hatherley and James, L. J., seem to admit that an executory agreement may amount to an appropriation, but require that the evidence of it should be most clear

(a) Quoted in *Merchants & M. N. Bank v. Barnes*, 18 Mont. 335, 48 Pac. 218, 56 Am. St. Rep. 586, 47 L. R. A. 737. This section is cited in *Bank of Harlem v. City of Bayonne*, 48 N. J. Eq. (3 Dick.) 246,

21 Atl. 478; *Preston v. Russell*, 71 Vt. 151, 44 Atl. 115; *Mack Mfg. Co. v. Wm. A. Smoot & Co.*, 102 Va. 724, 47 S. E. 859; *City of Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433.

§ 1284. Bills of Exchange and Checks not, in General, Assignments.— An ordinary bill of exchange, or draft, drawn generally, and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment. Its operation is not changed even when funds have been placed in the drawee's hands as a means of payment; for the drawee may apply these funds to another use, and although this act might violate his duty to the drawer, the payee would obtain no interest in or claim upon the specific fund.^{1 a} According to the great pre-

and explicit. The American courts do not generally accept this doctrine. They require a *present appropriation*, by order or otherwise, of a fund, whether existing or future; a mere promise or executory agreement to apply or to appropriate a fund does not, according to the American rule, amount to an equitable assignment:^b *Christmas v. Russell*, 14 Wall. 69; 20 L. ed. 762; *Trist v. Child*, 21 Wall. 441; 22 L. ed. 623; *Ex parte Tremont Nail Co.*, 16 Bank. Reg. 448; Fed. Cas. No. 14,168; *Christmas's Adm'r v. Griswold*, 8 Ohio St. 558; *Rogers v. Hosack*, 18 Wend. 319. It seems to me, however, that the opinions in *Thomson v. Simpson*, *supra*, leave very little difference between the English and the American rules.

¹ *Watson v. Duke of Wellington*, 1 Russ. & M. 602; *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Ex parte Shellard*, L. R. 17 Eq. 109; *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352; *Cowperthwaite v. Sheffield*, 3 N. Y. 243; 1 Sand. 416; *Marine etc. Ins. Bank v. Jauncey*, 3 Sand. 257; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Luff v. Pope*, 5 Hill, 413; 7 Hill, 577; *Greenfield's Estate*, 24 Pa. St. 232, 240; *Hopkins v. Beebe*, 26 Pa. St. 85; *Sands v. Matthews*, 27 Ala. 399; *Kimball v. Donald*, 20 Mo. 577; 64 Am. Dec. 209; *Mandeville v. Welch*, 5 Wheat. 277; 5 L. ed. 87; *First Nat. Bank v. Dubuque etc. R'y*, 52 Iowa, 378; 35 Am. Rep. 280; *Jones v. Pacific etc. Co.*, 13 Nev. 359; 29 Am. Rep. 308. But a bill of exchange *drawn on a specific fund* may operate as an equitable assignment of it: *Kahnweiler v. Anderson*, 78 N. C. 133. An agreement between the drawer and payee that certain funds remitted or the proceeds of certain goods consigned to the drawee shall be appropriated in payment of the bill may create an equitable interest in or lien upon the fund or proceeds in favor of the payee so that they shall not be diverted from their appropriated purpose by the drawee: See *ante*, § 1237,

(b) *Williams v. Ingersoll*, 89 N. Y. 508, 518.

(a) *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 Am. Rep. 316, and cases cited; *Holbrook v. Payne*, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; *Commonwealth v. American L. I. Co.*, 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep.

844; *Northern Trust Co. v. Rogers*, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526. A county warrant drawn on a specific fund may amount to an equitable assignment: *Jennings v. Taylor*, 102 Va. 191, 45 S. E. 913. As to bill of exchange drawn on specific funds see, in addition to cases cited in author's note, those cited in *In re Oliver*, 132 Fed. 588.

ponderance of authority, a check is, in this respect, a bill of exchange, and does not act as an equitable assignment of a portion of the drawer's deposit equal in amount to the face of the check.^{2b} There are cases, however, which hold that, under the circumstances in which it is ordinarily given, being drawn against an actual deposit, and not ex-

and cases cited; *Marine etc. Ins. Bank v. Jauncey*, 1 Barb. 486; *Lowery v. Steward*, 25 N. Y. 239; 82 Am. Dec. 346; *Harwood v. Tucker*, 18 Ill. 544; *Cowperthwaite v. Sheffield*, 3 N. Y. 243; *Frith v. Forbes*, 4 De Gex, F. & J. 409; *Robey etc. Iron-works v. Ollier*, L. R. 7 Ch. 695; *Ranken v. Alfaro*, L. R. 5 Ch. Div. 786.

² *Hopkinson v. Forster*, L. R. 19 Eq. 74; *In re Merrill*, 71 N. Y. 325, and cases cited; *Tyler v. Gould*, 48 N. Y. 682; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 87; 7 Am. Rep. 314; *Chapman v. White*, 6 N. Y. 412; 57 Am. Dec. 464; *Harris v. Clark*, 3 N. Y. 93; 51 Am. Dec. 352; 2 Barb. 94; *Winter v. Drury*, 5 N. Y. 525; *Dykers v. Leather Man. Bank*, 11 Paige, 612; *Bank of Republic v. Millard*, 10 Wall. 152; 19 L. ed. 897; *Marine Bank v. Fulton Bank*, 2 Wall. 252; 17 L. ed. 785; *Moses v. Franklin Bank*, 34 Md. 574.

In *Ætna Nat. Bank v. Fourth Nat. Bank*, *supra*, Allen, J., said: "The cases all agree that notwithstanding the agreement which bankers make with their customers to pay their checks to the amount standing to their credit, a check-holder can take no benefit from this agreement, and that a check does not operate as a transfer or assignment of any part of the debt, or create a lien at law or in equity upon the deposit [citing *Harris v. Clark*, *Winter v. Drury*, *Dykers v. Leather M. Bank*, *supra*, and *Thornhill v. Hall*, 2 Clark & F. 22]. The principle was applied by this court in *Cowperthwaite v. Sheffield*, 3 N. Y. 243, to a bill of exchange drawn against a consignment of goods, of which the consignees and drawees were advised by letter accompanying a notice of the shipment of the goods. The court held that the bill and letter of advice did not operate as an appropriation of the proceeds of the cotton to the payment of the bill." The language of the learned judge that "the cases *all* agree" is certainly too strong; for some cases maintain an entirely different view: See next following note.

(b) This section is cited to this effect in *Cincinnati, etc., R. R. Co. v. Bank*, 54 Ohio St. 60, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653. See, also, *Florence M. Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. ed. 424; *Pullen v. Placer County Bank*, 138 Cal. 169, 71 Pac. 83, 94 Am. St. Rep. 19; *Donohoe-Kelly Bkg. Co. v. Southern Pac. Co.*, 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28; *Reviere v. Chambliss*, (Ga.) 48 S. E. 122; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Love v.*

Ardmore Stock Exch., (Ind. Ty.) 82 S. W. 721; *Grammel v. Carmer*, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363, per Cooley, J.; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Coates v. Doran*, 83 Mo. 337; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816; *Bank of Marysville v. Brewing Co.*, 50 Ohio St. 151, 33 N. E. 105, 40 Am. St. Rep. 660; *Akin v. Jones*, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523. "While an equitable assignment or lien will not arise against

pected to be paid unless a sufficient amount stands to the credit of the drawer, a check is to all intents an order upon a particular fund within the meaning of the equitable rule, and assigns a portion of that fund to the payee equal in amount to its face.^{3 c} A check may undoubtedly operate in this manner as an equitable assignment when it is so drawn as to show an unmistakable intention of the drawer to transfer his exact deposit in the bank to the payee.^{4 d}

³ In *Bromley v. Brunton*, L. R. 6 Eq. 275, a check was held, under the circumstances, to be a sufficient appropriation of the drawer's funds to constitute a valid gift *inter vivos*. The effect of a check generally is not discussed; the decision is placed upon the special circumstances, and seems to conflict with *Harris v. Clark*, *supra*. See also *In re Brown*, 2 Story, 502, 517; *Fed. Cas. No. 1,985*; *Gourley v. Linsenbigler*, 51 Pa. St. 345; *Rhodes v. Childs*, 64 Pa. St. 18; *Fogarties v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468; *Munn v. Burch*, 25 Ill. 35; *Chicago etc. Ins. Co. v. Stanford*, 28 Ill. 168; 81 Am. Dec. 270.

⁴ *Kingman v. Perkins*, 105 Mass. 111; and see *Kahnweiler v. Anderson*, 78 N. C. 133.

a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice": *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. ed. 855; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 17 N. E. 671; *First Nat. Bank v. Clark*, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580; *New York Life Ins. Co. v. Patterson & Wallace*, (Tex. Civ. App.) 80 S. W. 1058. And see *Fortier v. Delgado & Co.*, 122 Fed. 604, 59 C. C. A. 180.

(c) *Niblack v. Park Nat. Bank*, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203; *Abt v. American T. & Sav. Bank*, 159 Ill. 467, 42 N. E. 856, 50

Am. St. Rep. 175; *Wyman v. Fort Dearborn Nat. Bank*, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259; *Brown v. Schintz*, 202 Ill. 509, 67 N. E. 172; *National Bank of America v. Ind. Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Schollmier v. Schoendelen*, 78 Iowa 426, 43 N. W. 282, 16 Am. St. Rep. 455; *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607; *Turner v. Hot Springs Nat. Bank*, (S. Dak.) 101 N. W. 348; *Pease v. Landauer*, 63 Wis. 20, 22 N. W. 847, 53 Am. Rep. 247; *Raesser v. National Exchange Bank*, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979; *Dillman v. Carlin*, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902.

(d) This portion of the text is quoted in *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805. See, also, *Hawes v. Blackwell*, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870. It may also so operate when the drawer becomes insolvent: *Schuler v. Laclede Bank*, 27 Fed. 424, per *Brewer, J.*

SECTION III.

ASSIGNMENT OF POSSIBILITIES, EXPECTANCIES, AND PROPERTY
TO BE ACQUIRED IN FUTURE.

ANALYSIS.

- § 1285. Equitable jurisdiction under modern legislation.
- § 1286. Essential elements and grades of contingencies, expectancies, and possibilities.
- § 1287. Assignment of possibilities.
- § 1288. Assignment of personal property to be acquired in the future; *rationale* of the doctrine; *Holroyd v. Marshall*.
- § 1289. Assignment of future cargo or freight.
- § 1290. Requisites of an assignment of property to be acquired in the future.
- § 1291. Extent of the doctrine; to what property and persons it applies.

§ 1285. Equitable Jurisdiction under Modern Legislation.—Modern English statutes have so far changed the common law as to permit the assignment *at law* of contingent and future interests, expectancies, and possibilities coupled with an interest in real estate. The American legislation has generally been broader, and authorizes the assignment at law of such future expectancies and possibilities, when coupled with an interest, whether connected with real or with personal estate.¹ Neither the English nor the American statutes allow the legal assignment of mere naked possibilities or expectancies not coupled with an interest. The jurisdiction of equity continues to be exclusive over all other assignments of contingent, future, expectant interests and possibilities not embraced within this legislation.

¹ English statute of 8 & 9 Vict., c. 106, sec. 6. This statute does not permit the legal transfer of any contingent interests or expectancies, etc., in personal property, nor of any mere *naked* possibility or expectancy in real estate.

Of the American statutes, that of New York (1 Rev. Stats., p. 725, sec. 35) and that of California (Civ. Code, secs. 693, 699, 700, 1045, 1046) may be taken as examples of the type mentioned in the text: See *Lawrence v. Bayard*, 7 Paige, 70, 76.

§ 1286. **Essential Elements and Grades of Contingencies, Expectancies, and Possibilities.**^a—In determining the extent and limits of the two jurisdictions, legal and equitable, it is important to determine the essential elements and different grades of contingent interests, expectancies, and possibilities. It should be carefully observed at the outset that they do not include future estates which are vested. A vested remainder is as truly a present fixed property or ownership as is an estate in possession. There may be interests or so-called estates in land or chattels, based upon some existing limitation, conveyance, or will, which are future *and contingent*, as depending upon the happening of some uncertain event, or limited to some uncertain person, but which are nevertheless *interests*, and not *mere* hopes or expectancies without any existing legal foundation. The ordinary contingent remainders, executory devises, conditional limitations, and the like are illustrations. Secondly, a lower grade of future interests may be called the *potentiality* of acquiring future property from the performance of some agreement or arrangement already entered into, but which is still executory.¹ Of course, the mere hope of acquiring future property without any present source from which it may be obtained is neither an interest nor right, nor anything which has value or can be made the subject of legal relations. But when a party has entered into a contract or arrangement by the ordinary and legitimate and natural operation of which he will acquire property, his existing right thereunder is certainly not a *mere* naked hope; it is a possibility of acquiring property coupled

¹ The phrase “*potential existence*” has a specific and technical meaning, in formulating the general doctrine of the law concerning the sale of personal property not yet having an *actual* existence: See *ante*, § 1236. As used in the text above, the word “*potentiality*” is taken in a more general sense; and in this signification it has been employed in several modern decisions.

(a) This section is cited in *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122; *Riddell v. Riddell*,

(*Nebr.*) 97 N. W. 609; *Metcalf v. Kincaid*, 87 Iowa 443, 54 N. W. 867, 43 *Am. St. Rep.* 391.

with a legal interest in the contract. The cargo to be obtained or the freight to be earned by a ship on a voyage already contracted for, the wages to be earned under an existing employment, the payment to become due under an existing building contract, are familiar examples.^b Finally, there is a mere expectancy arising from some social or moral relation, and not based upon any limitation, trust, contract, or other legal relation, such as the hope which an heir apparent or presumptive has of inheriting his ancestor's estate, or the hope of a bequest under the will of a living friend.²

§ 1287. Assignment of Possibilities.—Under the statutes described in a preceding paragraph, all future contingent interests in things real or personal, and also all possibilities, *coupled with an interest*, of acquiring property, real or personal, may be granted or assigned at law, so that the grantee or assignee acquires a legal right or interest, the enforcement or protection of which comes within the jurisdiction of the law. So far as this legislation has not been adopted, such interests and rights are assignable only in equity; and furthermore, possibilities not coupled with an interest,—*mere* possibilities or expectancies,—which are not embraced within these statutes, are, according to the general course of decision, assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility or expectancy has changed into a

² See Smith on Real and Personal Property, 249: "The word 'possibility' has a general sense, in which it includes even executory interests, which are the objects of limitations [e. g., contingent remainders, etc.]. But in its more specific sense, it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost but recoverable seisin, like a right of entry. And what is termed a *bare* or *mere* possibility signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession, unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir apparent or presumptive has of succeeding to the ancestor's estate."

(b) Quoted in *Manley v. Bitzer*, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242.

vested interest or possession.^{1a} The explanation is sometimes given that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract by decreeing a conveyance.

¹ *Warmstrey v. Lady Tanfield*, 1 Ch. Rep. 29; 2 Lead. Cas. Eq., 4th Am. ed., 1530, 1559, 1605; *Wright v. Wright*, 1 Ves. Sr. 409; *Beckley v. Newland*, 2 P. Wms. 182. The expectancy of an heir to the estate of his ancestor:^b *Hobson v. Trevor*, 2 P. Wms. 191; *Stover v. Eycleshimer*, 4 Abb. App. 309; 46 Barb. 84; *McDonald v. McDonald*, 5 Jones Eq. 211; 75 Am. Dec. 434; *Fitzgerald v. Vestal*, 4 Sneed, 258. The interest which one may take under the will of another who is still living:^c *Bennett v. Cooper*, 9 Beav. 252; *In re Wilson's Estate*, 2 Pa. St. 325. See also *Varick v. Edwards*, Hoff. Ch. 382; 11 Paige, 289; 5 Denio, 664; *McWilliams v. Nisly*, 2 Serg. & R. 507; 7 Am. Dec. 654; *Bayler v. Comm.*, 40 Pa. St. 37; 80 Am. Dec. 551; *Nimmo v. Davis*, 7 Tex. 26; *Graham v. Henry*, 17 Tex. 164; *Horst v. Dague*, 34 Ohio St. 371; *Patton v. Coen etc. Co.*, 3 Col. 265; *The Edward Lee*, 3 Ben. 114; *Sedam v. Cincinnati etc. Canal Co.*, 2 Disn. 309; *In re Irving*, L. R. 7 Ch. Div. 419. There is not a perfect unanimity among the authorities. Thus it has been held that the mere hope or expectation of receiving that to which the assignor had no right, and which might be withheld from him at pleasure, such as the expectancy of an heir to inherit his ancestor's estate, is not an interest capable of assignment in equity, any more than at law: See *Needles v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85.^d The Civil

(a) This section is cited in *Brown v. Brown*, 66 Conn. 493, 34 Atl. 490. See, also, *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172, 75 Am. St. Rep. 124; *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665 (possibility coupled with an interest); *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940; *Box v. Lanier*, (Tenn.) 79 S. W. 1042 (contingent interest in life insurance policy). Such an assignment must be in writing if the property affected is land: *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267. It must be founded upon a valuable, and not merely a good, consideration: *Lennig's Estate*, 182 Pa. St. 485, 38 Atl. 466, 61 Am. St. Rep. 725, 38 L. R. A. 378; *Stallcup v. Cronley's Trustee*, 25 Ky. Law Rep. 1675, 78 S. W. 441 (contingent interest in personalty).

(b) *Expectancy of heir.*—*Brands v. De Witt*, 44 N. J. Eq. 545, 6 Am. St.

Rep. 909, 10 Atl. 181, 14 Atl. 894; *Hale v. Hollon*, 90 Tex. 427, 39 S. W. 287, 59 Am. St. Rep. 819, 36 L. R. A. 75; *Fuller v. Parmenter*, 72 Vt. 362, 47 Atl. 1079. The expectancy may be released by a covenant not to contest a will: *In re Garcelon*, 104 Cal. 570, 38 Pac. 414, 43 Am. St. Rep. 134, 32 L. R. A. 595. It has been held, however, that such an assignment is not valid unless the ancestor's consent is obtained: *McClure v. Raben*, 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558.

(c) *Interest under will of living person.*—*Bacon v. Bonham*, 33 N. J. Eq. 614; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; but see *Wylie's Appeal*, 92 Pa. St. 196.

(d) So held, also, in Kentucky: *McCall v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335, 32 S. W. 406, 33 L. R. A. 266, criticizing the author's theory

§ 1288. **Assignment of Personal Property to be Acquired in the Future — Rationale of the Doctrine.**^a—A particular instance of this doctrine is that which deals with the assignment of property to be acquired in the future. I have already re-

Code of California adopts the same rule: Secs. 700, 1045. Also, the expected proceeds of a fair intended to be held in future by a society were held not assignable, in *Huling v. Cabell*, 9 W. Va. 522; 27 Am. Rep. 562; and see *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646. But the very general conclusion of authority, English and American, is in accordance with the doctrine of the text; and this conclusion is in strict conformity with the *principle* which distinguishes the theory of assignment in equity from that at law. In *In re Wilson's Estate*, *supra*, a woman, in consideration of marriage, conveyed to her own use during her life, and after her death to her children, all the estate which she then had or should thereafter acquire. This settlement was held to operate as an equitable assignment of property subsequently bequeathed to her by an uncle. *Gibson, C. J.*, after citing authorities in support of the doctrine and declaring it to be well settled, adds: "Indeed, it is no more than the familiar principle that he who executes a conveyance, on valuable consideration, purporting to pass a title before it is in him, will be bound to make it good whenever he acquires it." The operation of these assignments of expectancies was succinctly stated, according to the usual theory, in two recent cases by the supreme court of Pennsylvania. In *East Lewisburg etc. Co. v. Marsh*, 91 Pa. St. 96, 99, the court said: "Equity will support assignments of contingent interests and expectancies, things which have no present actual existence, but rest in mere possibility, not, indeed, as a present positive transfer operating *in presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*." In *Ruple v. Bindley*, 91 Pa. St. 296, 299, the court said: "An assignment for a valuable consideration, of demands, having at the time no actual existence, but which rests in expectancy only, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence." In my opinion, this theory of an agreement is hardly adequate to explain the full doctrine, and I prefer the one given *ante*, in § 1271.

stated *ante*, in § 1271. It may be conceded that some expressions there used by the author require modification to render his theory applicable to the assignment of a mere expectancy. But the court, in rejecting the well-settled equitable doctrine in favor of the legal rule, uses arguments and language ("Why should the common law declare such contracts invalid and void if courts of equity have the power to verify and enforce them?" etc.)

which afford a striking illustration of the author's observation in his preface to this work, that "in all the states which have adopted the Reformed Procedure there has been, to a greater or less degree, a weakening, decrease, or disregard of equitable principles in the administration of justice."

(a) This section is cited in *Read v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 L. R. A. 122.

ferred to this subject in one of its phases,—the equitable lien created by contract upon such property.¹ It is elementary, that a contract for the sale of chattels which the vendor does not own will not take effect upon the goods, when subsequently acquired, so as to pass a legal property in them to the purchaser, without some new act of the vendor after the property is acquired.^{2 b} The doctrine of equity is different. A sale, assignment, or mortgage, for a valuable consideration, of chattels or other personal property to be acquired at a future time, operates as an equitable assignment, and vests an equitable ownership of the articles in the purchaser or mortgagee as soon as they are acquired by the vendor or mortgagor, without any further act on the part of either; and this ownership a court of equity will protect and maintain at the suit of the equitable assignee.^{3 c} It is sometimes said that the sale, assignment,

¹ See *ante*, § 1236.

² *Lunn v. Thornton*, 1 Com. B. 379; *Gale v. Burnell*, 7 Q. B. 850; *Mogg v. Baker*, 3 Mees. & W. 195; *Head v. Goodwin*, 37 Me. 181; *Jones v. Richardson*, 10 Met. 481; *Moody v. Wright*, 13 Met. 17, 32; 46 Am. Dec. 706; *Pettis v. Kellogg*, 7 Cush. 456; *Calkins v. Lockwood*, 16 Conn. 276; 41 Am. Dec. 143; *Otis v. Sill*, 8 Barb. 102; *Hamilton v. Rogers*, 8 Md. 301; *Chapman v. Weimer*, 4 Ohio St. 481. With reference to the excepted case of chattels having a “potential” existence, see *ante*, note under § 1236.

³ *Holroyd v. Marshall*, 10 H. L. Cas. 191; *In re Ship Warre*, 8 Price, 269, note, 273; *Mitchell v. Winslow*, 2 Story, 630; *Seymour v. Canandaigua etc. R. R.*, 25 Barb. 284, 303; *Philadelphia etc. R. R. v. Woelpper*, 64 Pa. St. 366, 372; 3 Am. Rep. 596; *Baxter v. Bush*, 29 Vt. 465, 469; 70 Am. Dec. 429; *Page v. Gardner*, 20 Mo. 507; *Smithurst v. Edmunds*, 14 Pa. St. 408; *Williams v. Winsor*, 12 R. I. 9; *Clay v. East Tenn. etc. R. R.*, 6 Heisk. 421. *Holroyd v. Marshall*, *supra*, is a most important authority. One Taylor assigned the machinery in a mill in trust to secure a debt to Holroyd, and the deed covenanted that all the other machinery which should be placed in the mill during the time should vest in the trustee for the same purposes. T. procured new machinery, which was placed in the mill, and H. was

(b) *France v. Thomas*, 86 Mo. 80.

(c) *Wood v. Casserleigh*, 30 Colo. 287, 71 Pac. 360, 97 Am. St. Rep. 138; *Kimball v. Gafford*, 78 Iowa 65, 42 N. W. 583; *Ludlum v. Rothschild*, 41 Minn. 219, 43 N. W. 137; *Rutherford v. Stewart*, 79 Mo. 216. Chattel mortgage on crops not sown, held valid in

Eckles v. Ray & Lawyer, 13 Okl. 541, 75 Pac. 286; *Graves v. Currie*, 132 N. C. 307, 43 S. E. 897. Chattel mortgage on crops not sown, held void in *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 637; *Brown v. Neilson*, 61 Nebr. 765, 87 Am. St. Rep. 525, 86 N. W.

or mortgage, under these circumstances, operates in equity as a contract, which a court of equity will specifically enforce by decreeing a legal conveyance and delivery of the property to the purchaser or mortgagee, when it is sub-

notified of the fact. While this new machinery was in the mill, before H. had taken possession of it under the deed, it was levied upon under execution against T. In a suit between H. and the execution creditors, the court of chancery held that the right of the execution creditors under their levy had precedence: 2 De Gex, F. & J. 596; and see *Reeve v. Whitmore*, 4 De Gex, J. & S. 1; but the house of lords reversed this decree, and held that although there had been no new act intervening, H.'s equitable title was superior to the subsequent legal claim of the judgment creditors. "If the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed. But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is, as a conveyance, void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property which is not in existence cannot operate as an *immediate* alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, *and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired*. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If this be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it *at the time of its execution* will be no answer, when the means of doing so are afterwards obtained. Apply these familiar principles to the present case; it follows that, immediately on the new machin-

498, 54 L. R. A. 328; but an agreement in a lease to give a chattel mortgage on the crops on the fifteenth day of June of each year will be specifically enforced: *Ryan v. Donley*, (Nebr.) 96 N. W. 234. In *Townsend l. & C. Co. v. Allen*, 62 Kan. 311, 62

Pac. 1008, 84 Am. St. Rep. 388, 52 L. R. A. 323, however, it was held that a mortgage on brick to be manufactured from clay in its natural state when agreement was made, was invalid.

sequently acquired by the vendor or mortgagor. This view is certainly supported by the very high authority of most able judges, such as Lord Westbury, and it is undoubtedly true in part. In my opinion, however, it fails to wholly explain the equitable doctrine and jurisdiction, since transfers of personal property to be acquired in future are constantly enforced under the operation of this doctrine where a court of equity would hardly have decreed the specific performance of the contract if it had been confined to property then in the ownership and possession of the vendor

ery and effects being fixed or placed in the mill, they became subject to the operation of the contract, *and passed in equity to the mortgagees*, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was trustee of the property in question." In *Mitchell v. Winslow*, *supra*, the facts were similar, and the decisions were the same. The mortgagors in 1839, to secure a loan of money, mortgaged all the machinery, tools, and implements then in their mill, and all the machinery and tools which they might purchase for the mill during the next four years, and also all the stock which they might manufacture or purchase during that time. Before the four years had expired, and after an act of bankruptcy by the mortgagors, the mortgagees took possession under their mortgage of property, including tools, machinery, and stock purchased or manufactured by the mortgagors after the execution of the mortgage. The assignee in bankruptcy applied for an order compelling the mortgagees to deliver up to him such property. but the order was refused, on the ground that the stipulation concerning after-acquired property operated as an equitable mortgage, which would be enforced against volunteers, and any one who did not stand in the position of a *bona fide* purchaser without notice. Story, J., said it was established, under "the authorities, that wherever the parties by their contract intend to create a positive lien or charge, either upon real or upon personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." In *Smithurst v. Edmunds*, *supra*, the lessee of a hotel assigned all the furniture in the hotel to the lessor as security for the rent, and further covenanted to assign all other furniture which he should thereafter purchase and place on the demised premises during the term; it being declared to be the intent and agreement of the parties that when and as often as any additional furniture should be purchased and placed on the premises, it should be considered as belonging to the lessor as collateral security. The lessee purchased and placed in the hotel a large quantity of additional furniture. The contract was held to be an equitable assignment or mortgage of these chattels, which would be enforced against a subsequent execution creditor of the lessee.

or assignor.⁴ In other words, the doctrine of equitable assignment of property to be acquired in future is much broader than the jurisdiction to compel the specific performance of contracts. In truth, although a sale or mort-

⁴ This question was examined by Lord Westbury in the case of *Holroyd v. Marshall*, already quoted, and he maintains the theory which I venture to criticise as insufficient. He says: "In equity, it is not necessary for the alienation of property that there should be a formal deed of conveyance. [This is most certainly correct, and it expresses one of the most radical distinctions between the principles of law and of equity with regard to the acquisition of property: See *ante*, vol. 1, §§ 366-370.] A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor became a trustee for the vendee, subject, of course, to the contract being one to be specifically performed. And this is true not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed. A contract for the sale of goods—as, for example, of five hundred chests of tea—is not a contract which could be specifically performed, *because it does not relate to any chests of tea in particular*; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed. [This statement is certainly opposed to the rule as settled in the United States, and also, as I believe, to that prevailing in England.] The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person." To maintain his theory concerning the operation of equitable assignments of future-acquired property, Lord Westbury is here obliged to extend the equitable jurisdiction to compel the specific performance of contracts for the purchase and sale of chattels *far beyond* the limits as generally established by the courts of England and of the United States. He virtually says, as a universal proposition, that every contract for the purchase and sale of *specific*, identified chattels, even of such merchandise as may be bought in the market, will be specifically enforced in equity; and he goes so far as to state that an injunction may be granted to restrain the vendor from violating such contract by delivering the goods to another person than the buyer. This description of the equitable jurisdiction to specifically enforce contracts concerning personal property is certainly opposed to the doctrine as settled in our own country, and I believe it is unsupported by English authorities. It is a familiar rule that contracts for the sale of chattels are never specifically enforced by courts of equity unless they involve some extraordinary elements. A contract for the sale of personal property is never specifically enforced by a court of equity, simply because the articles referred to in it are specific and identified; if enforced at all, it is because

gage of property to be acquired in future does not operate as an immediate alienation at law, it operates as an equitable assignment of the *present possibility*, which changes into an assignment of the *equitable ownership* as soon as

the articles are of such a peculiar and extraordinary nature that they cannot be replaced or procured in the market, and therefore the remedy of compensation would be inadequate: See *Pusey v. Pusey*, 1 Vern. 273; 1 Lead. Cas. Eq. 1109, 1114. A contract to sell five hundred chests of a particular kind of tea in the vendor's warehouse would not be specifically enforced by the American courts of equity, and I believe not by the English courts, unless the tea was of a kind which could not possibly be obtained elsewhere in the market. It is certain that a mere contract to sell the existing furniture within a certain hotel, as in *Smithurst v. Edmunds*, *supra*, or to sell the existing tools, machinery, and merchandise in a certain mill, as in *Mitchell v. Winslow*, *supra*, would not be specifically enforced by a court of equity, because the legal remedy of damages would be fully adequate; yet, as has been seen, these and similar contracts, *when relating to such chattels to be acquired in future*, are regarded as equitable assignments of the property, and as such are enforced by courts of equity, both English and American. Furthermore, it will be shown in the sequel that the same doctrine of equitable assignment of property to be acquired in future is extended to present assignments of money to arise from existing contracts,—as, for example, of future wages arising under a contract of employment, of future payments to be earned in carrying out a contract for building, and the like, the future cargo or freight to be obtained or earned by a ship on a voyage contracted for, etc.; and it cannot be claimed that a court of equity would decree the specific performance of such agreements. The particular contract in the case of *Holroyd v. Marshall* would undoubtedly be specifically enforced in equity, because it was embodied in a deed of trust, and created an express trust.

The conclusion seems to me to be very plain, that the jurisdiction of equity with reference to sales, assignments, or mortgages of future-acquired property, although analogous to is not identical with nor wholly explained by the doctrine concerning the specific performance of contracts. There is something beyond the mere enforcement of an executory contract; there is an equitable right which, though at first only a possibility, becomes afterwards a full equitable ownership. It may seem presumptuous thus to differ from so able a judge as Lord Westbury, who, more than any other chancellor since Lord Hardwicke, has grasped the *principles* of equity jurisprudence; but the reasons which I have given must be weighed by the reader; to me they appear convincing.^a

There are decisions which say that a mortgage of such tools, machinery, or articles as shall be subsequently used on certain premises, or placed in a certain mill, and the like, cannot be enforced and is inoperative, because the description of the chattels is too vague and uncertain to admit of the

(a) The theory announced by Lord Official Receiver, 13 App. Cas. (H. Westbury was criticised in *Tailby v. L.*) 523.

the property is acquired by the vendor or mortgagor; and because this ownership thus transferred to the assignee is equitable, and not legal, the jurisdiction by which the right of the assignee is enforced, and is turned into a legal property, accompanied by the possession, must be exclusively equitable; a court of law has no jurisdiction to enforce a right which is purely equitable. This, in my opinion, is the only correct and sufficient *rationale* of one of the most distinctively equitable doctrines in the whole scope of the equity jurisprudence.

§ 1289. Assignment of Future Cargo or Freight.—A particular instance of non-existing property to be acquired in future which may be equitably assigned is the future cargo to be obtained, or the future freight to be earned, by a ship during an existing voyage, or during a contemplated voyage on which she is about to depart. If a charter-party or other form of agreement has already been entered into for the contemplated voyage, the potentiality of obtaining a cargo or of earning freight seems to be a possibility coupled with an interest, and not a bare expectancy; and as such it is probably assignable even at law under statutes and decisions of many states. Whatever may be the rule at law, it is well settled that such possibility is assignable in equity; that an equitable ownership vests in the assignee as fast as the cargo is obtained or the freight is earned; and that his interest or ownership will be protected and enforced by a court of equity.¹ In accordance with this doc-

specific performance of a contract containing the same terms: See *Morrill v. Noyes*, 56 Me. 458, 471; 96 Am. Dec. 486; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; 38 Am. Dec. 368. This conclusion might be correct if the rule as to the specific performance of an executory contract was to be taken as the sole criterion; but it is opposed to the overwhelming weight of authority in reference to the validity and effect in equity of sales and mortgages of property to be acquired in future.

¹ *Lindsay v. Gibbs*, 22 Beav. 522; *In re Ship Warre*, 8 Price, 269, note, 273, note; *Curtis v. Auber*, 1 Jacob & W. 506, 512; *Douglas v. Russell*, 4 Sim. 524; 1 Mylne & K. 488; *Langton v. Horton*, 1 Hare, 549; *Mitchell v. Winslow*, 2 Story, 630; Fed. Cas. No. 9,673. In *Mitchell v. Winslow*, Mr. Justice

(e) See *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23.

trine, it has been held that a *mortgage of a railroad* and its franchises operates as an equitable assignment of the rolling stock, — locomotives, cars, and the like, — which are acquired or manufactured by the company after the exe-

Story gave an elaborate review of the authorities, which is so instructive that I shall quote from it: “In *re Ship Warre*, 8 Price, 269, note, Lord Eldon said that he should find it extremely difficult to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings forever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title until that debt should be paid. Again, in *Curtis v. Auber*, 1 Jacob & W. 506, 512, where an assignment was made of the present and future earnings of a ship, Lord Eldon supported it, and said: ‘In one case I think it was held that although you might assign the wool *then* growing on the backs of the sheep, you could not assign the *future* fleeces. But still it was a good equitable assignment, and rendered the future earnings liable in equity.’ The same doctrine was maintained by Mr. Vice-Chancellor Shadwell in *Douglas v. Russell*, 4 Sim. 524, and his decree was afterwards affirmed by the lord chancellor (1 Mylne & K. 488) as to an assignment of freight earned and to be earned on an outward and homeward voyage, then about to be undertaken; and it was acted upon and supported in a like assignment of freight to be earned on a particular voyage in the case of *Leslie v. Guthrie*, 1 Bing. N. C. 697, 708. But the latest case, and certainly one of the most important and satisfactory in its reasoning as well as its conclusions, is that of *Langton v. Horton*, 1 Hare, 549, before Wigram, V. C. There a deed of assignment by way of mortgage was made of a whole ship and her tackle and appurtenances, and all oil and head-matter and other cargo which might be caught and brought home in the ship on and from her then present voyage; and the question arose between an execution creditor of the assignor and the assignee, whether the assignment was good as to the future cargo obtained in the voyage after the assignment. The learned vice-chancellor decided that it was. Upon that occasion he said: ‘Is it true, then, that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that by contract an interest in a thing not in existence at the time of the contract may in equity become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title I do not now advert to; but cases recognizing the general proposition are of common occurrence. A tenant, for example, contracts that particular things which shall be on the property when the term of his occupation expires shall be the property of the lessor at a certain price, or at a price to be determined upon in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor; and a court of equity will enforce such contracts when they are founded on valuable considerations, and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has

cution of the instrument, and passes an equitable ownership in or lien on such articles to the mortgagee. Other cases take a different view, and hold that the rolling stock are fixtures, and become part of the realty as soon as acquired, and that being so annexed to the soil, the *legal* title thereto is vested in the mortgagee, or that the lien of the mortgage extends to them.^{2 a} Other illustrations of the doctrine as applied to particular transactions are given in the foot-note.³

agreed to leave engines and machinery not annexed to the freehold which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies in terms to implements which shall be there at the time specified; and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted. But it is not necessary that I should refer to such cases as these, for Lord Eldon, in the case of the *Ship Warre*, and in *Curtis v. Auber*, has decided all that is necessary to dispose of the present argument. Admitting that those cases are not specifically and in terms like the principal case, they are not of less authority for the present purpose; for they remove the difficulty which has been raised in argument, and *decide that non-existing property may be the subject of valid assignment*. I will suppose the case of the owner of a ship which is going out in ballast, proposing to borrow of another party the sum of five thousand pounds to pay the crew and furnish an outfit, and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a court of equity, upon a contract so framed, would hold that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries that the fruit of the voyage, the whales taken, or the oil obtained shall be his security for the amount of his advances. I cannot, without going in opposition to many authorities, throw any doubt upon the point that Birnie, the contracting party [the shipowner], would be bound by the assignment to the plaintiffs.'"

² *Pennock v. Coe*, 23 How. 117; 16 L. ed. 436; *Phila. etc. R. R. v. Woelpper*, 64 Pa. St. 366; 3 Am. Rep. 596; *Morrill v. Noyes*, 56 Me. 458, 471; 96 Am. Dec. 486; *Pierce v. Emery*, 32 N. H. 484; *Farmers' Loan etc. Co. v. Hendrickson*, 25 Barb. 484; *Seymour v. Canandaigua etc. R. R.*, 25 Barb. 284, 303; *Phillips v. Winslow*, 18 B. Mon. 431; 68 Am. Dec. 729; *Clay v. East Tenn. etc. R. R.*, 6 Heisk. 421.

³ In some of these instances the assignments are evidently valid at law: Assignments of payments to become due from the performance of an exist-

(a) *Thompson v. Valley R. R. Co.*, 256. In *Steele v. Ashenfelter*, 40-132 U. S. 73, 10 Sup. Ct. 29, 33 L. ed. Nebr. 770, 59 N. W. 361, 42 Am. St.

§ 1290. **Requisites of an Assignment of Property to be Acquired in the Future.**—It has been assumed through all the foregoing discussion that the instrument *does* amount to a sale, assignment, or mortgage of future-acquired property; but it should be carefully observed that every sale or mortgage dealing with future property does not necessarily

ing contract:^b *Ruple v. Bindley*, 91 Pa. St. 296; *Clafin v. Kimball*, 52 Vt. 6; *Schreyer v. Mayor of New York*, 8 Jones & S. 255; *Hall v. Buffalo*, 2 Abb. App. 301; *Hawley v. Bristol*, 39 Conn. 26; but a contract must have been entered into and be existing from which the future payments may arise: *Herbert v. Bronson*, 125 Mass. 475; *Huling v. Cabell*, 9 W. Va. 522; 27 Am. Rep. 562; *Jermyn v. Moffitt*, 75 Pa. St. 399; *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646. Assignment of future wages under existing contract of employment:^c In Massachusetts such assignments are required by statute to be recorded: *Harrop v. Landers etc. Co.*, 45 Conn. 561; *Augur v. New York Belting etc. Co.*, 39 Conn. 536; *Garland v. Harrington*, 51 N. H. 409; *Murphy v. Murphy*, 121 Mass. 167; *Sullivan v. Sweeney*, 111 Mass. 366; *Knowlton v. Cooley*, 102 Mass. 233. Assignment of future accounts and demands:^d *East Lewisburg etc. Co. v. Marsh*, 91 Pa. St. 96; *Guthrie and Byles's Appeal*, 92 Pa. St. 269; *Sedam v. Cincinnati etc. Canal Co.*, 2 Disn. 309 (future tolls); but see *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646; *White v. Coleman*, 130 Mass. 316. Miscellaneous cases:^e *Brown v.*

Rep. 694, a mortgage on property to be thereafter acquired by a railroad company was held invalid.

(b) *Money to become due.*—*Walton v. Horkan*, 112 Ga. 814, 38 S. E. 105, 81 Am. St. Rep. 77; *Stott v. Franey*, 20 Oreg. 410, 26 Pac. 271, 23 Am. St. Rep. 132. Money to become due under a building contract: *Third Nat. Bank v. Atlantic City*, 126 Fed. 413.

(c) *Future earnings.*—*Colorado Fuel & Iron Co. v. Kidwell*, (Colo. App.) 76 Pac. 922; *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564; *Smith v. Bates Mach. Co.*, 182 Ill. 166, 55 N. E. 69; *Metcalf v. Kincaid*, 87 Iowa 443, 54 N. W. 867, 43 Am. St. Rep. 391; *Peterson v. Ball*, 121 Iowa 544, 97 N. W. 79; *Millington v. Laurer*, 89 Iowa 322, 56 N. W. 533, 48 Am. St. Rep. 385; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207 (assignment of

future wages not yet contracted for upheld). It is held in *Steinbach v. Brant*, 79 Minn. 383, 82 N. W. 651, 79 Am. St. Rep. 494, however, that an assignment of wages to become due, indefinite as to amount, unlimited in time, without acceptance by the employer, and without notice to an attaching creditor, is void as to the latter.

(d) Assignment of future book-debts, though not limited to book-debts in any particular business, valid: *Tailby v. Official Receiver*, 13 App. Cas. (H. L.) 523, reversing 18 Q. B. Div. 25, and restoring 17 Q. B. Div. 88; overruling *In re D'Epineuil*, 20 Ch. Div. 758, and approving *In re Clarke*, 36 Ch. Div. 348.

(e) *Miscellaneous cases.*—*Peugh v. Porter*, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. ed. 859 (of part of a claim against a foreign government, to be determined

have that effect; there is a plain distinction between an assignment of property to be acquired in future and a *mere power* to deal with such property. In order to create an equitable assignment, and thus let in the operation of the equitable doctrine, there must be on the face of the instrument expressly, or collected from its provisions by necessary implication, language of *present transfer* directly applying to the future as well as to the existing property, or else language importing a present *contract* or *agreement* between the parties to sell or assign the future property, or that the security of the mortgage should immediately attach to the future property, as the case may be. Where an assignment of existing chattels by way of mortgage contains a provision which simply amounts to an authority or license to the mortgagee to take possession of or to enter and seize after-acquired property, this does not operate as an equitable assignment of the after-acquired property, nor create in the mortgagee any present equitable interest in such property. It creates, at most, only a *power*; and a power is very different from an inter-

Tanner, L. R. 2 Eq. 806; 3 Ch. 597 (future freight); In re Irving, L. R. 7 Ch. Div. 419 (future dividends from a bankrupt's estate); Swift v. Railway etc. Ass'n, 96 Ill. 309; Gwin v. Biel, 70 Ind. 505 (future rents and profits); Horst v. Dague, 34 Ohio St. 371 (share in the proceeds to arise from sale of real estate to be made by an executor under direction of the will); Patten v. Coen etc. Co., 3 Col. 265; People v. Dayton, 50 How. Pr. 143 (future fees of a public officer); The Edward Lee, 3 Ben. 114; Fed. Cas. No. 4,292 (future salvage money by a seaman); McClure v. McDearmon, 26 Ark. 66.

by a commission); Wright v. Ellison, 1 Wall. 16; The Elmbank, 72 Fed. 610; Phillips v. Edsall, 127 Ill. 535, 20 N. E. 801; Canty v. Latterner, 31 Minn. 239, 17 N. W. 385; Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387; Taft v. Marsily, 120 N. Y. 474, 24 N. E. 926; Jones v. Mayor, 90 N. Y. 387 (assignment of claim against municipality, before the claim was by statute made legally enforceable, upheld); Fair-

banks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475 (of interest in proceeds of pending litigation); Williams v. Ingersoll, 89 N. Y. 508; Reynolds v. Strong, 10 N. Dak. 81, 85 N. W. 987, 88 Am. St. Rep. 680 (chattel mortgage on future earnings of a threshing rig); Collins's Appeal, 107 Pa. St. 590, 52 Am. Rep. 479 (pledge of interest in a partnership to be subsequently formed).

est, — no interest in the property arises until the power has been exercised.¹

§ 1291. **Extent of the Doctrine — To What Property and Persons It Applies.**— The general doctrine concerning sales or mortgages of after-acquired property leads to the further conclusion, that when chattels which have been mortgaged or assigned as security are sold or exchanged by the owner, the lien upon the original articles will extend to the resulting fund or the substituted goods; and this lien will be valid in equity, not only against the mortgagee, but also against any person claiming title to such fund or goods under him as a volunteer.^{1 a} According to the general doctrine of equity established beyond any doubt by the highest judicial authority, the equitable assignment or the equitable lien upon property to be acquired in the future is valid and enforceable, not only against the contracting party himself, but also against subsequent judgment creditors, assignees in bankruptcy, and all other volunteers holding or claiming under him, and against subsequent

§ 1290, ¹ *Reeve v. Whitmore*, 4 De Gex, J. & S. 1, 16–18, per Lord Westbury; and see *Gardner v. McEwen*, 19 N. Y. 123; *Head v. Goodwin*, 37 Me. 181; *Chapin v. Cram*, 40 Me. 561; *Cudworth v. Scott*, 41 N. H. 476; *Walker v. Vaughn*, 33 Conn. 577; *Rowan v. Sharps etc. Co.*, 29 Conn. 282; *Henshaw v. Bank of Bellows Falls*, 10 Gray, 568, 571, 572; *Rose v. Bevan*, 10 Md. 466; 69 Am. Dec. 170; *Chapman v. Weimer*, 4 Ohio St. 481; *Oliver v. Eaton*, 7 Mich. 108; *Person v. Oberteuffer*, 59 How. Pr. 339; *Williams v. Winsor*, 12 R. I. 9.

§ 1291, ¹ It is assumed, of course, that there are no statutes preventing this operation of the doctrine: *Legard v. Hodges*, 1 Ves. 477; *Collyer v. Fallon*, Turn. & R. 459; *Fletcher v. Morey*, 2 Story, 555, 566; and see *Davis v. Marx*, 55 Miss. 376; *Ball v. Vason*, 56 Ga. 264; *Arnold v. Morris*, 7 Daly, 498; *contra*, *Cowart v. Cowart*, 3 Lea, 57. A mortgage in the stock in trade of a shop-keeper which purports to cover goods substituted in place of those from time to time sold is certainly valid in equity; it creates an equitable lien upon the after-acquired property as against the mortgagor, and those claiming under him with notice or as volunteers; and the lien would undoubtedly attach to such goods even in the absence of any express clause to that effect in the instrument: *Abbott v. Goodwin*, 20 Me. 408; but see the next following note.

(a) Cited to this effect in *Blair v. Mosby*, 87 Tenn. 759, 11 S. W. 940, 5 Smith, 114 Ind. 114, 5 Am. St. Rep. L. R. A. 122. 593, 15 N. E. 817. See, also, *Read v.*

purchasers from him with notice of the assignment or lien.^{2 b} This operation of the equitable doctrine as against other persons than the immediate parties is, however, very much restricted and limited in most of the states by statutes.³ The doctrine of equitable liens resulting from executory contracts, and that of equitable assignment of non-existing property, constitute two of the most remarkable and distinctive features of the equity jurisprudence. The particular rules which they involve are all drawn from the fundamental maxims or principles of equity; they exhibit in the most striking manner the opposing theories and methods of equity and of the law.

There is another species or phase of equitable assignment, not alluded to in this chapter, because it depends upon entirely different principles, — equitable assignment by subrogation. I have already described one important application of this peculiar species of equitable assignment in the previous chapter upon mortgages, while dealing with the right of redemption,⁴ and the entire doctrine will be examined in the subsequent and appropriate title of Subrogation.

² See *ante*, cases cited under §§ 1236, 1288.

³ The statutes referred to are those concerning transfers and mortgages made with intent to hinder, delay, or defraud subsequent creditors and purchasers, and those concerning the filing or recording of chattel mortgages. The decisions giving a construction to this legislation have *virtually* abrogated the equitable doctrine in its application to subsequent creditors and purchasers. For example, in many states a chattel mortgage which purports to cover future-acquired goods in place of those which have been sold, and which thus expressly or impliedly permits the mortgagor to sell the original chattels embraced in the instrument, while the lien is extended to the newly acquired articles, is absolutely void as against subsequent creditors of the mortgagor. This statutory system and the rules created by it belong, however, to the domain of the law, rather than to equity.

⁴ See *ante*, §§ 1211-1213.

CHAPTER NINTH.

CONTRACTS IN EQUITY.

SECTION I.

GENERAL DOCTRINE CONCERNING CONTRACTS.

ANALYSIS.

- § 1292. Object of this chapter.
- § 1293. What constitutes a contract.
- § 1294. Equitable contract by representations and acts.
- § 1295. Effects of a contract in equity; covenant creating an equitable servitude.
- § 1296. Effects of contracts in general.
- § 1297. Enforcement of contracts in equity.

§ 1292. **Object of This Chapter.**— I purpose to examine, in this chapter, those doctrines only concerning the nature and effects of contracts which are peculiarly and distinctively equitable. I shall not enter upon any discussion of those doctrines and rules relating to contracts which are identical both in equity and in the law.¹ The whole treatment of the subject may therefore be regarded as responsive to three fundamental questions: What constitutes a contract in equity? what primary rights of property or persons arise from a contract in equity? and what remedial rights and remedies does equity recognize and give for the enforcement of a contract? It will be more convenient to answer the latter two inquiries together, and thus to describe the effect of contracts.

§ 1293. **What Constitutes a Contract.**— Very little need be said under this head. The essential elements of a contract are the same in equity and at law. In general, the same

¹ Such discussion would be unnecessary, even if my limits permitted it; since it may be found in every complete treatise on the law of contracts, and it properly forms no part of equity jurisprudence.

rules prevail in both jurisdictions as to parties and their capacity to contract, as to consideration, and as to the assent or *aggregatio mentium*. In equity, as well as at law, "an agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no consensus, what may have been written or said becomes immaterial."^{1 a} To this general agreement between the equitable and the legal rules there is one important exception and one modification. While a married woman is as incapable of binding herself personally in equity to the same extent as at law, her contracts relating to or made in view of her separate estate are so far valid and effectual that they are enforceable against such separate estate.² The modification mentioned relates to the requirement of a valuable consideration. Equity will never enforce an executory agreement unless there was an *actual* valuable consideration; and, unlike the common law, it does not permit a seal to supply the place of a real consideration. Disregarding mere forms, and looking at the reality, it requires an actual valuable consideration as essential in every such agreement, and allows the want of it to be shown, notwithstanding the seal, in the enforcement of covenants, settlements, and executory contracts of every description.^{3 b} In construing and applying the statute of

¹ Per Lord Westbury, in *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 638, 643. Until there is an assent on the same terms, the transaction has not passed beyond the condition of negotiation. In equity, as at the law, a contract may be regarded as an offer on one side and an assent on the other. A great number of cases have been decided by courts of equity determining whether a contract had or had not been actually concluded, and laying down particular rules as to the offer and the assent; but these rules are the same at law and in equity, and the decisions contain nothing peculiar to equity jurisprudence: See *Pomeroy on Specific Performance of Contracts*, secs. 58-67, and cases cited.

² See *ante*, §§ 1121-1126.

³ *Cochrane v. Willis*, 34 Beav. 359; *Houghton v. Lees*, 1 Jur., N. S., 862; *Ord v. Johnston*, 1 Jur., N. S., 1063; *Jefferys v. Jefferys*, *Craig & P.* 138; *Hervey*

(a) The text is cited to this effect in *Kaster v. Mason*, (N. Dak.) 99 N. W. 1083.

(b) The text is cited to this effect in *Steinmeyer v. Steinmeyer*, 55 S. C. 9, 33 S. E. 15. See, also, §§ 370, 1405.

frauds, in determining what contracts come within its scope, what memoranda are sufficient to a sale by its requirements, and all other matters of detail, courts of equity and of law adopt and follow the same rules.⁴ Even when equity *seems* to depart from or disregard the statute, and specially in its enforcement of verbal contracts for the sale of land which have been part performed, it is only invoking the aid of its most salutary principles for the purpose of carrying out the ultimate objects of the statute. As the primary object of the statute is to prevent frauds, mistakes, and perjuries, by substituting written for oral evidence in the most important classes of contracts, courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results.⁵

§ 1294. Equitable Contract by Representations and Acts.—All ordinary contracts which consist of an intentional offer on one side and an intentional acceptance on the other, resulting in a meeting of minds upon the same terms, are thus governed by identical rules, with reference to their creation, in law and in equity. There is, however, a form of contract peculiar to equity which is created by representations made by one party, and acts done by the other party upon the faith of such representations.¹ Where an

v. Audland, 14 Sim. 531; Meek v. Kettlewell, 1 Phil. Ch. 342; 1 Hare, 464; Stone v. Hackett, 12 Gray, 227; Wason v. Colburn, 99 Mass. 342; Estate of Webb, 49 Cal. 541, 545; Minturn v. Seymour, 4 Johns. Ch. 497; Burling v. King, 66 Barb. 633; Shepherd v. Shepherd, 1 Md. Ch. 244; Vasser v. Vasser, 23 Miss. 378.

⁴ See Pomeroy on Specific Performance of Contracts, secs. 71-95, and cases cited.

⁵ Jervis v. Berridge, L. R. 8 Ch. 351; Haigh v. Kaye, L. R. 7 Ch. 469; and see *ante*, vol. 2, § 921, and cases cited.

¹ A representation deliberately and intentionally made, for the purpose of influencing the conduct of another, and then acted upon by him, is gener-

absolute unconditional representation of something to be done in the future is made by one person, in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the acts by which the intended result is obtained and purpose accomplished, a contract is thereby concluded between the parties.^a The representation must be absolute in its terms and positive in its nature, — something more than the mere expression of an intention depending upon contingencies, or of a wish, hope, or expectation, — otherwise the obligation, if any, which arises from it will be only moral or honorary.² This

ally the foundation of a *right* which a court of equity will enforce: Per Lord Cottenham, in *Hammersley v. De Biel*, 12 Clark & F. 45, 61, note. But in order that the right should be that of contract, the representation must be in some sense promissory, — that is, must be something in the future. Representations of facts as existing or past may be the occasions of rights, but the rights will then be referable to fraud or to equitable estoppel, and not to contract. While the law can only give compensation in damages, equity, as has been shown, will compel the party to make his representations good by specifically performing them: See *Bold v. Hutchinson*, 20 Beav. 250; 5 De Gex, M. & G. 558; *Neville v. Wilkinson*, 1 Brown Ch. 543.

²In the recent case of *Dashwood v. Jermyn*, L. R. 12 Ch. Div. 776, 781, the court formulated the doctrine as follows: "If a man makes a representation on the faith of which another man alters his position, enters into a deed, incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of an annuity, or to make a provision by will. That in the eye of a court of equity is a contract, an engagement which the man making it is bound to perform." This statement of the rule is certainly too broad, since it includes representations of existing and past facts. This language would turn all cases of fraudulent representations and of equitable estoppels into contracts, and that courts of equity have never done. In the case of *Maunsell v. White*, 4 H. L. Cas. 1039, 1056, Lord Cottenham, speaking of the circumstances as described in the text, said: "There is no middle term, no *tertium quid*, between a representation so made to be effective for such a purpose, and a contract; they are identical." Most of the cases involving this doctrine are the results of negotiations prior to marriages: *De Beil v. Thomson*, 3 Beav. 469; 12 Clark & F. 61, note; *Hammersley v. De Biel*, 12 Clark & F. 45; *Saunders v. Cramer*, 3 Dru. & War. 87; *Moore v. Hart*, 1 Vern. 110, 201; 2 Ch. Rep. 284; *Cokes v. Mascal*, 2 Vern. 34, 200; *Luders v. Anstey*, 4 Ves. 501; 5 Ves. 213; *Crosbie v. McDoual*, 13 Ves. 148; *Mont-*

(a) The text is quoted with approval in *McKeegan v. O'Neill*, 22 S. C. 454, 460, 468, but the facts did not

bring the case within the principle here stated.

purely equitable form of contract is distinguishable from the case of an offer accepted by means of acts. Where one party makes an offer, the other party may accept it by acts instead of by words, and a binding contract will

gomery v. Reilly, 1 Bligh, N. S., 364; 1 Dow & C. 62; Payne v. Mortimer, 1 Giff. 118; 4 De Gex & J. 447; Alt v. Alt, 4 Giff. 84; Loffus v. Maw, 3 Giff. 592; Prole v. Soady, 2 Giff. 1; Skidmore v. Bradford, L. R. 8 Eq. 134; Coverdale v. Eastwood, 15 Eq. 121. The representation must be absolute. In Randall v. Morgan, 12 Ves. 67, a father, previous to his daughter's marriage, refused to make a settlement, but said he should allow her the interest of two thousand pounds, and if she married, *he might bind himself* to do so, and to pay her the principal at his death. This was held not to be a contract, since the representation was not positive and absolute. Again, the representation must be made with the express purpose of bringing about the result which does actually take place, for the purpose of accomplishing an object which is on the faith of it accomplished. In Dashwood v. Jermyn, L. R. 12 Ch. Div. 776, a paper was signed by A and given to B whereby, as a mark of his esteem and friendship, A agreed to allow B five hundred pounds a year, and to bequeath him on his own (A's) death ten thousand pounds. B showed this paper to Mrs. C, who thereupon consented that her daughter should marry B, and they were married. It did not appear that A knew of any such purpose when he gave the paper to B; he was ignorant of any marriage negotiation between B and Mrs. C's daughter, and Mrs. C and daughter were utter strangers to him; and no communication concerning the marriage ever passed between A and B, or between A and Mrs. C or daughter. A paid B one installment of the five hundred pounds, and then died, making no provision whatever for B in his will. Held, that there was no contract which would be enforced against A's estate; and see Loxley v. Heath, 27 Beav. 523; 1 De Gex, F. & J. 489; Jameson v. Stein, 21 Beav. 5; Kay v. Crook, 3 Smale & G. 407; Maunsell v. White, 1 Jones & L. 539, 567.

There is another phase of the doctrine which has occasioned much judicial inquiry. When, during the negotiation, the party expressly refuses to enter into a contract, and only pledges his honor, which he insists should be accepted as sufficient, clearly no obligation arises which will be enforced by the courts; and it seems the result is the same when the representation is of a mere intention. There can be no possible doubt, where the party in so many words refuses to bind himself by a contract, and requires his pledge of honor to be taken instead of a legal obligation. But in regard to the effect of a *representation of intention* there has been a direct conflict of opinion among some of the very ablest equity judges in England. In Maunsell v. White, 1 Jones & L. 539, 4 H. L. Cas. 1039, a young gentleman being suitor for the hand of a young lady who was yet a minor, her guardians objected to the marriage, unless a suitable settlement was made by him. He applied to an uncle, who wrote the following answer: "My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I repeat, that my Tipperary estate will come to you at my

result at law as well as in equity. In that case, however, there is an *intention* by the offerer to create a contract, and the acts of the other party are evidence of his intention to accept; so that there is a conscious, intentional meeting of minds of both the parties. But in the equitable contract by representation, the one making the representation *may not intend to be bound*, may even intend to mislead. Equity thus infers a contract, although there may not be the mutual intention, the conscious, intentional meeting of both the minds, which is an essential element of the legal conception of a contract.

§ 1295. Effects of a Contract in Equity — Covenant Creating an Equitable Servitude.—Before describing the general effects of contracts, I shall notice some particular agreements which create special rights in equity, where no such rights, or perhaps no rights at all, between the same parties, exist at law. When the owner of land enters into a

death, unless some unforeseen occurrence should take place." The writer thus carefully guarded *every* positive statement by adding some qualification or contingency; but he directed that his letter should be shown to the lady's guardians. This was done, and the marriage followed. The uncle afterwards changed his mind and failed to devise any property to his nephew. Lord St. Leonards held there was no contract, and his decision was affirmed by the house of lords. In *Money v. Jorden*, 15 Beav. 372, 2 De Gex, M. & G. 318, 5 H. L. Cas. 185, the effect of a statement of intention was fully discussed, with a great contrariety of opinion. A gentleman being about to marry, his creditor, to whom he was indebted on a bond, stated that in case of his marriage she would never trouble him about the bond; that she had given it up, and would not enforce its payment; but when asked to actually surrender the bond, she refused, insisting that her own word must be trusted, and that he might rely on her word. The gentleman was therefore married, and a suit having been subsequently brought to recover the amount of the bond, he sought to restrain the action by injunction. The relief was granted by the lower courts, but was refused in the house of lords by a majority. Lord St. Leonards held that a representation of intention might be binding, while Lord Cranworth held that it was not. See also *Moorhouse v. Colvin*, 15 Beav. 341; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Norton v. Wood*, 1 Russ. & M. 178; *Cross v. Sprigg*, 6 Hare, 552; *Viscountess Montacute v. Maxwell*, 1 P. Wms. 618. The representation would not be enforced, under the rule of the text, unless the acts were done in reliance upon it; e. g., when it was not acted on as a reason for the marriage: *Goldicutt v. Townsend*, 28 Beav. 445; *Jameson v. Stein*, 21 Beav. 5; nor where it was waived: *Caton v. Caton*, L. R. 2 H. L. 127, 142.

covenant concerning it, when in a deed the grantor or the grantee covenants, or in a lease the lessor or the lessee covenants, concerning the land, concerning its use, restricting certain specified uses, stipulating for certain specified uses, subjecting it to easements or servitudes, and the like, and the land is afterwards conveyed, or sold, or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it, or will be restrained from violating it, at the suit of the original covenantee or of any other person who has a sufficient equitable interest, although perhaps without any *legal* interest, in such performance. It makes no difference whatever, with respect to this equitable liability, and this right to enforce the covenant in equity, whether the covenant is or is not one which in law "runs with the land."¹ Subsequent owners deriving title

¹ *Tulk v. Moxhay*, 2 Phill. Ch. 774, 777; and see *ante*, § 689, note, in which a large number of English and American cases illustrating the text are cited. This doctrine may be regarded as an equitable substitute for or addition to the legal rule concerning covenants running with the land; or it may be explained by regarding the covenant as creating an equitable easement. The latter theory has been adopted by many able American courts. In either view, the covenant confessedly creates an equitable burden on the land, which follows it into the hands of subsequent holders, with the single qualification that a subsequent owner who acquires the *legal* estate for value and without notice takes it free from this burden. In no case is it necessary that the covenant should "run with the land," in order that the equitable easement or burden should be created. Sir George Jessel, in the passage quoted in the next following note, explains, in his usual accurate manner, the equitable operation of such covenants. He shows that notice to the subsequent owner is not an essential element to the existence of the equitable burden; want of notice simply enables the purchaser of the *legal* estate for value to be free from the burden. A subsequent holder who acquires only an equitable estate takes it subject to the burden, even in the absence of any notice.

(a) See, also, *post*, § 1342, and Pom. Equitable Remedies, where the subject is more fully treated. This paragraph of the text is cited in *Wilmington v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356 (agreement made between lessees of a driv-

ing park and others, whereby the latter are permitted to post advertisements on the fences, is binding on assignees of the lease with notice); *Kettle River Ry. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

under deeds containing such covenants would, of course, have constructive notice thereof. This equitable right would arise where no similar legal right, or perhaps no legal right at all, would exist between the same parties, in the following instances: 1. Where the covenant is not one which runs with the land, because in such case no legal

The most frequent condition of facts to which the doctrine has been applied in the United States is the following: A, the owner of a block of land, divides it into lots for sale, and sells all these lots to different grantees. In the deed of lot No. 1 are covenants of the grantee not to build nearer the street than a certain line, or not to build certain kinds of buildings, or not to use the lots for certain purposes, or not to build so as to cut off a certain prospect, or other negative or affirmative covenants. The deeds of all the other lots contain similar covenants. Finally, the whole land is sold, so that A retains no interest whatever. The lots are afterwards conveyed to subsequent grantees. Each subsequent grantee would be charged with constructive notice of the covenants in the original deed under which he claimed title. If the subsequent grantee of any lot—say No. 1—should violate the covenants in the deed of his lot, then plainly there would be no right of action *at law* against him in favor of the owner of any other lot; for there would be no legal privity whatsoever between them. Even if the covenants *did* run with the land, there would be no action at law, because the grantee of lot No. 2 would not be in any sense an *assignee of the reversion*,—that is, of the original covenantor's (A's) rights under the covenant. Although no action at law would lie, it is well settled that a suit in equity may be maintained by the original grantee or by the subsequent owner of any lot, to prevent a violation of the covenants by the owner of any other lot. Many of the American cases cited *ante*, in vol. 2, under § 689, arose out of such a condition of facts. The prevailing theory in the American courts is to regard the covenants as creating an equitable easement or servitude. The following cases also illustrate the doctrine: In *Clark v. Martin*, 49 Pa. St. 289, each grantee of adjoining lots covenanted not to build on the rear portion of his premises above a certain height, and this was enforced; *Schworer v. Boylston Market Ass'n*, 99 Mass. 285 (a covenant that a strip of land should not be subject to fences, and should be used as a way, was enforced by the subsequent grantee of other land benefited thereby); *Peck v. Conway*, 119 Mass. 546 (a covenant not to erect a building on the land conveyed was enforced against a subsequent grantee of the covenantor by a subsequent grantee of the original covenantor; the defendant had constructive notice from his title deeds); *Whitney v. Union R'y*, 11 Gray, 359; 71 Am. Dec. 715 (a covenant not to use the land in a certain manner enforced against a subsequent grantee charged with notice); *Parker v. Nightingale*, 6 Allen, 341; 83 Am. Dec. 632 (in conveyances of adjoining lots by same grantor, each grantee covenanted that the lot should only be used for dwelling-houses; held binding on all subsequent grantees, and enforceable by any subsequent grantee against another); *Clark v. New York Life Ins. & T. Co.*, 64 N. Y. 33 (the doctrine was recognized as fully settled; but on a construction of the language of the cove-

liability whatever would rest upon the subsequent grantee or owner; 2. Where the *covenantee* having parted with all interest in the premises, there is no *legal* privity of estate

nants it was held not to apply to defendant's lot).^b In *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, there was a covenant by the grantor not to sell off any marl from the premises adjoining the lot conveyed. The court fully recognized and accepted the doctrine of the text, but held that this particular covenant was one which equity would not enforce; if not absolutely illegal, it closely resembled covenants in restraint of trade, which are confessedly illegal. All these cases show that the doctrine is wholly independent of the *legal* notion concerning covenants which do or do not run with the land. See also *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Trustees etc. v. Thacher*, 87 N. Y. 311; 41 Am. Rep. 365.^c The equitable jurisdiction to enforce such covenants is subject to one most important limitation. It is not absolute, but is governed by the same general rules which control the equitable relief of specific performance of contracts. If, therefore, the restrictive covenants in deeds of lots were made with evident reference to the continuance of the existing general condition of the property and its surroundings, but in the lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, then the equitable relief will not be granted, and the plaintiff will be left to his remedy at law. For example, if the covenants restricted the grantees of lots to use for purposes of residence, and since their execution the whole neighborhood had ceased to be used for such purposes, and had been wholly given up to business, manufacturing, and the like: *Trustees etc. v. Thacher*, 87 N. Y. 311, 317, 318; 41 Am. Rep. 365, and cases cited by Danforth, J.^d

(^b) See, also, *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843; *McMahon v. Williams*, 79 Ala. 288; *Morris v. Tuscaloosa Mfg. Co.*, 83 Ala. 565, 3 South. 689 (covenant that the land conveyed be used for residence purposes only); *Fresno Canal & I. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53 (covenant to take water for the use of the land from a certain irrigation company); *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410 (covenant that no intoxicating liquors be sold on the premises in quantities less than five gallons); *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241 (covenant in lease against sale of liquor binding on sublessee); *Hodge v.*

Sloan, 107 N. Y. 252, 1 Am. St. Rep. 816, 17 N. E. 335.

(^c) But the covenant "must relate to or concern the land or its use or enjoyment. It is not enough that a covenant affects the use of land, or the enjoyment of an easement therein, in a *collateral* way." Thus an agreement by a landowner that the products of the land be transported exclusively by one company does not so relate to the land as to be binding on purchaser with notice: *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Kettle River Ry. Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

(^d) See, also, *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11.

or of contract between the plaintiff who seeks to enforce the covenant and the subsequent owner against whom the enforcement is sought, because in such case no action at law for a breach would lie; 3. Where the stipulations of the covenant and the breach thereof are of such a nature that there is no basis upon which to estimate damages. In all these cases, however, the covenant may be enforced in equity. I have, as it will be seen, continued to state the doctrine in its most general form as applying to affirmative as well as to restrictive covenants, and as rendering the owner liable to the affirmative duty of specifically performing the covenant, as well as to the negative remedy of restraint from violating it, notwithstanding the very recent decisions by the English court of appeal holding that the doctrine applies only to restrictive covenants, and does not extend to those which stipulate for affirmative acts.² In my opinion, the doctrine has been fully estab-

² Haywood v. Brunswick etc. Soc., L. R. 8 Q. B. Div. 403 (covenant to build and keep in repair some houses); London etc. R'y v. Gomm, L. R. 20 Ch. Div. 562, 582, 583, 586, 587. In this case the covenant was to resell the land. Jessel, M. R., said (pp. 582, 583): "With regard to the argument founded on Tulk v. Moxhay, that case was very much considered by the court of appeal in Haywood v. Brunswick Benefit Society, and the court there decided that they would not extend the doctrine of Tulk v. Moxhay to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course, that authority would be binding upon us, if we did not agree to it, but I most cordially accede to it. I think we ought not to extend the doctrine of Tulk v. Moxhay in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in Tulk v. Moxhay was affirmative in its terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied,—as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden,—the court interferes on one or other of the above grounds. *This is an equitable doctrine*, establishing an exception to the rules of the common law, which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate *subject to the equitable burden*, with the qualification that if he acquired the legal estate *for value and without notice*, he was freed from the burden. *That*

lished, in its most general form, without such limitation, by the overwhelming weight of authority, English and American.^e

§ 1296. **Effects of Contracts in General.**—As has already been stated, one of the most distinctive features of equity jurisprudence is its peculiar mode of viewing executory contracts, and the rights arising therefrom. Where a contract stipulates merely for personal acts to be done or omitted, the equitable and the legal notions as to its effects are the same; the resulting rights are strictly personal in equity as well as at law. Where an executory contract deals with or relates to property, real or personal, as its subject-matter, its operation in equity may be the same as at law; under proper circumstances courts of equity may treat the resulting rights and obligations as purely

qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right; and if the purchaser took only an equitable estate, he took subject to the burden, whether he had notice or not." Hannen, J. (p. 586), and Lindley, J. (p. 587), reached the same conclusion. The numerous English cases cited in vol. 2, under § 689, contain no such limitation. While in most instances the covenants undoubtedly were restrictive or negative merely, yet in several cases the doctrine was applied to covenants in express terms requiring affirmative acts; e. g., to keep up a sea-wall: *Morland v. Cook*; to erect a pump and reservoir; *Cooke v. Chilcott*; and in other cases the covenant was in negative terms, but an injunction restraining its violation necessarily required the doing of affirmative acts; e. g., prohibiting building, except in a specified manner: *Coles v. Sims*; to use gardens in a certain manner: *Western v. Macdermot*; by a lessee of an inn to buy all his beer from the lessor: *Luker v. Dennis*. These, and American cases to the same effect, show, as it seems to me, that the rule in its general scope as stated in the text had been fully settled. I doubt whether American courts would feel themselves bound to follow these latest English decisions which put a limitation upon the rule hitherto unknown. It is proper to remark that the first of these two cases, in which the limitation was for the first time laid down, was an action at law for damages, decided by a court composed of judges trained in legal rather than in equitable doctrines. Finally, the limitation, in my opinion, is wholly arbitrary, for, on principle, there seems to be no distinction between the equitable operation and effect of affirmative and of restrictive covenants. See, however, as partially sustaining this limitation, *Brewer v. Marshall*, 19 N. J. Eq 537; 97 Am. Dec. 679.

(e) This passage of the text is Cheatham, 88 Mo. 498, 57 Am. Rep. quoted with approval in *Sharp v.* 433.

personal.¹ But, in addition to this legal aspect, equity always treats such executory contracts as creating specific, present, equitable interests in the lands, chattels, funds, or other property to which they relate. The nature and extent of the equitable interest depends, of course, upon the provisions of the particular contract; it may be an equitable estate, the virtual, beneficial ownership, or it may be a specific lien or charge, or it may be a burden analogous to a servitude. All the distinctively equitable doctrines with regard to the rights and liabilities arising from and remedies for the enforcement of such contracts are the necessary and logical deductions from this fundamental conception: that an executory agreement creates specific equitable interests in the property which is its subject-matter.²

§ 1297. **Enforcement of Contracts in Equity.**—In the enforcement of contracts, equity may be governed by very different considerations from those which are indispensably requisite at law. The law holds parties strictly and literally to the very terms of their agreements, and demands from the plaintiff an exact performance of all the stipulations on his part which are essential to a recovery, or else no legal right of action can accrue to him on the contract. Also, no action at law can be maintained upon

¹ That is, an executory contract relating to money or to other property may, in equity, as at law, be treated as imposing only the personal obligation of ordinary indebtedness, as creating only the personal right to a pecuniary payment, and as enforced only by the recovery of a general pecuniary judgment. This purely legal aspect of contracts is, however, very uncommon. In almost all cases where there is a personal indebtedness and a pecuniary recovery, as in suits for an accounting, and the like, the ultimate remedy is made more efficient by the notion of some equitable interest, lien, or charge, or some trust attaching to specific funds of money or of securities, by which the actual relief consists in reaching and appropriating such specific fund or other form of property.

² This equitable conception and its results have been already fully described in previous chapters, and the discussion need not be repeated. With regard to the conception in general and the equitable estates created, see *ante*, vol. 1, §§ 365-369, 372; on conversion by contracts, *ante*, vol. 3, §§ 1159, 1161, 1163; on liens created by contract, *ante*, vol. 3, §§ 1235-1237. Other illustrations will be given in the subsequent chapter on the specific performance of contracts.

a contract which is not valid in compliance with rules of the common law or of statute. Both of these stringent requirements are relaxed in equity, and contracts may be enforced, where, from some default, or some lack of legal formality or condition, no action at law can be maintained. There are two general classes of such cases. The first embraces those contracts in which the plaintiff, by reason either of some extrinsic circumstance or of his own default, has not performed, or even cannot perform, all the conditions on his part necessary to be performed in order that an action at law may be maintained thereon, but which nevertheless a court of equity regards as binding and will enforce.^{1 a} The second class embraces contracts which are not valid in law, which the law does not treat as contracts at all, but which equity regards as binding in conscience, and enforces by its remedy of specific performance. The legal invalidity may result from the non-observance of some

¹ Equity distinguishes between those terms and stipulations which are of the essence of a contract, and those which are not, and does not permit the defendant to set up a breach of the latter as complete bar to all relief, or a sufficient reason for wholly refusing to execute the agreement. In these cases, no action at law can be maintained; but equity, if the contract is otherwise a proper one, will compel a performance, with such compensations or allowances as may be just to the parties. In *Mortlock v. Buller*, 10 Ves. 292, 305, 306, Lord Eldon said: "Lord Thurlow used to refer this doctrine of specific performance to this: that it is scarcely possible that there may not be some small mistake or inaccuracy, as that a leasehold interest, represented to be for twenty-one years, may be for twenty years and nine months; some of these little circumstances that would defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract." See also *Stewart v. Alliston*, 1 Mer. 26, 32. Even when the partial failure or inability to perform results directly from the plaintiff's own default, the contract will still be enforced, if the relief is demanded by equitable principles; as, for example, when the plaintiff has performed substantially, but not with such exactness, in respect to all the terms, that he could maintain an action at law; or where the plaintiff has failed to perform at or within the stipulated times, in cases in which time is not of the essence of the contract: *Davis v. Hone*, 2 Schoales & L. 341, 347; *Voorhees v. De Meyer*, 2 Barb. 37; *Coale v. Barney*, 1 Gill & J. 324; *McCorkle v. Brown*, 9 Smedes & M. 167; *Shaw v. Livermore*, 2 G. Greene, 338.

(a) The text is quoted in *Johnson* and cited, *Croft v. Peck*, 64 Tex. 627, v. Roanoke, etc., Co., 82 Va. 284, 289; 631.

statutory requirements concerning the mode of making the agreement, or from certain doctrines of the common law, irrespective of statute, affecting its terms or its subject-matter. By far the most important and numerous species of contracts contained in this class are those which, being void at law under the statute of frauds, have been part performed by the plaintiff, and will therefore be wholly executed *in specie*, at his suit and for his benefit, by courts of equity.² Among the agreements which the original common law treated as invalid, irrespective of statutes, but which equity, in the application of its conscientious principles, regards as binding, and enforces by granting its relief of specific performance, are the following: Agreements for the assignment or disposition of a possibility, expectancy, or hope of succession;³ agreements to assign things in action;⁴ executory agreements made between a man and a woman who afterwards marry, which then became absolutely void at common law, but which equity

² The theory upon which equity proceeds in administering its specific relief in such cases is, that the defendant, having permitted the plaintiff to treat the agreement as binding, and to do positive acts based upon such assumption, it would be a fraud in him to repudiate his undertaking, and to set up the statute as an obstacle in the way of its completion: See *Buckmaster v. Harrop*, 7 Ves. 341, 346; *Mundy v. Jolliffe*, 5 Mylne & C. 177; *London etc. Ry v. Winter, Craig & P.* 57; *Earl of Lindsey v. Great Northern Ry*, 10 Hare, 664, 700; *Kirk v. Bromley Union*, 2 Phill. Ch. 640; *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Lord v. Underdunk*, 1 Sand. Ch. 46; *Jervis v. Smith, Hoff.* Ch. 470. The verbal contract which is part performed must be such that the court would decree its specific enforcement if it were in writing: *Kirk v. Bromley Union*, *supra*.

³ Although void at the common law, such contracts are enforced in equity, if free from overreaching and fair in all respects: See *ante*, § 1287; *Wiseman v. Roper*, 1 Ch. Rep. 158; *Beckley v. Newland*, 2 P. Wms. 182; *Hyde v. White*, 5 Sim. 524; *Lyde v. Mynn*, 1 Mylne & K. 683; *Price v. Winston*, 4 Munn. 63.

⁴ Agreement to assign certain debts: *Adderley v. Dixon*, 1 Sim. & St. 607; *Wright v. Bell*, 5 Price, 325; *Cutting v. Dana*, 25 N. J. Eq. 265; *Tuttle v. Moore*, 16 Minn. 123; *Woodward v. Harris*, 3 Sand. 272; *Hughes v. Piedmont etc. Ins. Co.*, 55 Ga. 111; to sell an annuity: *Withy v. Cottle*, 1 Sim. & St. 174; *Kenney v. Wexham*, 6 Madd. 355, 357; *Clifford v. Turrell*, 1 Younge & C. Ch. 138; to sell a patent right: *Cogent v. Gibson*, 33 Beav. 557; *Corbin v. Tracy*, 34 Conn. 325; *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *Binney v. Annan*, 107 Mass. 94; 9 Am. Rep. 10; *Ely v. McKay*, 12 Allen, 323.

may specifically enforce against either the husband or wife at the suit of the other;⁵ ^b contracts made by an owner to convey his land at some future day named, who dies before the time for completion arrives.⁶ In all of these cases, however, modern statutes have changed the legal rules, so that such contracts would be valid at law.

SECTION II.

EQUITABLE DEBTS.

ANALYSIS.

- § 1298. General nature.
- § 1299. Husband's liability for wife's necessities.
- § 1300. Liability for money advanced to pay debts of a person incapable of contracting.
- § 1301. On death of one joint debtor.
- § 1302. On death of a joint surety.

§ 1298. **General Nature.**—A debt, in its most general conception, is a personal liability for a definite sum of money, arising out of contract express or implied, or obligation in the nature of contract. A debtor is one who is personally liable for the payment of such sum, and from whom payment can be enforced by means of a *personal* pecuniary judgment. If the debt is recognized by the law, and can be recovered by an action at law, it is a legal debt; if it is *only* recognized by equity, and not by the law, and only be recovered by a suit in equity, the debt is equitable. Where there is no personal liability, and no *personal* pecuniary judgment can be recovered either at law or equity,

⁵ Cannel v. Buckle, 2 P. Wms. 243; Acton v. Acton, Prec. Ch. 237; Gould v. Womack, 2 Ala. 83; Crostwaight v. Hutchinson, 2 Bibb, 407; 5 Am. Dec. 619.

⁶ At common law this contract is rendered impossible; the administrator cannot convey, because he acquires no interest whatever in the land, and no legal obligation devolves upon the heir. Equity enforces the contract against the heir: Milnes v. Gery, 14 Ves. 400, 403, in argument of counsel; Newton v. Swazey, 8 N. H. 9; Saunders v. Simpson, 2 Har. & J. 81; Glaze v. Drayton, 1 Desaus. Eq. 109; Wilkinson v. Wilkinson, 1 Desaus. Eq. 201.

(b) The text is quoted and followed in Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753.

there is no debt nor debtor.¹ There are many instances in which a pecuniary liability exists in equity, which may not perhaps be recognized at law, growing out of trust relations, where funds of money impressed with a trust may be reached *as specific, identified funds*, and not as a general *personal* indebtedness; and the jurisdiction at law, by means of the action of assumpsit for money had and received, has been so enlarged, that nearly all cases of *personal* indebtedness, which do not directly conflict with some positive rule of the law, *may* be enforced by legal action. I shall therefore merely state a few particular cases in which the indebtedness is wholly equitable, and no liability at all would exist at law, for the purpose of illustrating the general principle.

§ 1299. Husband's Liability for Wife's Necessaries. — Questions as to the husband's liability for necessities furnished to his wife usually arise at law and belong to the jurisdiction of law courts. It is, however, settled by the highest authority, ancient and modern, that where a husband has deserted his wife, and a third person advances money to her for the purpose of her maintenance, and the money has been actually applied to such purpose, an equitable, although not a legal, debt is thereby created; the person making the advance is entitled in equity, though not at law, to recover the amount from the husband.¹ This rule applies not only where the husband

§ 1298, 1 *Ex parte Jones*, L. R. 12 Ch. Div. 484, 488, 489, 490, holding that a married woman is not a "debtor," although her contracts may be enforced against her separate property in equity; see extracts from opinions of James, Brett, and Cotton, LL. JJ., *ante*, under § 1122.

§ 1299, 1 *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pitfield*, 1 P. Wms. 558; *Jenner v. Morris*, 3 De Gex, F. & J. 45, 51, 52, 55, overruling *May v. Skey*, 16 Sim. 588; *Deare v. Soutten*, L. R. 9 Eq. 151, 154.^a In *Jenner v. Morris*, the decision by Lord Chancellor Campbell and Turner, L. J., was based upon

(^a) To the same effect, see *Leuppie v. Osborn's Ex'rs*, 52 N. J. Eq. 637, 29 Atl. 433, citing, in addition to the above English cases, *Walker v. Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216; *Kenyon v. Farris*, 47 Conn. 510,

36 Am. Rep. 86. But see *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447, 34 N. E. 692 (citing the text), where the court declined to follow the English authorities.

has actually left and deserted his wife, but also where the separation has been mutual, if without her fault, and without any provision by the husband for her support. The principle which underlies this rule has been extended in some states so far as to assert a general jurisdiction of equity to compel the maintenance of a deserted wife out of the husband's property under the name of "alimony."^{2b}

§ 1300. Liability for Money Advanced to Pay Debts of a Person Incapable of Making a Contract.—This particular rule concerning married women may be generalized. Whenever money is loaned or advanced to a person under dis-

principle, and upon the authority of the older cases in 1 Peere Williams. One passage in the opinion of Turner, L. J., relating to the general jurisdiction of equity, is so instructive and so broad in its application that I shall quote it (p. 55): "We are thrown back, therefore, upon the old authorities. In considering them, it must be borne in mind that the decrees of the court very often furnish the best evidence which now can be had of the extent of its jurisdiction and of the principles by which it is guided, and that in disregarding the older decisions of the court there is great danger of breaking in upon its principles. This case seems to me to present a remarkable instance of that danger. In Lord Redesdale's treatise on pleading I find this statement (Mitford's Eq. Pl., 4th Eng. ed., 112; 5th ed., 134): 'Cases frequently occur in which the principles by which the ordinary courts are guided in their administration of justice give a right; but from accident, or fraud, or defect in their mode of proceeding, those courts can afford no remedy, or cannot give the most complete remedy; and sometimes the effect of a remedy attempted to be given by a court of ordinary jurisdiction is defeated by fraud or accident. In such cases courts of equity will interpose to give those remedies, which the ordinary courts would give if their powers were equal to the purpose, or if their mode of administering justice could reach the evil; and also to enforce remedies attempted to be given by those courts when their effect is so defeated.' It is therefore an ancient head of the jurisdiction of this court to interpose in cases in which the principle of the law gives a right, but the forms of the law do not give a remedy"; and he goes on to show that the law, *on principle*, admits a right of the creditor, but according to the rules of form there is no legal action by which such right can be enforced. It is well settled that those who furnish necessities *directly* to a deserted wife may sue the husband at law for their value, she being his agent to that extent, with uncountermandable authority to bind him: *Gilman v. Andrus*, 28 Vt. 241; 67 Am. Dec. 713; *Walker v. Loughton*, 31 N. H. 111; *Rumney v. Keyes*, 7 N. H. 571; *Kimball v. Keyes*, 11 Wend. 33; but courts of law do not recognize any privity between the husband and a person who has supplied his wife with money to purchase necessities. In *Deare v. Soutten*, Lord Romilly, M. R., held the same doctrine.

² See *ante*, § 1120, and cases cited.

abilities and incapacitated from making a binding contract, as to an infant, a lunatic, and the like, and the money is thus loaned or advanced and actually used for the purpose of paying for necessities or necessary expenses of the party borrowing, although no legal debt arises, and the lender can maintain no action at law to recover back the amount, yet, *since his money was advanced and used for the purpose of paying debts which would be recoverable at law*, he can sue in a court of equity, and stand in the place of those creditors whose debts had been so paid, and recover back the amount of his advance. An equitable debt thus arises under the principle of subrogation.¹ ^a It

¹ *Marlow v. Pitfeild*, 1 P. Wms. 558;^b *In re National etc. Building Soc.*, L. R. 5 Ch. 309, 313, per Giffard, L. J. In this latter case the court said: "There was no legal debt, and if no legal debt, the next thing to inquire is, whether there was an equitable debt. A class of cases has been referred to on that subject, the principal of which are *In re German Mining Co.*, 4 De Gex, M. & G. 19, and *In re Cork etc. R'y*, L. R. 4 Ch. 748, the latter of which was before the lord chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle recognized in old cases, beginning with *Marlow v. Pitfeild*, where there was a loan to an infant, and the money was spent in paying for necessities, and in another, of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held that although the party lending the money could maintain no action at law, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. This is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from." The doctrine has also been extended, with great caution and within narrow limits, to cases where money has been loaned to a corporation, by a transaction which was *ultra vires* and therefore void, for the purpose of paying off existing and valid liabilities of the corporation. Although no legal debt was thereby created against the corporation, it has been held that an equitable debt arose, so that the loan could be recovered back in equity: *In re German Mining Co.*; *In re Cork etc. R'y*, *supra*; *Troup's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225; *In re Magdalena etc. Co.*, Johns. 690; but see *In re National etc. Soc.*, *supra*.^c

(a) The text is quoted in *Wells v. Town of Salina*, 71 Hun 559, 25 N. Y. Supp. 134; cited in *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447, 34 N. E. 692.

(b) See, also, *Rhodes v. Rhodes*, 44 Ch. Div. 94.

(c) See, also, *Wells v. Town of Salina*, 71 Hun 559, 25 N. Y. Supp. 134, quoting the text; *Blackburn*

might perhaps be said that all cases in which parties are entitled to sue in equity and recover mere pecuniary demands, upon the principle of subrogation or equitable assignment, were examples of equitable debts.

§ 1301. **On Death of One Joint Debtor.**—The common-law rule had been firmly settled from an early day, that on the death of one or more of several joint debtors, the liability of the deceased absolutely ceased; no action at law could be maintained against their personal representatives; the debt remained that of the survivors only, and they alone could be sued. This rule was a necessary conclusion, drawn by processes of verbal logic, from the intensely technical conception of a *joint* liability or right at the common law, as one, single, indivisible right or liability.¹ There is, however, an equitable debt. The equitable rule is now settled in England, professedly based upon the notion that all joint liabilities at law are in equity joint and several, that the creditor has his option at all times either to sue the survivors alone at law, or to sue the representatives of the deceased debtor in equity, whether the survivors are solvent or not, and without attempting, much less exhausting, any legal remedy against the survivors; and this doctrine has been adopted in some of the American states.² The prevailing American rule is not so broad.

¹ To use a homely metaphor, a joint right was not a bundle of separate rights united together by some external bond; it was one single right, although it might belong to several parties as creditors, or might impose a liability upon several as debtors.

² Where the personal representatives of the deceased are thus sued in equity, the survivors must also be joined as defendants: *Wilkinson v. Henderson*, 1 Mylne & K. 582; *Braithwaite v. Britain*, 1 Keen, 206, 219; *Brown v. Weatherby*, 12 Sim. 6, 11; *Devaynes v. Noble*, 2 Russ. & M. 495; *Thorpe v. Jackson*, 2 Younge & C. 553, 561; *Freeman v. Stewart*, 41 Miss. 138. This particular rule has sometimes been referred to the general juris-

Building Soc. v. Cunliffe, Brooks & Co., 22 Ch. Div. 71; *Portsea Building Soc. v. Barclay*, [1895] 2 Ch. 298. In *In re Wrexham, etc., Ry. Co.*, [1899] 1 Ch. 440, the theory of subrogation as applied to such cases was rejected; the lender was held

entitled to have his loan treated as valid, so far as the money was applied in discharge of legal debts and liabilities of the company, but was not subrogated to any securities or priorities of the creditors who were paid by means of his money.

In most of the states, where no statute has made a change, upon the death of one or more joint debtors, obligors, or promisors, a legal action can be maintained against the survivors alone, and in such action the personal representatives of the deceased cannot be made defendants for any purpose. An equitable action can be maintained against the executors or administrators of the deceased when, and only when, either the legal remedy against the survivors has been exhausted, or such remedy would be absolutely useless. In such equitable action, therefore, the plaintiff must aver and prove either the recovery of a judgment and the issue and return of an execution thereon unsatisfied, against the survivors, or else that the survivors are utterly insolvent.³ In several of the states which have adopted the reformed procedure, either from a judicial interpretation of its general principles or from express provisions of the codes, this particular jurisdiction of equity

isdiction over mistake, on the ground that *the parties were mistaken in making their contract joint!* There cannot, of course, be any real element of truth in such an explanation. The early chancellors in laying down the rule so diametrically opposed to a favorite dogma of the common law may have ventured upon some such explanation to account for their jurisdiction; but it is clearly verbal and formal. The true ground of the jurisdiction must be found, I think, in the general principle laid down by Turner, L. J., quoted in the preceding note under § 1299.

³ In a large portion of the states which have adopted the reformed procedure, it is held that the codes have not changed either of these conclusions, but the same rules prevail under the code: *Voorhis v. Childs's Ex'r*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 N. Y. 373; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Scholey v. Halsey*, 72 N. Y. 578; *Lane v. Doty*, 4 Barb. 530, 534; *Morehouse v. Ballou*, 16 Barb. 289; *Bentz v. Thurber*, 1 Thomp. & C. 645; *Livermore v. Bushnell*, 5 Hun, 285; *Yates v. Hoffman*, 5 Hun, 113; *Masten v. Blackwell*, 8 Hun, 313; *Maples v. Geller*, 1 Nev. 233, 237, 239; *Fowler v. Houston*, 1 Nev. 469, 472; *Lanier v. Irvine*, 24 Minn. 116; *Cairns v. O'Brien*, 40 Wis. 469; *Jones v. Estate of Keep*, 23 Wis. 45; *People v. Jenkins*, 17 Cal. 500; *Humphreys v. Crane*, 5 Cal. 173; *May v. Hanson*, 6 Cal. 642; but see *Bank of Stockton v. Howland*, 42 Cal. 129; *Barlow v. Scott's Adm'rs*, 12 Iowa, 63; *Pecker v. Cannon*, 11 Iowa, 20; *Marsh v. Goodrell*, 11 Iowa, 474; *Williams v. Scott's Adm'rs*, 11 Iowa, 475; *County of Wapello v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370; *Childs v. Hyde*, 10 Iowa, 294; 77 Am. Dec. 113 (these Iowa cases were decided prior to the Code of 1860). The rule and the foregoing decisions in New York seem to be abrogated by the new Code of Civil Procedure, sec. 758.

has been wholly abrogated; a legal action may be brought at once against the surviving joint debtors and the administrators or executors of the deceased.^{4 a}

§ 1302. **Death of a Joint Surety.**—The reasons of the equitable doctrine described in the last paragraph do not apply when the deceased joint debtor is a surety. It is therefore well settled, both at law and in equity, that where a principal debtor and a surety are jointly bound by the contract to the creditor, and the surety has received no benefit from the consideration, on the surety's death his liability is completely ended and gone. His estate is liable neither at law nor in equity.¹ This result only follows

⁴ *Braxton v. State*, 25 Ind. 82; *Eaton v. Burns*, 31 Ind. 390; *Voris v. State ex rel. Davis*, 47 Ind. 345, 349; *Myers v. State ex rel. McCray*, 47 Ind. 293, 297; *Hays v. Crutcher*, 54 Ind. 260; *Hudelson v. Armstrong*, 70 Ind. 99; *Owen v. State*, 25 Ind. 107; *Klussman v. Copeland*, 18 Ind. 306. In Indiana there is no express provision of the code, and the decision is based upon the general provisions abolishing the distinctions between legal and equitable actions concerning parties, and providing for a severance in the judgment. In *Braxton v. State*, *supra*, the action was against three survivors and the administrators of the deceased obligors on a bond. The court said: "It was manifestly the intent of the legislature in the adoption of these provisions to afford as far as possible a simple and direct means of bringing all the parties having an interest in the controversy before the court, and of settling all their rights in a single litigation, and thereby to avoid a multiplicity of suits." The same result was reached in Ohio, in *Burgoyne v. Ohio Life Ins. etc. Co.*, 5 Ohio St. 586, 587, per Ranney, C. J. I venture to express the opinion that these decisions are in complete accordance with the spirit and intent of the reformed procedure. In the following states the same result is reached by express provisions of the codes: Iowa: Code 1860, sec. 2764; Rev. 1873, sec. 2550; *Sellon v. Braden*, 13 Iowa, 365; Kentucky: Code, sec. 39; Missouri: Code, art. 1, sec. 7; Kansas: Gen. Stats. 1868, c. 21, secs. 1-4; New York: Code Civ. Proc. (new code), sec. 758. The same result follows from the provisions of the Georgia Code, although it does not adopt the reformed procedure: *Anderson v. Pollard*, 62 Ga. 46.

¹ *Simpson v. Field*, 2 Ch. Cas. 22; *Sumner v. Powell*, 2 Mer. 30; *Turn. & R.* 423; *Other v. Iveson*, 3 Drew. 177; *Richardson v. Horton*, 6 Beav. 185; *Jones v. Beach*, 2 De Gex, M. & G. 886; *Wilmer v. Currey*, 2 De Gex & S. 347; *Getty v. Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528; *Risley v. Brown*, 67 N. Y. 160; *Hauck v. Craighead*, 67 N. Y. 432; *Davis v. Van Buren*, 72 N. Y. 587, 588, 589; *Randall v. Sackett*, 77 N. Y. 480; *United States v. Price*, 9 How. 83, 92; *Harrison v. Field*, 2 Wash. (Va.) 136; *Pickersgill v. Lahens*, 15 Wall. 140; *Weaver v. Shryock*, 6 Serg. & R. 262, 264; *Waters's Rep's v. Riley's Adm'r*, 2 Har. & G. 305,

(a) See further, on the general subject of this paragraph, § 409, *ante*.

when the undertaking of the principal debtor and the surety is strictly joint. The very reasons on which it rests prevent it from applying where the undertaking is joint and several or several. It should be observed, however, that by suing all the debtors and obtaining a judgment the creditor might elect to treat a joint and several obligation as a strictly joint one.² Furthermore, the death of one of several co-sureties on a joint undertaking does not at all relieve his estate from the liability of contribution among the co-sureties.³

310; 18 Am. Dec. 302. In *Getty v. Binsse*, *supra*, one La Farge and one Lahens were joint makers of a note to plaintiff for fifteen thousand dollars, La Farge being surety. He was under no liability to the plaintiff irrespective of or prior to the making the note. He died, and this action in equity was brought against his executor, Binsse, to recover the amount of the note. The court said (p. 388): "It is a well-settled principle that in case of a joint obligation, if one of the obligors dies, his representatives are at law discharged, and the survivor alone can be sued: *Towers v. Moor*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Bradley v. Burwell*, 3 Denio, 61. It seems to be equally well settled that if the joint obligor so dying be a surety, not liable for the debt, irrespective of the joint obligation, his estate is absolutely discharged both at law and in equity, the survivor only being liable. In such a case, where the surety owed no debt outside and irrespective of the joint obligation, the contract is the measure and the limit of his obligation. He signs a joint contract, and incurs a joint liability, and no other. Dying prior to his co-maker, the liability all attaches to the survivor." In *United States v. Price*, *supra*, there was a *joint and several bond*, but judgment had been recovered against all the obligors, and afterwards the surety died. Held, that as the creditor had elected to treat the obligors as joint debtors, he could not now proceed in equity against the surety's estate. This rule and the whole doctrine of the common law upon which it is based seem to have been abrogated in New York by the new Code of Civil Procedure, sec. 758; but this legislation does not affect contracts made prior to its enactment: *Randall v. Sackett*, 77 N. Y. 480. In Indiana the rule given in the text has never been recognized at all: *Hudelson v. Armstrong*, 70 Ind. 99; *Voris v. State*, 47 Ind. 345, 349, 350; see also *Royal Ins. Co. v. Davies*, 40 Iowa, 469; 20 Am. Rep. 581.^a

² *United States v. Price*, 9 How. 83, 92.

³ *Dussol v. Bruguiera*, 50 Cal. 456. This decision is in entire accordance with the doctrine as settled by the English cases. If, therefore, one co-surety, either before or after the death, pays the debt, he is entitled to a contribution from the estate of the deceased co-surety.

(^a) It was held in *Richardson v. Draper*, 87 N. Y. 337, that where the surety received some incidental benefit from his obligation, his estate

should be held liable; as where he guaranteed the bonds of a corporation of whose stock he was the chief owner.

CHAPTER TENTH.

PERSONS NOT SUI JURIS.

SECTION I.

INFANTS.

ANALYSIS.

- § 1303. Questions stated.
- § 1304. Origin of the equitable jurisdiction over infants.
- § 1305. How jurisdiction is acquired; infant made a "ward of court."
- §§ 1306-1307. Extent of the jurisdiction.
- § 1306. Appointment of guardians.
- § 1307. Custody of infants; custody of parents, when controlled.
- §§ 1308-1310. How the jurisdiction is exercised.
- § 1308. Supervision of the guardian.
- § 1309. Management of property.
- § 1310. Marriage of infant ward.

§ 1303. Questions Stated.—I shall not in this chapter enter upon any discussion of the rights, powers, capacities, and liabilities of infants; nor shall I treat of the different kinds of guardians, their modes of appointment, their powers, duties, and liabilities.¹ I purpose merely to describe in a very brief manner the inherent original jurisdiction of equity, as a part of its general jurisprudence, and independent of the statutory legislation concerning the same subject-matters, over the persons and estates of infants, the general nature and extent of that jurisdiction, how it is acquired, and how and for what purposes it is exercised.² In England this particular jurisdiction is one

¹ The general jurisdiction of equity over all guardians as fiduciary persons, for the purpose of compelling them to account, has already been stated: *Ante*, § 1097.

² Throughout the United States the modes of appointing guardians, and their rights, powers, and duties, are generally regulated, and in many states very minutely regulated, by statutes. A special, and often complete, statu-

of the most important branches of the equity jurisprudence, and hardly any other is more frequently exercised by the courts of chancery. In this country, by reason of statutory legislation, it is relatively of much less importance.³

§ 1304. *Origin of This Equitable Jurisdiction.*— It is also wholly unnecessary to enter upon any discussion of the mooted questions as to the origin of the jurisdiction. It may, in its very inception, have belonged to the king as a part of his executive power as *parens patriæ* to protect his subjects, and may by him have been transferred to the court of chancery. It is, however, firmly established as a judicial function of the court; it does not belong to the chancellor alone as the personal delegate and representative of the crown; it is exercised by all the judges composing the court of chancery, in the same manner, and governed by the same regulations, as all other confessedly judicial functions.¹ The same inherent jurisdiction is pos-

tory jurisdiction over them is given to the probate courts, under whatever name, as a part of the general statutory system for the administration and settlement of decedents' estates. In this manner, the original jurisdiction of equity, like that over administrations, has been to a great extent superseded, and in some states probably abrogated, by the special statutory system. On the other hand, as to all matters not included within the statutes, and in many states concurrently with this statutory system, the original equity jurisdiction over infants, like that over administrations, still remains in full force, to be exercised whenever occasion calls for its being set in motion. The very recent American decisions illustrating this original jurisdiction are undoubtedly few; but they are sufficient to show that it has not been generally abrogated nor become entirely obsolete.

³ For a full and detailed discussion of the jurisdiction in all its phases, see the English and American notes to *Eyre v. Countess of Shaftsbury*, 2 Lead. Cas. Eq., 4th Am. ed., 1416, 1446, 1487.

¹ Although the theory that the jurisdiction had its origin in the king's power as *parens patriæ* has been accepted by many of the English judges, and has been constantly repeated by text-writers, English and American, there seem to be almost insuperable difficulties involved in it, and it has been rejected by some of the ablest English jurists. In this country, according to our system of government, the power of *parens patriæ* belongs exclusively to the legislature of each state, and is not possessed by the courts. With regard to the nature and origin of the jurisdiction, see *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; 2 Lead. Cas. Eq., 4th Am. ed., 1416, 1446,

sessed, although not exercised so freely and minutely, by the American courts, unless curtailed or taken away by statute,—a fact very difficult of explanation, on the assumption that the jurisdiction is a part of the executive functions of the crown.^{2 a}

§ 1305. How Acquired.—In order that the jurisdiction may be acquired in any particular case, the infant must be made a “ward of the court.” He thus becomes a ward of the court whenever he is brought before the court for any purpose, as a party plaintiff or defendant to a suit, petition, order, application, or any other proceeding.^{1 a} It has sometimes been said that the infant must have property, in order that he may be a ward of the court and the jurisdiction may attach to him. This is inaccurate.

1487; *Cary v. Bertie*, 2 Vern. 333, 342; *Morgan v. Dillon*, 9 Mod. 135, 139; *Butler v. Freeman*, Amb. 301; *De Manneville v. De Manneville*, 10 Ves. 52, 63; *Ex parte Phillips*, 19 Ves. 118, 122; *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 20, 21; *Wellesley v. Wellesley*, 2 Bligh, N. S., 124, 129, 136, 142.

² *Williamson v. Berry*, 8 How. 495; 12 L. ed. 1170; In the Matter of Hubbard, 82 N. Y. 90, 92; *Wilcox v. Wilcox*, 14 N. Y. 575; *Aymar v. Roff*, 3 Johns. Ch. 49; *Matter of Andrews*, 1 Johns. Ch. 99; *Ex parte Crumb*, 2 Johns. Ch. 439; *Matter of Wollstonecraft*, 4 Johns. Ch. 80; *Wood v. Wood*, 5 Paige, 596, 605; 28 Am. Dec. 451; *People v. Wilcox*, 22 Barb. 178; *Matter of Clifton*, 47 How. Pr. 172; *State v. Stigall*, 22 N. J. L. 286, 289; *State v. Baird*, 18 N. J. Eq. 194; 21 N. J. Eq. 384, 387; In re Harrall, 31 N. J. Eq. 101; *Downin v. Sprecher*, 35 Md. 474; *Armstrong v. Stone*, 9 Gratt. 102, 106; *Hutson v. Townsend*, 6 Rich. Eq. 249; *Striplin v. Ware*, 36 Ala. 87; *Goodman v. Winter*, 64 Ala. 410; 38 Am. Rep. 13; *Johns v. Smith*, 56 Miss. 727; *Cowls v. Cowls*, 3 Gilm. 435; 44 Am. Dec. 708; *Miner v. Miner*, 11 Ill. 43; *Lynch v. Rotan*, 39 Ill. 14; *McCord v. Ochiltree*, 8 Blackf. 15; *Garner v. Gordon*, 41 Ind. 92; *Maguire v. Maguire*, 7 Dana, 181; *Gardenhire v. Hinds*, 1 Head, 402.

¹ *Butler v. Freeman*, Amb. 301; *Williamson v. Berry*, 8 How. 495, 531; 12 L. ed. 1170. A suit is not necessary; any proceeding or application relating directly to the infant is sufficient: In re Graham, L. R. 10 Eq. 530; In re Hodge's Settlement, 3 Kay & J. 213. The infant must be a ward of the court: In re Potter, L. R. 7 Eq. 484.

§ 1304, (a) See, also, *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455; *Lake v. McDavitt*, 13 Lea. 26.

§ 1305, (a) The text is cited to this effect in *McGowan v. Lufborrow*, 82 Ga. 523, 14 Am. St. Rep. 178, 9

S. E. 427. See, also, *Lloyd v. Kirkwood*, 112 Ill. 329 (the court should see that the proper pleadings are made to present any defense the infant may have).

Property is not essential to the *existence* of the jurisdiction; it is, at most, a requisite to the *exercise* of the jurisdiction, since without it the powers of the court could not be fully enforced.^{2 b} Although the existence of property belonging to the infant must therefore be generally alleged, it is a clear deduction from the cases that the allegation is mainly formal; the amount of property is certainly immaterial; and it seems that the allegation cannot be questioned, nor the fact of property as alleged denied, for the purpose of defeating the jurisdiction.³

§ 1306. Its Extent — Appointment of Guardians.— The jurisdiction having thus attached, we may next inquire as to its extent, or what acts may be done in virtue of it. In the first place, it is a firmly settled doctrine that the court of equity can and will appoint a guardian of the person and estate of the infant, when there is no other guardian, or none who will or can act.¹ This is ordinarily the first

² This view is laid down by Lord Eldon with more than his usual directness, in *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 21: "It is not, however, from any want of jurisdiction that it [the court] does not act where it has no property of an infant, but from want of the means to *exercise* its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so,—that is to say, by its having the means of applying property for the use and maintenance of the infants."

³ That the allegation is formal results from the fact that the jurisdiction will be exercised although the property is in another country, wholly beyond the reach of the courts. Some of the American cases seem to have gone to the length of sustaining and exercising the jurisdiction where it affirmatively appeared that the infant had no property: *Johnstone v. Beattie*, 10 Clark & F. 42; *Cowls v. Cowls*, 3 Gilm. 435; 44 Am. Dec. 708; *Maguire v. Maguire*, 7 Dana, 181.

¹ This power to appoint guardians exists in the American states, so far as it has not been taken away or restricted by statute: *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Wellesley v. Wellesley*, 2 Bligh, N. S., 124; *In re Kaye*, L. R. 1 Ch. 387; *Wilcox v. Wilcox*, 14 N. Y. 575; *In the Matter of Hubbard*,

(b) *In re McGrath*, [1892] 2 Ch. 496, [1893] 1 Ch. 143, citing, also, *In re Spence*, 2 Ph. 247, 252; *Brown v. Collins*, 25 Ch. Div. 56, 60; *In re Scanlan*, 40 Ch. Div. 200; *In re*

Nevin, [1891] 2 Ch. 299. But the jurisdiction in such cases is limited to the removal of one guardian and the appointment of another: *In re McGrath*, [1893] 1 Ch. 143, 147.

step which is taken, and the further control of the infant's person or property is usually exerted upon and through this guardian. The power can of necessity only be exercised in respect of persons or property within the territorial jurisdiction of the court, — that is, within the state or country, — but the jurisdiction does not depend upon the legal *domicile* of the infant. It is sufficient to authorize the appointment of a guardian if the infant is *an actual resident* within the territorial jurisdiction of the court, — that is, within the state, although his property is wholly within another state or country, and even though his legal domicile is elsewhere.² On the other hand, where the infant is both domiciled and actually resident out of the state, but has property within the state, the courts of that state have power to appoint a guardian over the property, and for the maintenance of the infant.³ If, however, the infant is neither domiciled nor actually resident in the state, and has no property within its territory, the courts of that state have no power to appoint a guardian; there is manifestly no foundation for the exercise of the jurisdiction.⁴ Finally, where an infant domiciled and resident out of the state has been clandestinely and surreptitiously brought within the state for the purpose of giving jurisdiction, the court refuses to exercise its jurisdiction and to appoint a guardian for such infant.⁵

82 N. Y. 90, 92; *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451; In the Matter of Wollstonecraft, 4 Johns. Ch. 80; *Miner v. Miner*, 11 Ill. 43; *Maguire v. Maguire*, 7 Dana, 181.^a

² *Johnstone v. Beattie*, 10 Clark & F. 42; an infant was domiciled in Scotland, and all her property was situated there, she having none in England; but she was at the time a resident of England, and it was held that the court of chancery had jurisdiction to appoint her guardian. And see *Nugent v. Vetzera*, L. R. 2 Eq. 704.

³ *Logan v. Fairlee*, Jacob, 193; *Stephens v. James*, 1 Mylne & K. 627; *Salles v. Savignon*, 6 Ves. 572; *Hope v. Hope*, 4 De Gex, M. & G. 328 (over infants resident abroad).

⁴ In the Matter of Hubbard, 82 N. Y. 90, 93.

⁵ In the Matter of Hubbard, 82 N. Y. 90, 95; and see *Smith v. Meyers*, 1 Thomp. & C. 665; *Carpenter v. Spooner*, 2 Sand. 717; In the Matter of La-

(a) See, also, *Lake v. McDavitt*, 13 Lea 26.

§ 1307. **The Same. Custody of Infants.**—In addition to its power to appoint guardians, the court of equity will also exercise its jurisdiction, in a proper case, and to promote the highest welfare of the infant, where there is already a guardian, natural or legal, by controlling the *person* of the infant, and by removing it personally from the custody of its natural or legal guardian, even from the custody of its own parents. By the common law, as well as by the law of nature, the father is the natural guardian of his infant children. It is not only the father's right, but his imperative *duty*, to have custody of the persons of his infant children, and to educate and train them so as to promote their future well-being as members of society. The equitable jurisdiction over the persons of infants is based upon this parental duty, and is an indirect means of enforcing it by furnishing a remedy for its violation. The jurisdiction is a delicate one; it rests in the highest degree upon the enlightened discretion of the court, and will only be exercised when plainly demanded as the means of securing the infant's present and future well-being. It is well settled, therefore, that a court of equity may interfere on behalf of infants, and remove them from the custody and control of their father or mother, whenever the habits, practices, instruction, or example of the parent, exerting a personal influence on the infants, tend to corrupt their morals and undermine their principles; or when the parent is neglecting their education suitable for their condition in life; or is endangering their property; or is guilty of ill-treatment or cruelty towards them.¹ The court.

grave, 45 How. Pr. 301, 305; *a fortiori* this is so, where the infant is brought into the state by force. As to the court allowing or compelling the removal of an infant out of its jurisdiction, see *Dawson v. Jay*, 3 De Gex, M. & G. 764.^b

¹ I shall not enter upon any discussion of the particular circumstances which do or do not warrant the court in thus interfering; much less examine the respective rights of the father and the mother to the custody of their children. In this country the tendency of the decisions, and especially of

(^b) See, also, *Elliott v. Lambert*, need not be shown, if it is for the benefit of the infant).
28 Ch. Div. 186 (case of necessity)

will, of course, under like circumstances, remove infants from the custody of a legal or appointed guardian. When infants are thus removed from the control of their parent or their legal guardian, the court does not generally ap-

the modern statutes, is to place the mother's rights upon an equality with those of the father. My only purpose is to cite authorities establishing the jurisdiction; but these very cases will disclose the circumstances which call for its exercise. There is one fundamental rule, viz., that the exercise of the jurisdiction depends upon the sound and enlightened discretion of the court, and has for its sole object the highest well-being of the infant; it should never, therefore, be influenced by any *sentimental* considerations in behalf of either the mother or the father: *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *sub nom.* *Wellesley v. Wellesley*, 2 Bligh, N. S., 124 (the facts of this case are simply astounding); *Shelley v. Westbrook*, Jacob, 266, note; *De Manneville v. De Manneville*, 10 Ves. 52, 62; *Whitfield v. Hales*, 12 Ves. 492; *Creuzé v. Hunter*, 2 Cox, 242; *Kiffin v. Kiffin*, cited 1 P. Wms. 705; *Warde v. Warde*, 2 Phill. Ch. 786; *Anonymous*, 2 Sim., N. S., 54; *Thomas v. Roberts*, 3 De Gex & S. 758; *In re Besant*, L. R. 11 Ch. Div. 508 (children removed from mother's custody); *Hope v. Hope*, 4 De Gex, M. & G. 328; *Swift v. Swift*, 4 De Gex, J. & S. 710; *Matter of Waldron*, 13 Johns. 418; *People v. Mercein*, 8 Paige, 47; 25 Wend. 64.^a

Mere insolvency of the father is not sufficient ground for interference; there must be further circumstances hazarding the infant's property: *In re Fynn*, 2 De Gex & S. 457; see *Kiffin v. Kiffin*, cited 1 P. Wms. 705.

Also, the mere fact that the *father's* conduct is even grossly immoral, even though he is living in adultery, but where his children are not brought into contact with it, and are not subjected to the injurious influence of its example, is not a sufficient ground for removing them from his custody. This jurisdiction is not designed merely as a punishment for the immoral practices of the father, but *solely* as a protection for the well-being of infants:

(^a) See, also, *Agar-Ellis v. Lascelles*, 24 Ch. Div. 317 (the court will not interfere with the father in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of court, out of the jurisdiction without the consent of the court); *In re Elderton*, 25 Ch. Div. 220 (custody of children given to the mother); *Smart v. Smart*, [1892] App. Cas. (Priv. Coun.) 425; *F. v. F.*, [1902] 1 Ch. 688 (from consideration of child's welfare, court removed

child's appointed guardian because of latter's change of religion merely); *Richards v. Collins*, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831; *Heinemann's Appeal*, 96 Pa. St. 112, 42 Am. Rep. 532. Some American courts have gone to an extraordinary length in disregarding the wishes of parents who were admittedly competent and suitable persons, out of supposed considerations of the children's welfare: See, for illustration, *Washaw v. Gimble*, 50 Ark. 355, 7 S. W. 389 (an incredible judicial outrage); *Sturtevant v. State*, 15 Nebr. 459, 48 Am. Rep. 349, 19 N. W. 617.

point another regular guardian; it places them in the custody of a suitable person *as an acting guardian*.²

§ 1308. How Exercised — Supervision of the Guardian.— An infant having been made a ward of the court, and a guardian being appointed, the further jurisdiction concerning the ward is ordinarily exercised by supervising, directing, and controlling the acts of the guardian in the management of his trust. The supervision and control may be summed up as directed chiefly to three distinct matters: 1. The intellectual, moral, and religious training of the ward; 2. The protection and management of his property, including his maintenance; 3. His marriage. *Education of the ward*: While the court will undoubtedly require the infant to be suitably educated according to his prospects and condition, the manner and course of the education and all its details are left to the judgment and discretion of the guardian, and the ward will be compelled to comply with his guardian's decision.¹ The English courts exercise some supervision over the religious training of the ward, acting upon the *general* rule that the ward should be brought up in the religious beliefs, opinions, and practices of his father. This general rule is subject to modification, however, under the particular circumstances of individual cases.²

Ball v. Ball, 2 Sim. 35; and see State v. Baird, 21 N. J. Eq. 384; Commonwealth v. Addicks, 5 Binn. 520; 2 Serg. & R. 174.

Whatever may be true of fathers, this particular rule certainly should not be applied to a mother guilty of such immorality; for the supposition that her infant children could not be contaminated would simply be impossible and absurd. I doubt whether any American court, at the present day, would remove infants from the custody of their father because his opinions and teachings were irreligious, skeptical, or even atheistical, unless they were also positively immoral.

§ 1307, 2 Ex parte Mountfort, 15 Ves. 445.

§ 1308, 1 Hall v. Hall, 3 Atk. 721; Tremain's Case, 1 Strange, 168; Hope v. Hope, 4 De Gex, M. & G. 328.

§ 1308, 2 Under what circumstances the religious beliefs of the father may be departed from appears from some of the cases here cited. It is well settled, however, that a guardian is not necessarily bound to bring up his ward in the tenets of the established church of England: See Talbot v. Earl of Shrewsbury, 4 Mylne & C. 672; Austin v. Austin, 34 Beav. 257; 4 De Gex, J.

§ 1309. **The Same. Management of Property.**—The court will exercise a constant supervision over the guardian in the management of the ward's property. The guardian not only may, but must, use a sound discretion in applying a reasonable amount of the income, or even, if necessary, of the principal, of the personal estate for the maintenance and education of the infant in a manner suitable to his prospects and condition.¹ Independently of statute, the

& S. 716; *Stourton v. Stourton*, 8 De Gex, M. & G. 760; *In re Newbery*, L. R. 1 Ch. 263; 1 Eq. 431; *Hawksworth v. Hawksworth*, L. R. 6 Ch. 539, 543, 544; *Andrews v. Salt*, L. R. 8 Ch. 622; *In re Agar-Ellis*, L. R. 10 Ch. Div. 49; *In re Besant*, L. R. 11 Ch. Div. 508.^a

¹The amount allowed for maintenance will depend upon the circumstances of each case: See *Pierpoint v. Lord Cheney*, 1 P. Wms. 488; *Bradshaw v. Bradshaw*, 1 Jacob & W. 647; *Heysham v. Heysham*, 1 Cox, 179; *Brown v. Smith*, L. R. 10 Ch. Div. 377; *In the Matter of Bostwick*, 4 Johns. Ch. 100.^a

A father is, in general, bound to maintain his infant children. Where the infants have property of their own, an allowance out of it for their maintenance will not, therefore, be ordinarily allowed, even though there is a provision for their maintenance in the will or deed conferring the property; the father, if able, must maintain them out of his own estate: *Stocken v. Stocken*, 4 Mylne & C. 95, 98; *Meacher v. Young*, 2 Mylne & K. 490; *Ransome v. Burgess*, L. R. 3 Eq. 773.^b

There is an exception to this general rule; where the father's means are so small that he is unable to defray the cost of an education suitable to their prospects, an allowance for their maintenance will be made to him out of *their* estate: *Buckworth v. Buckworth*, 1 Cox, 80; *Wright v. Vanderplank*,

§ 1308, (a) This subject has received much attention from the English courts in recent years. In the following cases the religion of the father was followed: *In re Montague*, 28 Ch. Div. 82; *In re Scanlan*, 40 Ch. Div. 200; *In re Nevin*, [1891] 2 Ch. 299 (notwithstanding his agreement with the deceased mother that the children should be brought up in her religion); *F. v. F.*, [1902] 1 Ch. 688 (Protestant child's guardian, who had become Catholic, removed). In the following cases the father was held to have abandoned his right to have the children brought up in his own faith: *In re Clarke*, 21 Ch. Div.

817; *In re McGrath*, [1892] 2 Ch. 496, [1893] 1 Ch. 143; *In re Newton*, [1896] 1 Ch. 740.

§ 1309, (a) See, also, *Jenkins v. Whyte*, 62 Md. 427; *Pitts v. Rhode Island Hospital Trust Co.*, 21 R. I. 544, 79 Am. St. Rep. 821, 45 Atl. 553, 48 L. R. A. 783 (allowance made, though will directed an accumulation of income); as to allowance for past maintenance, *Hyland v. Baxter*, 98 N. Y. 610.

§ 1309, (b) See, also, *National Valley Bank v. Hancock*, 100 Va. 101, 107, 93 Am. St. Rep. 933, 938, 57 L. R. A. 729, 40 S. E. 611, and cases cited.

control of the guardian extends only to the personal estate, and the rents and profits of the real estate, and not to the *corpus* of the land. He is not, in general, permitted to change the nature of the property, as by turning personal into real estate; although this may be allowed by the court, when, under the circumstances, it appears to be for the benefit of the infant ward.² It seems to be a doctrine sustained by a preponderance of authority, that a court of equity has no power, as a part of its jurisdiction over infants, to order a sale of the infant's real estate for purpose of maintenance, education, or investment.³ The

8 De Gex, M. & G. 133; *Havelock v. Havelock*, L. R. 17 Ch. Div. 807.^c Also, where the property is not given to the infants simply with a direction for their maintenance, but is conveyed upon an express *trust* for their maintenance, then it must be so applied, irrespective of their father's ability to support and educate them:^d *Thompson v. Griffin*, Craig & P. 317, 320; *In re Dalton*, 1 De Gex, M. & G. 265; *Ransome v. Burgess*, L. R. 3 Eq. 773; *In re Hodges*, L. R. 7 Ch. Div. 754; *In re Roper's Trusts*, L. R. 11 Ch. Div. 272.

² See *Ex parte Grimstone*, 4 Brown Ch. 235, note; Amb. 708; *Vernon v. Vernon*, cited 1 Ves. 456; *Ex parte Phillips*, 19 Ves. 118, 122; *Frith v. Cameron*, L. R. 12 Eq. 169; *De Witte v. Palin*, L. R. 14 Eq. 251; *Marquis of Camden v. Murray*, L. R. 16 Ch. Div. 161. The reason why such change of property is not permitted is, that the rights of the ward's successors — heirs or next of kin — would thereby be entirely altered if the infant should die under age. In order to preserve these rights, when a conversion was allowed, the court required a declaration that the resulting property should continue to be of its original nature; e. g., if money was invested in land, that it should continue to be personal property: See *Ware v. Polhill*, 11 Ves. 257, 278; *Ex parte Phillips*, 19 Ves. 118, 122; *Lord Ashburton v. Lady Ashburton*, 6 Ves. 6; *Steed v. Preece*, L. R. 18 Eq. 192; *Kelland v. Fulford*, L. R. 6 Ch. Div. 491.

³ *Williamson v. Berry*, 8 How. 495, 531; *Rogers v. Dill*, 6 Hill, 415; *Faulkner v. Davis*, 18 Gratt. 651; 98 Am. Dec. 698; *Kearney v. Vaughan*, 50 Mo. 284; *per contra*, *Goodman v. Winter*, 64 Ala. 410; 38 Am. Rep. 13

(c) See, also, *Stephens v. Howard*, 32 N. J. Eq. 244, and cases cited. That the mother may have an allowance out of the estate of the child for its past maintenance, see *Pierce v. Pierce*, 64 Wis. 73, 54 Am. Rep. 581, 24 N. W. 498, and cases cited; *In re Besondy*, 32 Minn. 385, 50 Am. Rep. 579, 20 N. W. 366.

(d) Quoted, *National Valley Bank*

v. Hancock, 100 Va. 101, 107, 108, 40 S. E. 611, 93 Am. St. Rep. 933, 938, 57 L. R. A. 728.

(e) The text is quoted in *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 48 Am. St. Rep. 662, 38 Pac. 224; cited with approval in *Messner v. Giddings*, 65 Tex. 301 (reviewing the cases). *Contra*, see *Thorington v. Thorington*, 82 Ala.

powers and duties of guardians in their management of the property of infant wards, and the powers of courts to direct a sale of their lands, are so much regulated by statutes in the various states, that these general rules of the purely equitable jurisdiction can have little practical application throughout the United States.¹

§ 1310. **Marriage.**—The English courts of equity exercise a very strict and stern control over the marriage of their infant wards. This special phase of the jurisdiction is based upon the notion that a suitable settlement should always accompany a marriage; and especially that the property of the wife, when she is the ward, should be settled to her sole and separate use. The marriage of an infant ward, even where the parents are living, must receive the approval and sanction of the court. An apprehended marriage, of which the court does not approve, will be restrained by injunction. A marriage of an infant ward without obtaining the consent of the court is a gross contempt, and will be punished as such, although the marriage itself cannot be avoided. If an infant female ward is thus married, the husband and all who aided in pro-

(a court of chancery has inherent power to order a sale of infants' real estate); and see *Sharp v. Findley*, 59 Ga. 722; *Bulow v. Witte*, 3 S. C. 308; *Huger v. Huger*, 3 Desaus. Eq. 18.

489, 1 South. 716; *Hale v. Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, and cases cited (an important case); *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455. That the court may direct the infant's estate to be mortgaged to secure money for necessary repairs, see *In re Jackson*, 21 Ch. Div. 786. In *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 48 Am. St. Rep. 662, 38 Pac. 224, the court, while conceding the correctness of the author's statement above, held that authority to direct a mortgage of the estate for the purpose of avoiding foreclosure

of an existing mortgage could be found in a statute authorizing the guardian to "safely keep the property of the ward, to maintain the same, and to deliver it to his ward at the close of his guardianship in as good condition as he received it." A mortgage for such a purpose does not seem to contravene the spirit of the rule as defined by the English case just cited.

(f) The text is quoted in *Northwestern Guaranty Loan Co. v. Smith*, 15 Mont. 101, 48 Am. St. Rep. 662, 38 Pac. 224.

curing it may be punished by fine and imprisonment; and the husband will be compelled to execute a settlement on his wife, to be approved by the court, even though the wife should expressly waive her right to such settlement.¹ This control over the marriage of wards, if it ever existed in theory, has become practically obsolete in the American states; it is not in harmony with our social habits, customs, and modes of thought.

SECTION II.

PERSONS OF UNSOUND MIND.

ANALYSIS.

- § 1311. Origin of this jurisdiction.
- § 1312. Mode of exercising the jurisdiction in England.
- § 1313. Jurisdiction in the United States.
- § 1314. Jurisdiction in cases of weak or unsound mind.

§ 1311. Origin of This Jurisdiction.—Whatever be the correct theory with respect to the jurisdiction over infants, it is absolutely certain that the corresponding jurisdiction over the person and property of lunatics and idiots, and all others who may be adjudicated *non compotes mentis*, was derived by delegation from the crown; it was a portion of the king's executive power as *parens patriæ*, and did

¹ Although this subject is of great practical importance in England, and the decisions are numerous, I have not deemed it necessary to enter upon any detailed discussion or classification of the cases; for there is no evidence that any such jurisdiction is exercised at the present day by the American courts: See *Smith v. Smith*, 3 Atk. 304; *Ex parte Mitchell*, 2 Atk. 173; *More v. More*, 2 Atk. 157; *Herbert's Case*, 3 P. Wms. 115; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; 2 *Lead. Cas. Eq.* 1416; *Lord Raymond's Case*, *Cas. t. Talb.* 58; *Tombes v. Elers*, 1 *Dick.* 88; *Pearce v. Crutchfield*, 14 *Ves.* 206; *Leeds v. Barnardiston*, 4 *Sim.* 538; *Ball v. Coutts*, 1 *Ves. & B.* 292, 303; *Wortham v. Pemberton*, 1 *De Gex & S.* 644; *Field v. Moore*, 7 *De Gex, M. & G.* 691; *Martin v. Foster*, 7 *De Gex, M. & G.* 98; *Att'y-Gen. v. Read*, *L. R.* 12 *Eq.* 38; *White v. Herrick*, *L. R.* 4 *Ch.* 345; *Shipway v. Ball*, *L. R.* 16 *Ch. Div.* 376.^a

(a) *Buckmaster v. Buckmaster*, 33 *Ch. Div.* 482; *Bolton v. Bolton*, [1891] 3 *Ch.* 270.

not belong to the court of chancery by virtue of its inherent and general judicial functions. This branch of the regal authority was delegated to the chancellor as the personal representative of the crown, by means of an official instrument called the Sign Manual, signed by the king's own signature, and sealed with his own privy seal, and was exercised by the chancellor alone, and not by the court of chancery.^{1 a} After this special jurisdiction had thus been exercised in any particular case, by adjudicating an individual to be a lunatic, and by appointing a committee of his person and property, a further jurisdiction then arose in the *court of chancery* to supervise and control the official conduct of the committee;^b but this supplementary jurisdiction of the *court* seems to have been a part of its general authority over trusts, trustees, and fiduciary persons.² The jurisdiction in matters of lunacy and all the proceedings thereon in England are now regulated by statute.³

¹ Ex parte Grimstone, Amb. 706; 4 Brown Ch. 235, note; Eyre v. Countess of Shaftsbury, 2 P. Wms. 103, 118, 119; Dormer's Case, 2 P. Wms. 265; Cary v. Bertie, 2 Vern. 333, 342, 343; Wigg v. Tiler, 2 Dick. 552; Ex parte Degge, 4 Brown Ch. 235, note; Oxenden v. Lord Compton, 2 Ves. 69, 71; Ex parte Chumley, 1 Ves. 296; Ex parte Baker, 6 Ves. 8; Ex parte Phillips, 19 Ves. 118, 122; Ex parte Pickard, 3 Ves. & B. 127; Lysaght v. Royse, 2 Schoales & L. 151, 153; In re Fitzgerald, 2 Schoales & L. 432; In the Matter of Webb, 2 Phill. Ch. 10; Gillbee v. Gillbee, 1 Phill. Ch. 121; In the Matter of Barker, 2 Johns. Ch. 232, 234.

² Ibid.; In re Fitzgerald, 2 Schoales & L. 432, 438; Nelson v. Duncombe, 9 Beav. 211; In re Blewitt, 6 De Gex, M. & G. 187. As to maintenance, see In re Sanderson's Trust, 3 Kay & J. 497; In re Baker's Trusts, L. R. 13 Eq. 168; In re Gibson, L. R. 7 Ch. 52; In re Wynne, L. R. 7 Ch. 229; In re Evans, L. R. 21 Ch. Div. 297; Ex parte Whitbread, 2 Mer. 99, 102; In re Blair, 1 Mylne & C. 300, 302; In re Frost, L. R. 5 Ch. 699; In re Weaver, L. R. 21 Ch. Div. 615; In re Leeming, 3 De Gex, F. & J. 43; In re Wharton, 5 De Gex, M. & G. 33.^c

³ See 16 & 17 Vict., c. 70; 18 & 19 Vict., c. 13; 25 & 26 Vict., c. 86.^d

(a) The text is quoted in Hamilton v. Traber, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229.

(b) The text is quoted in Hamilton v. Traber, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229.

(c) *Lunatic's maintenance*.—See, also, Rhodes v. Rhodes, 44 Ch. Div.

94; In re Plenderleith, [1893] 3 Ch. 332 (creditors not paid until lunatic is provided for); In re Winkle, [1894] 2 Ch. 519 (same, when receiver of property has been appointed).

(d) Also, Lunacy Act of 1890, 53 & 54 Vict., c. 5.

§ 1312. *Mode of Exercising Jurisdiction in England.*— The proceedings in which this jurisdiction is exercised are substantially as follows: Some friend of the alleged lunatic addresses a petition to the chancellor personally, or other judge in lunacy; a special commission is thereupon issued, directing a judicial inquisition of the alleged lunacy, which inquisition is made by means of a jury, — a regular trial of the issues before a jury; their finding or verdict, so long as it stands unimpeached, and the inquisition is not superseded, is conclusive as to the *status* of the party. Upon the return of the commission and inquisition, if the party is found to be a lunatic, the chancellor or judge in lunacy appoints a committee in the nature of a guardian over the person and property of the lunatic. This committee, in his character as trustee, is, of course, under the supervision and control of the court of chancery. The scope of these proceedings has been enlarged by modern statutes, so that it embraces persons who are not strictly lunatics or idiots, but who are *non compotes mentis*, and therefore incapable of managing their property.¹

§ 1313. *Jurisdiction in the United States.*— It necessarily follows from its origin that this special jurisdiction over the persons and property of lunatics is not generally possessed by the courts of equity in the United States as a part of the original inherent equitable jurisdiction.¹ There are a few apparent exceptions, but these exceptions in reality only confirm the truth of my statement. In a very few states the constitutions or statutes, in their general grants of jurisdiction to courts of equity, confer jurisdiction over lunatics, idiots, and persons *non compotes mentis*.² The

§ 1312, ¹ See *Sherwood v. Sanderson*, 19 Ves. 280, 285; *Ex parte Cranmer*, 12 Ves. 445; *Gibson v. Jeyes*, 6 Ves. 266, 273; *Ridgeway v. Darwin*, 8 Ves. 65; *In re Webb*, 2 Phill. Ch. 10; *Lysaght v. Royse*, 2 Schoales & L. 151, 153; *In re Fitzgerald*, 2 Schoales & L. 432, 438; *In re Monaghan*, 3 Jones & L. 258.

§ 1313, ¹ See *Dowell v. Jacks*, 5 Jones Eq. 417.

§ 1313, ² In these states, therefore, the jurisdiction is wholly statutory, and is not included in the general powers belonging to the courts *as courts of equity*, — powers inherited from the English court of chancery. Among these states are Pennsylvania, Tennessee, Mississippi: See *ante*, vol. 1, §§ 284–286, in notes.

powers of the American courts are conferred and regulated by statutes.³ While there is much variety of detail in this legislation, the proceedings authorized by it, in all their substantial features, resemble those of the English court, as described in the last preceding paragraph. They extend not only to lunatics and idiots, but to confirmed drunkards, and other persons who are so *non compotes mentis* that they are incapable of managing their own affairs.⁴ When the special statutory jurisdiction has been exercised, a person has been adjudged or "found" a lunatic or otherwise *non compos mentis*, and a committee or guardian has been appointed, the general jurisdiction of equity extends over such committee or guardian, for the purpose of calling him to an account of his trust, in the same manner as over all other strictly fiduciary persons.⁵

§ 1314. Jurisdiction in Cases of Weak or Unsound Mind.—The special jurisdiction above described is confined to per-

³ In some states the power is not given exclusively to courts of equitable jurisdiction.

⁴ Ample opportunities are provided for reviewing the finding, and for setting aside or superseding the inquisition. In some states the court seems to have power to direct a new inquisition in a summary manner. As illustrations, see *Matter of Barker*, 2 Johns. Ch. 232, 234; *In re Lasher*, 2 Barb. Ch. 97; *In re Dickie*, 7 Abb. N. C. 417; *Hirsch v. Trainer*, 3 Abb. N. C. 274; *In re McAdams*, 19 Hun, 292; *In re Zimmer*, 15 Hun, 214; *In re Page*, 7 Daly, 155; *Matter of Colah*, 6 Daly, 308; *In re Collins*, 18 N. J. Eq. 253; *In re Hill*, 31 N. J. Eq. 203; *In re Fitzgerald*, 30 N. J. Eq. 59; *In re Conover*, 28 N. J. Eq. 330; *In re Lawrence*, 28 N. J. Eq. 331; *Dean's Appeal*, 90 Pa. St. 106; *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470; *Dowell v. Jacks*, 5 Jones Eq. 417; *Walker v. Russell*, 10 S. C. 82; *Morton v. Sims*, 64 Ga. 298; *Gray v. Obear*, 59 Ga. 675; *Watson's Interdiction*, 31 La. Ann. 757; *Francke v. His Wife*, 29 La. Ann. 302; *Ex parte Dozier*, 4 Baxt. 81; *Cuneo v. Bessoni*, 63 Ind. 524; *Meharry v. Meharry*, 59 Ind. 257.^a

⁵ See *ante*, § 1097, and cases cited in note; *In re Harrall*, 31 N. J. Eq. 101.

(a) See, also, *Ashley v. Holman*, 15 S. C. 97; *In re Harris*, 7 Del. Ch. 42, 28 Atl. 329 (injunction to restrain alleged insane person from dealing with his estate pending the inquisition); *Equitable Trust Co. v. Garis*, 190 Pa. St. 544, 70 Am. St. Rep. 644, 42 Atl. 1022 (as to lunatic's maintenance); *Whetstone v. Whetstone's Ex'rs*, 75 Ala. 495, 506

(citing the text). For a brief historical sketch of the jurisdiction and procedure both in England and in New York, see the opinion of Vann, J., in *Hughes v. Jones*, 116 N. Y. 75, 15 Am. St. Rep. 386, 22 N. E. 446, 5 L. R. A. 632; in Maryland, see *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258, 27 Atl. 229.

sons who may be and are adjudicated or found to be lunatics, idiots, or *non compotes mentis*. The very first step, in order that the court may, through a committee, control the person and property of the particular individual is a proceeding by which he is judicially determined to belong to the *status* of lunatics or *non compos mentis*. In addition to this peculiar authority, a court of equity may, in appropriate cases, in pursuance of its inherent general powers, protect the property of persons of weak or unsound mind, who have not been and who even cannot be judicially "found" *non compotes mentis*.¹ These two

¹ In *Beall v. Smith*, L. R. 9 Ch. 85, 91, James, L. J., said: "The law of the court of chancery undoubtedly is, that in certain cases where there is a person of unsound mind, not found so by inquisition, and therefore incapable of invoking the protection of the court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend. . . . It is to be borne in mind that unsoundness of mind gives the court of chancery no jurisdiction whatever. It is not like infancy in that respect. The court of chancery is by law the guardian of infants, whom it makes its wards. The court of chancery is not the curator either of the person or of the estate of a person *non compos mentis*, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the court of chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property than it can the management or disposition of the property of a person abroad, or confined to his bed by illness. The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself if of sound mind." The judge then gives examples of such jurisdiction, viz.: where there is trust property, and the person of unsound mind is interested, or in the case of a partnership in which one partner becomes unsound of mind, or where the incompetent person, by his next friend, seeks to set aside instruments or gifts fraudulently obtained from him. In all these cases the court acts by virtue of its ordinary jurisdiction over trusts, partnership, or fraud. He then adds: "But I know of no authority and no principle for the court of chancery taking into its care the estates or other property of which such a person is the legal owner." In this case the lord justice was looking at the matter negatively, and mainly considering the *limitations* on the jurisdiction. In *Jones v. Lloyd*, L. R. 18 Eq. 265, 274, 275, Jessel, M. R., looked at the affirmative, and considered the existence of the jurisdiction. The plaintiff, who sued by a next friend, was lunatic, but had not been so found by inquisition, and he sought to dissolve a partnership of which he was a member, on the ground of his mental condition. The jurisdiction to entertain the suit before the plaintiff had been "found" a lunatic was strenuously denied. On this question the master of rolls said: "Can a suit be instituted by the lunatic, not found so by inquisition, by his next friend?

jurisdictions are wholly distinct. The former is special; the latter is the general jurisdiction of equity exercised, "not by reason of the incompetency, but notwithstanding the incompetency." The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if he were of sound mind.

I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion really to refer to the reason; but independently of authority, let us look at the reason of the thing. If this were not the law, anybody might at his will and pleasure commit waste on a lunatic's property or do damage or serious injury and annoyance to him or his property, without there being any remedy whatever. In the first place, the lords justices or the lord chancellor are not always sitting for applications in lunacy. In the next place, if they were, everybody knows it takes a considerable time to make a man a lunatic by inquisition, and his family sometimes hesitate about making him a lunatic, or hope for his recovery, and take care of him in the mean time without applying for a commission in lunacy. Is it to be tolerated that any person can injure him or his property without there being any power in any court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that because no effort of his can be made, no member of his family can file a bill in his name as a next friend, to prevent that injury? Is it to be allowed that a man may make away with the share of a lunatic in a partnership business, or take away the trust property in which he is interested, without this court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it, those propositions, when stated, really furnish a complete answer to the suggestion that he cannot maintain such a suit. Of course, they do not answer the question as to how far he may carry it; but that he can maintain such a suit for the purpose of protection, for the purpose of obtaining, as in this case, a receiver, I should think there can be no doubt whatever." The case of *Light v. Light*, 25 Beav. 248, is also directly in point sustaining such jurisdiction.^a

(a) As to the jurisdiction to order payment of income to the foreign committee of a lunatic who resides abroad, see *In re Brown*, [1895] 2 Ch. 666; *In re De Linden*, [1897] 1 Ch. 453; *Thiery v. Chalmers*, *Guthrie & Co.*, [1900] 1 Ch. 80; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. In the last-named case,

Lindley, L. J., mentions as further instances of the jurisdiction, in addition to those in the author's note, *Farnham v. Milward & Co.*, [1895] 2 Ch. 730; *In re George Armstrong & Sons*, [1896] 1 Ch. 536; *Howell v. Lewis*, 61 L. J. (Ch.) 89; *Wartnaby v. Wartnaby*, *Jac.* 377; *Porter v. Porter*, 37 Ch. Div. 429. See, also, *Edwards v. Edwards*, 14 Tex. Civ. App. 87, 36 S. W. 1080.

